

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2015 MTWCC 21

WCC No. 2015-3545

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CAR WERKS, LLC

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent/Third Party Petitioner

vs.

JAMES E. GAWRONSKI

Third Party Respondent.

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

**Summary:** An uninsured employer contests the Uninsured Employers' Fund's acceptance of liability for an injury claim on the grounds that the employee's injuries were not suffered in a car accident in the course of employment but were actually suffered in an earlier motorcycle accident.

**Held:** The uninsured employer has not met its burden of proving that the employee's injuries were related to an earlier motorcycle accident. This Court did not find the uninsured employer's evidence credible. Moreover, there is sufficient credible evidence and objective medical findings to support the employee's claim for benefits. The uninsured employer is legally obligated to indemnify the Uninsured Employers' Fund for all benefits paid or payable to the employee for his workers' compensation claim.

**Topics:**

**Credibility.** Where a witness for the uninsured employer testified by telephone from the Montana State Prison, the Court could not examine the witness' demeanor and therefore could not make a finding as to his credibility. However, the witness made it clear that he was adverse to the

injured worker by stating that the worker got him into “trouble,” indicating bias.

**Witnesses: Credibility.** Where a witness for the uninsured employer testified by telephone from the Montana State Prison, the Court could not examine the witness’ demeanor and therefore could not make a finding as to his credibility. However, the witness made it clear that he was adverse to the injured worker by stating that the worker got him into “trouble,” indicating bias.

**Credibility.** An uninsured employer was found not credible for two reasons: (1) he greatly exaggerated his employee’s injuries from a non-work-related motorcycle accident; and (2) he stated a former employee told him during an in-person conversation that the injured worker intended to defraud the business, but the alleged conversation took place while the former employee was incarcerated.

**Witnesses: Credibility.** An uninsured employer was found not credible for two reasons: (1) he greatly exaggerated his employee’s injuries from a non-work-related motorcycle accident; and (2) he stated a former employee told him during an in-person conversation that the injured worker intended to defraud the business, but the alleged conversation took place while the former employee was incarcerated.

**Witnesses: Credibility: Exaggeration.** An uninsured employer was found not credible where his account of his employee’s injuries from a non-work related motorcycle accident was greatly exaggerated in comparison to the employee’s medical records from the accident.

**Proof: Conflicting Evidence.** Where the claimant testified live in Court and was found credible, and the Court could make no finding on the credibility of a witness who testified by phone, the Court gave no weight to the telephonic witness’ allegation that the claimant told him he intended to defraud the uninsured employer and concluded that the witness’ story was fabricated.

**Uninsured Employers’ Fund: Burden of Proof.** If the UEF has accepted liability for a claim and the uninsured employer disagrees with the determination, the uninsured employer has the burden of proving that the claim is noncompensable. Here, the uninsured employer did not offer any

evidence that the worker's injuries were causally related to anything other than his industrial injury.

**Uninsured Employers' Fund: Indemnification.** An uninsured employer has a statutory liability to reimburse the UEF for all benefits paid or to be paid to its injured worker pursuant to § 39-71-504(1)(b), MCA.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-504.** An uninsured employer has a statutory liability to reimburse the UEF for all benefits paid or to be paid to its injured worker pursuant to § 39-71-504(1)(b), MCA.

¶ 1 The trial in the above-entitled matter was held on June 30, 2015, in Missoula. Petitioner Car Werks, LLC (Car Werks), was represented by Terry Wallace. Jack Palmer, Manager of Car Werks, was also present. Respondent and Third Party Petitioner Uninsured Employers' Fund (UEF) was represented by Joseph Nevin. Misty Knight, Claims Examiner and Mark Hurlbut, Program Manager, were also present for the UEF. Third Party Respondent James E. Gawronski was present and represented by Bradley J. Jones and Thomas C. Bulman.

¶ 2 Exhibits: Exhibits 1 and 3 through 11 were admitted without objection. During the course of trial, foundation was laid for Exhibit No. 2 and the exhibit was admitted without objection. Exhibit 13 was introduced at trial and admitted over Petitioner's objection. Exhibit 12 was labeled, "All other medical records," however, none were offered.

¶ 3 Witnesses: John Holmes testified telephonically from the Montana State Prison. No party objected to this form of his testimony. Holmes was sworn in by Cynthia Outland, a notary and Case Manager at the prison to whom Holmes was personally known. Palmer, Knight, and Gawronski were also sworn and testified.

¶ 4 Issues Presented: This Court restates the issues in the Pretrial Order as follows:<sup>1</sup>

Issue One: Whether the UEF correctly accepted liability for Gawronski's claim.

Issue Two: Whether Car Werks is obligated to indemnify the UEF for all benefits paid or payable with respect to Gawronski's claim.

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<sup>1</sup> Pretrial Order at 2, Docket Item No. 31.

## FINDINGS OF FACT<sup>2</sup>

¶ 5 Gawronski was an employee of Car Werks, a used car lot in Missoula. He briefly testified at trial. This Court found Gawronski to be a credible witness.

¶ 6 On Wednesday, July 24, 2013, Gawronski was in a motorcycle accident.<sup>3</sup> A car entered his lane of traffic and he swerved and laid his bike down in gravel.<sup>4</sup> He estimates he was traveling 10 miles per hour.<sup>5</sup>

¶ 7 Gawronski suffered a cut and abrasions on his forehead and abrasions on his elbows.<sup>6</sup> He went to see his primary health care provider on the date of the accident, as he had a scheduled appointment, and she drove him to the walk-in clinic where he saw Meredith Ruland, PA-C.<sup>7</sup> He received 14 stiches to close the cut on his forehead.<sup>8</sup> That evening, Gawronski informed Ruland that he developed aches and pains as the day wore on and discovered a large bruise on his left hip.<sup>9</sup> Ruland advised him to return to the clinic if his symptoms worsened or did not improve.<sup>10</sup>

¶ 8 At trial, Gawronski agreed with the characterization of his motorcycle injuries as “superficial.”

¶ 9 Gawronski reported to work the next day, but was told to take time off because of his appearance. He returned to work the following Monday and resumed his normal working hours.

¶ 10 On July 30, 2013, Ruland left Gawronski a voice message to phone her with an update on his condition.<sup>11</sup> There is no indication in Ruland’s records that Gawronski ever

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<sup>2</sup> All Findings herein are taken from trial testimony unless otherwise noted.

<sup>3</sup> Ex. 3a.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Ex. 3b.

<sup>9</sup> Ex. 3c.

<sup>10</sup> *Id.*

<sup>11</sup> Ex. 3d.

responded. On August 2, 2013, Gawronski returned to the clinic to have the stitches removed.<sup>12</sup> The medical record from that day does not mention any ongoing problems.<sup>13</sup>

¶ 11 On September 5, 2013, Gawronski was in a car accident while showing an SUV to a customer. The vehicle was stopped and he was turned in his seat, talking to the customer behind him in the rear seat. The customer's father was in the front passenger seat. The SUV was rear-ended by another vehicle, causing Gawronski to hit the steering wheel and then bounce back and hit the head rest. After the accident he returned to the car lot, completed the deal on the damaged car and then sought medical treatment. That was Gawronski's last day of work at Car Werks.

¶ 12 Gawronski sought treatment that afternoon at an urgent care clinic, complaining of back and neck pain.<sup>14</sup> Carla C. Fritz, MD, noted that Gawronski was moving "stiffly" and prescribed pain medication and muscle relaxers, and stated that he should not work if he found the medicine "too sedating."<sup>15</sup>

¶ 13 Gawronski returned to Dr. Fritz on September 12, 2013.<sup>16</sup> The medical record from that day states: "His lower back is still very sore as is his right neck/shoulder region."<sup>17</sup> Dr. Fritz noted, "The medicine he is taking makes him very sleepy and he cannot work."<sup>18</sup> The record further states that Gawronski had a tight trapezius muscle on the right, tender with palpation, and was very tender in the upper lumbar/lower thoracic paraspinal muscles.<sup>19</sup> Dr. Fritz advised him: "No work until pain reduced and range of motion improved."<sup>20</sup> He was referred for physical therapy to decrease pain and increase movement/range of motion.<sup>21</sup>

¶ 14 Gawronski continued treating, but the records reflect that he continued to have low-back and neck pain.<sup>22</sup>

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<sup>12</sup> Ex. 3e.

<sup>13</sup> *Id.*

<sup>14</sup> Ex. 4.

<sup>15</sup> Ex. 4a.

<sup>16</sup> Ex. 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Ex. 5a.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Exs. 6, 8, 9 & 10.

¶ 15 On January 21, 2014, Denise R. Llovet, FNP, CNM, wrote a prescription for Gawronski for chiropractic evaluation and treatment of low-back and neck pain for injuries sustained in a car accident while working.<sup>23</sup> The record shows that Gawronski attended chiropractic sessions at Matz Family Chiropractic from February 11, 2014, through March 31, 2014, during which time he was given active trigger point treatment and achieved “50% improvement.”<sup>24</sup>

¶ 16 Gawronski filed a workers’ compensation claim for the injuries sustained in the accident.

¶ 17 At the time of the car accident, Car Werks was uninsured.<sup>25</sup>

¶ 18 On June 3, 2014, the UEF accepted liability for Gawronski’s claim.<sup>26</sup> The UEF notified Car Werks that it would be required to reimburse it for all benefits paid or to be paid to Gawronski.<sup>27</sup>

¶ 19 Car Werks notified the UEF that it was disputing the acceptance of liability on the grounds that Gawronski was actually injured in the motorcycle accident.<sup>28</sup>

¶ 20 John Holmes testified via telephone from the Montana State Prison. Since Holmes testified via telephone, this Court cannot make a finding as to his credibility.<sup>29</sup> Although this Court could not observe Holmes’ demeanor, he made it clear to this Court that he

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<sup>23</sup> Ex. 11.

<sup>24</sup> Exs. 11h-11u.

<sup>25</sup> Pretrial Order at 1.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> Petitioner CarWerks’s [sic] Responses to Third Party Respondent Gawronski’s Motion for Summary Judgment (Car Werks’ Responses), Ex. 1, Docket Item No. 22.

<sup>28</sup> Car Werks’ Responses, Exs. 2 & 4; Notice of Appeal, Docket Item No. 1.

<sup>29</sup> See *Bonamarte v. Bonamarte*, 263 Mont. 170, 174-76, 866 P.2d 1132, 1134-35 (1994) (explaining that M.R.Evid. 611(e) usually requires in-person testimony, that requiring a person to testify in person serves many important policies and purposes, and that a fact finder cannot make a determination of the credibility of a witness who testifies via telephone); see also *City of Missoula v. Duane*, 2015 MT 232, ¶¶ 16-20, 380 Mont. 290, 355 P.3d 729 (holding that testimony via Skype is permissible under M.R.Evid. 611(e) because, “While telephone testimony presents the listener with a disembodied voice and no clue as to the demeanor of the witness, Skype allows the court and jury to observe and hear the testimony of the witness firsthand”). Car Werks had initially informed this Court that Holmes would testify via videoconference. However, five days before trial, Car Werks’ attorney told this Court that he was having trouble arranging for Holmes’ video testimony and requested permission to have Holmes testify via telephone. In e-mail correspondence dated June 25, 2015 (Docket Item No. 30), this Court advised the parties that it was willing to travel to see Holmes testify via videoconference. This Court cited *Bonamarte* in its e-mail. However, Car Werks had Holmes testify telephonically and there was no objection by either Gawronski or the UEF.

was adverse to Gawronski. Holmes made the point of stating that Gawronski got him into “trouble” and referenced a federal indictment, indicating bias against Gawronski.

¶ 21 Holmes — who had previously helped Palmer repossess cars and had past dealings with Gawronski — was incarcerated from August 2013 until March 2014. According to Holmes, he met Gawronski at a bar in Missoula a couple of weeks after he was released, even though he was not supposed to be in any establishment that served alcohol. Holmes could not recall the date of their meeting with any specificity; he stated that it was “right after winter.” Holmes testified that he met with Gawronski because Gawronski was claiming that Holmes still owed him money for guns that Gawronski had sold him. Holmes testified that during that meeting, Gawronski stated he had been injured in his motorcycle accident but “was trying to get money from Mr. Palmer from a car accident after the motorcycle accident . . . .” Holmes was unsure of many of the dates, but said: “Alls [sic] I know is he had that motorcycle accident first. Then he was driving Jack Palmer — Jack’s cars and got in a wreck in a car. Then he said he’s claiming the injuries from — and they really started from the motorcycle accident, and he was claiming them on Jack’s car lot’s insurance.” Holmes testified that no one else was present, that nothing else was discussed during their meeting, and that he had not spoken to Gawronski since.

¶ 22 Holmes testified that he met with Palmer “a couple months” after his conversation with Gawronski. Holmes testified that Palmer stated Gawronski was “suing him” and that he then told Palmer what Gawronski had allegedly told him about his injuries. When asked during cross-examination if his meeting with Palmer was in June 2014, Holmes agreed that that sounded correct. Holmes first testified that no one else was present, but then testified that Palmer’s father may have been there, though he was not sure.

¶ 23 After this meeting, Palmer prepared a sworn statement for Holmes to sign. Holmes signed a statement under oath, stating:

To whom this may concern.

Under Oath I make this statement.

I had a conversation with Jim Gawranski [sic] at the time he had an accident while he was on test drive with a customer, he told me that he was going to sue Jack and his insurance company for injuries that he had already had from a motorcycle accident. He said it didn’t matter because the insurance would end up paying for the injury, he thought he had been let go wrongfully and didn’t care if it affected Jack and his car lot. He had sold me some automatic weapons and wanted me to pay him more money and he was doing whatever he had to do to get money.<sup>30</sup>

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<sup>30</sup> Ex. 2.

Holmes signed the statement.<sup>31</sup> Palmer notarized the statement and dated it November 22, 2014.<sup>32</sup>

¶ 24 Gawronski denied that he told Holmes that he was going to claim an injury in the auto accident when his injuries really stemmed from his motorcycle accident. He deemed Holmes' claim regarding his alleged statement a "complete fabrication."

¶ 25 This Court is not persuaded that Holmes' recitation of the content of his conversation with Gawronski is truthful. Although Holmes indicated that Gawronski had confided in him in the past and did not think that Holmes was on speaking terms with Palmer, it makes no sense that Gawronski would tell Holmes that he was defrauding Palmer's business at a meeting in which they were discussing their dispute over whether Holmes still owed Gawronski money for guns. Since the Court found Gawronski to be a credible witness, and since this Court gives no weight to Holmes' testimony nor to his sworn statement, this Court finds that Gawronski did *not* tell Holmes that his injuries were actually sustained in the motorcycle accident.

¶ 26 Jack Palmer testified at trial. The Court did not find Palmer to be a credible witness. This Court was particularly troubled by two parts of Palmer's testimony.

¶ 27 First, Palmer greatly exaggerated when describing Gawronski's injuries from his motorcycle accident in an attempt to bolster Car Werks' claim that Gawronski was actually injured in the motorcycle accident. Palmer, who saw Gawronski on the day of the motorcycle accident, testified that he was "shocked" that Gawronski was not in the hospital. Palmer testified that Gawronski's head was "split wide open." Palmer testified that Gawronski "took an absolute beating" in the motorcycle accident, that he was "beat to hell," and that the whole side of Gawronski's body "was black and blue." Palmer went on to state that he personally had never seen anyone hurt that badly who was still able to walk around. According to Palmer, Gawronski moved very slowly after the motorcycle accident because he was hurt and had not healed by the time of the car accident.

¶ 28 The medical records do not reflect that Gawronski was anywhere near this injured in the motorcycle accident. Palmer could not explain the difference between his description of Gawronski's injuries and the medical report, other than to say that the medical providers must "wear different glasses than I wear." This Court is not persuaded that the medical providers understated Gawronski's condition and finds that if Gawronski

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*



was as injured in the motorcycle accident as Palmer claims, the providers would have noted that in their medical records.

¶ 29 Second, Palmer’s testimony did not mesh with Holmes’. Palmer testified that he had the conversation with Holmes about Gawronski falsely claiming his motorcycle injuries on his workers’ compensation claim “within a month or two” of Gawronski’s car accident. Palmer then agreed that this testimony was consistent with a sworn statement he signed<sup>33</sup> as part of Car Werks’ opposition to Gawronski’s summary judgment motion, which states:

9. Around November 1, 2013, John Holmes came to Carwerks [sic] and indicated to Jack Palmer that Jim was falsifying the facts of his injury in the September 5, 2013 accident, and was doing it because Carwerks [sic] had terminated his employment wrongfully and he wanted to get back at Carwerks [sic] . . . .<sup>34</sup>

¶ 30 When asked at trial whether he was sure that his meeting with Holmes was around November 1, 2013, Palmer testified, “If that’s what I wrote down there, then that’s exactly when it was.” Palmer testified that he prepared the statement for Holmes to sign within “a couple [of] weeks” of their meeting. However, on cross-examination, when Palmer realized that his meeting with Holmes could not have been around November 1, 2013, because Holmes was incarcerated at that time, Palmer did not have a reasonable explanation. Instead, when pressed on the discrepancy, he testified, “Whatever — I know the statement that he made was the statement that he signed that I notarized. That was the statement.” On redirect, Palmer merely stated that he must have gotten the dates wrong.

¶ 31 While this Court knows that it can be difficult to remember exact dates, this Court does not think Palmer made an inadvertent mistake, given the specificity of his sworn statement and his initial testimony, and the large discrepancies between Palmer’s testimony and Holmes’. Rather, this Court finds that Holmes and Palmer did not get their stories straight.

¶ 32 Misty Knight, a claims examiner for the UEF, testified at trial. This Court found her to be a credible witness.

¶ 33 Knight testified that she has more than seven years of experience as a workers’ compensation claims examiner. Her duties include determining which claims submitted to the UEF are compensable and then managing those accepted claims. Knight

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<sup>33</sup> Car Werks’ Responses at 5.

<sup>34</sup> *Id.* at 2.

explained that she is trained to look for objective medical findings. She compared the First Report of Injury on Gawronski's claim with the medical report generated on the day of his car accident and noted objective medical findings of decreased rotation and flexion in his neck.<sup>35</sup> She also noted that the medical report stated he had never had issues with his back before.<sup>36</sup>

¶ 34 Knight noted that Gawronski was seen at the medical clinic a week later with no change in his symptoms. He was to remain off work until his pain was reduced and his range of motion improved.<sup>37</sup> The Medical Status Form dated November 21, 2013, further assisted Knight in determining that Gawronski's claim was viable due to the radiculopathy diagnosis and the fact that the medical provider continued to state that Gawronski should remain off work.<sup>38</sup>

¶ 35 Knight explained that when Gawronski was released to light-duty work by the Medical Status Form of December 15, 2013,<sup>39</sup> she called Palmer to see if work was available. However, Palmer told Knight that he did not want Gawronski back.

¶ 36 Knight knew that Palmer believed Gawronski's injuries were the result of his motorcycle accident. Knight testified that she reviewed the medical record from July 24, 2013,<sup>40</sup> the day of Gawronski's motorcycle accident, and considered his injuries minor. She also noted that Gawronski had no complaints of back pain after that accident.

¶ 37 Knight calculated Gawronski's wage loss benefits based on pay stubs she received from both Gawronski and Palmer. She received no information from any source that required her to recalculate the wage loss benefits. She estimated that the UEF has paid out approximately \$45,000 on Gawronski's claim.

¶ 38 The parties mediated their dispute over the UEF's acceptance of liability.

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<sup>35</sup> Ex. 4a.

<sup>36</sup> Ex. 4.

<sup>37</sup> Ex. 5-5a.

<sup>38</sup> Ex. 8.

<sup>39</sup> Ex. 9.

<sup>40</sup> Exs. 3a-3c.

## CONCLUSIONS OF LAW

¶ 39 This case is governed by the 2011 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Gawronski's industrial accident.<sup>41</sup>

### **Issue One: Whether the UEF correctly accepted liability for Gawronski's claim.**

¶ 40 Section 39-71-520(2)(a), MCA, provides that after the mandatory mediation process, this Court has jurisdiction to resolve a dispute over the UEF's determination on a claim. If the UEF has accepted liability for a claim and the uninsured employer disagrees with that determination, the uninsured employer has the burden of proving that the claim is noncompensable.<sup>42</sup>

¶ 41 Car Werks has not met its burden. Car Werks contends that the evidence shows that Gawronski's injuries stem from a motorcycle accident on July 24, 2013, and not the car accident of September 5, 2013. Car Werks points to Holmes' testimony and affidavit in support of this contention. However, this Court gave Holmes' testimony and affidavit no weight and found that Gawronski did not tell Holmes that his injuries were actually sustained in the motorcycle accident. Second, relying entirely on Palmer's testimony, Car Werks argues that the evidence shows that Gawronski was actually injured in the motorcycle accident. However, this Court did not find Palmer's testimony credible.

¶ 42 In contrast, the credible evidence shows that Gawronski suffered only superficial injuries in the motorcycle accident and that he was more seriously injured in the car accident. The medical records generated on the day of Gawronski's car accident show that he sought treatment for an injury to his neck and back consistent with the mechanism of the accident. As Gawronski explained, he was turned to speak to the rear seat passenger when the car was rear-ended, causing him to hit the steering wheel and then the head rest with the side of his neck. He was taken off work, prescribed medications, and received physical therapy and chiropractic treatments for months. The claims examiner testified credibly that the evidence pointed to a real injury for which Gawronski sought appropriate treatment, and the medical records contain evidence of objective medical findings in support of his workers' compensation claim. Car Werks did not offer

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<sup>41</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citing *Fleming v. Int'l Paper Co.*, 2008 MT 327, ¶ 26, 346 Mont. 141, 194 P.3d 77); § 1-2-201, MCA.

<sup>42</sup> *Uninsured Employers' Fund v. Grant*, 2004 MTWCC 38, ¶¶ 37-38; *Uninsured Employers' Fund v. Gould*, 2004 MTWCC 79.

any medical evidence that Gawronski's injuries were causally related to anything other than his industrial accident.<sup>43</sup>

¶ 43 The evidence shows that Gawronski was injured in a work-related accident. The UEF correctly accepted liability for Gawronski's claim.

**Issue Two: Whether Car Werks is obligated to indemnify the UEF for all benefits paid or payable with respect to Gawronski's claim.**

¶ 44 The UEF has a right of reimbursement from Car Werks for all benefits paid or to be paid to Gawronski pursuant to § 39-71-504(1)(b), MCA, which states:

The fund shall collect from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to or on behalf of an injured employee of the uninsured employer.

¶ 45 This statute "establishes a statutory liability on the part of the uninsured employer to reimburse the UEF."<sup>44</sup> Car Werks has failed to show that Gawronski's claim was not compensable or that any of the benefits paid by the UEF to Gawronski were not appropriate. Car Werks is therefore obligated to indemnify the UEF for all benefits paid or payable to Gawronski for his work-related accident.

JUDGMENT

¶ 46 The Uninsured Employers' Fund correctly accepted liability for the injured employee's claim.

¶ 47 The uninsured employer – Car Werks – is obligated to the Uninsured Employers' Fund for all benefits paid or payable for the injured employee's claim.

¶ 48 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

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<sup>43</sup> See *Ford*, ¶ 49 (holding that medical causation must be proven through medical evidence and opinion).

<sup>44</sup> *Uninsured Employers' Fund v. Gould*, 2003 MTWCC 23, ¶ 9.

DATED this 9<sup>th</sup> day of December, 2015.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Terry Wallace  
Joseph Nevin  
Bradley J. Jones/Thomas C. Bulman

Submitted: June 30, 2015