

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 45

WCC No. 2011-2772

GINGER DOSTAL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner and Respondent disagree regarding what amount constitutes a reasonable fee to charge for photocopying certain documents. Respondent has also refused to authorize certain medical treatment, including referral to a specific orthopedist who performed previous surgeries on Petitioner's back; referral to a pain management specialist; and a lumbar spine MRI. Petitioner contends that Respondent has acted unreasonably in the adjustment of her claim, and argues that she should receive her attorney fees and a penalty.

Held: Based on the evidence presented, the Court concluded that the parties may reasonably charge each other 10 cents per page plus \$25 per hour of labor for photocopying these documents. Petitioner is entitled to referral to the orthopedist she requested and is also entitled to referral to a pain management specialist. Petitioner is not entitled to a lumbar MRI. Respondent was unreasonable in refusing the referrals and Petitioner is entitled to her attorney fees and a penalty relative to those two issues.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-205. Since the UEF clearly did not set its copying fees based on the cost of material and time expended pursuant to § 39-71-205(1), MCA, the Court rejected the UEF's argument that the Court should so hold. The UEF may charge a "reasonable amount" for photocopying claims files. The Court looked to the fees charged by local copy shops

who make their services available to the public in determining a “reasonable amount.”

Physicians: Referrals. The Court rejected the UEF’s argument that it was within its rights to deny the referral to a pain management specialist requested by Petitioner’s treating physician on the grounds that the UEF could refuse to authorize further treatment until Petitioner submitted to an evaluation under § 39-71-605, MCA, where the UEF denied the referral more than a year before it requested Petitioner submit to an evaluation.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. The Court rejected the UEF’s argument that it was within its rights to deny the referral to a pain management specialist requested by Petitioner’s treating physician on the grounds that the treating physician did not support the request with objective medical findings when the applicable version of the statute (1991) contained no such provision.

Physicians: Referrals. The Court rejected the UEF’s argument that it was within its rights to deny the referral to a pain management specialist requested by Petitioner’s treating physician on the grounds that the treating physician did not support the request with objective medical findings when the applicable version of the statute (1991) contained no such provision.

Statutes and Statutory Interpretation: Applicable Law. Where the 1991 WCA controls the claim, the UEF cannot read additional requirements into the statute which the legislature added in later years.

Statutes and Statutory Interpretation: Inserting or Removing Items. Where the 1991 WCA controls the claim, the UEF cannot read additional requirements into the statute which the legislature added in later years.

Uninsured Employers’ Fund: Reasonableness of Claims Handling. The Court found the UEF’s conduct unreasonable where it ignored several referral requests from Petitioner’s treating physician. Although the UEF was aware of the requests, the requests went unheeded because the treating physician did not know that the UEF would not consider requests contained within treatment notes but would only consider referrals if they were submitted on a “form” which the UEF had never created.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2907. Where the Court found no delay, denial, or termination of benefits caused by a dispute between the parties over photocopy charges, the Court held that it was immaterial whether Respondent acted unreasonably regarding the photocopy charge dispute.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2907. Where the evidence demonstrated that Petitioner was ineligible for the treatment authorization she sought, the Court held that Respondent could not be found to have unreasonably denied treatment which Petitioner would never have been able to receive.

Uninsured Employers' Fund: Reasonableness of Claims Handling. The Court found that the UEF unreasonably delayed and denied a treatment referral where Petitioner's treating physician repeatedly requested the referral and the UEF refused to authorize it solely because it would have required Petitioner to travel to Billings, when the UEF had previously authorized Petitioner to travel to Billings to be seen by this provider and the provider had performed three surgeries on Petitioner in Billings.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-611. The Court concluded that attorney fees were available to Petitioner where the Court orally ruled that she was entitled to a referral her treating physician had made and where the Court subsequently issued a written ruling.

Uninsured Employers' Fund: Attorney Fees. Where the Court found that the UEF "failed to enunciate a clear, defensible reason" for denying Petitioner a referral requested by her treating physician, the Court found that the UEF had acted unreasonably and concluded that Petitioner was entitled to her attorney fees.

Uninsured Employers' Fund: Penalty. Where the Court found that the UEF "failed to enunciate a clear, defensible reason" for denying Petitioner a referral requested by her treating physician, the Court found that the UEF had acted unreasonably and concluded that Petitioner was entitled to a penalty.

¶ 1 The trial in this matter began on October 17, 2011, in Great Falls, Montana, and resumed and concluded on October 20, 2011, at the Workers' Compensation Court in

Helena. Petitioner Ginger Dostal was present and was represented by J. Kim Schulke. Leanora O. Coles represented Respondent Uninsured Employers' Fund (UEF). Bernadette Rice, claims examiner for the UEF, also attended.

¶ 2 Exhibits: I admitted Exhibits 1 through 22 without objection. I overruled Petitioner's relevancy objections and admitted Exhibits 23 through 33. I excluded Exhibit 34. I admitted pages 1, 6, 7, and the top of page 2 of Exhibit 35. I excluded pages 3, 4, 5, and the bottom of page 2 of Exhibit 35. Pursuant to Petitioner's request, I took judicial notice of Exhibits 20 and 24 from a previous case involving these parties: WCC No. 2010-2598. Respondent offered a cleaner copy of Exhibit 4, page 20, which I admitted as Exhibit 4, page 20(a).

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of Rosemary Youderian, FNP, Steve Davison, and Toni Broadbent can be considered part of the record. During trial, I took judicial notice of the March 16, 2011, deposition of Alan K. Dacre, taken in WCC No. 2010-2598. On October 17, 2011, Petitioner Ginger Dostal, Bernadette Rice, and Karla K. Kyweriga were sworn and testified at trial. On October 20, 2011, Rice was recalled and testified.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:¹

Issue One: Whether Respondent should have to reimburse Petitioner's counsel's firm for copying charges totaling \$214.40.

Issue Two: Whether Petitioner's counsel must reimburse Respondent \$1,012 for copy charges.

Issue Three: Whether Respondent should authorize an MRI of Petitioner's lumbar spine.

Issue Four: Whether Respondent should authorize a referral to Dr. Dacre.

Issue Five: Whether Respondent should authorize a referral to a pain management specialist.

Issue Six: Whether Respondent has acted unreasonably in its handling of Petitioner's claim such that Petitioner is entitled to attorney fees and penalties.

¹ Pretrial Order, Docket Item No. 30, at 9-10.

FINDINGS OF FACT

¶ 5 Dostal testified at trial. I found her to be a credible witness. Dostal resides in Stanford, Montana.²

¶ 6 On May 24, 1993, Dostal suffered an industrial injury to her ankles and her back when she fell off a roof while performing her job duties as a roofer for Randy Crowley Construction in Harlowton, Montana.³

¶ 7 Dostal's employer was uninsured at the time of her industrial injury and therefore the UEF administers her claim. The UEF accepted liability and has paid medical benefits relating to Dostal's right foot and ankle, left ankle, and lumbosacral spine.⁴

The parties' disputes regarding Dostal's medical treatment

¶ 8 In August 2004, Dostal began treating with Alan K. Dacre, M.D.⁵ Dr. Dacre has performed three surgeries on Dostal's back. He performed each surgery in Billings.⁶ The first, an anterior lumbar interbody fusion, occurred on December 7, 2004.⁷ However, Dr. Dacre regularly saw Dostal in Lewistown when he traveled there to see patients.⁸

¶ 9 On April 12, 2006, Dr. Dacre sent a letter to the patients he treated in Lewistown and stated that he would no longer conduct bimonthly clinics in Lewistown. Dr. Dacre explained that Gregory S. McDowell, M.D., would conduct monthly clinics in Lewistown and would be available to provide spine care. Dr. Dacre further stated that he would continue to treat patients who were able to travel to Billings for treatment.⁹

¶ 10 On July 18, 2006, Dr. Dacre performed a second surgery on Dostal's spine – a posterior spinal instrumented fusion with posterolateral decompression at L5-S1 – because of a non-union.¹⁰

² Trial Test.

³ Pretrial Order, Uncontested Facts, at 1.

⁴ Pretrial Order, Uncontested Facts, at 1-2.

⁵ Pretrial Order, Uncontested Facts, at 2; Trial Test.

⁶ *Id.*

⁷ Pretrial Order, Uncontested Facts, at 2; Ex. 3 at 33-35.

⁸ Trial Test.

⁹ Ex. 3 at 74.

¹⁰ Pretrial Order, Uncontested Facts, at 2; Ex. 3 at 80-82.

¶ 11 On April 9, 2009, Dr. Dacre operated on Dostal for a third time to remove some of the hardware associated with her 2006 fusion surgery and to explore her lumbar fusion.¹¹

¶ 12 In his deposition, Dr. Dacre testified that at some point, he and Dostal discussed the possibility of her treating with either Dr. McDowell or Steven Rizzolo, M.D., who were available for appointments closer to Stanford, but Dostal preferred to continue treating with Dr. Dacre.¹² Dr. Dacre added that it is not always easy to transfer a patient, and it is “generally frowned upon” to transfer a patient who is in the midst of treatment. He explained:

So patients don’t – number one, they’ve established a provider that they either get along with or feel is treating them appropriately, and it becomes very difficult for them to, number one, wish to switch.

And number two, another physician may have a bit of a different plan. It may not always necessarily agree with what you’ve done. And it makes them hard to take – take the liability for that.

. . . .

[F]rom my perspective as a treating physician, I have initiated treatment; it’s my duty to carry that through. . . .¹³

¶ 13 Dr. Dacre testified that it is appropriate practice for him to follow patients whom he has operated on and he would generally not transfer a patient to another physician, even one within his practice, barring extraordinary circumstances. He explained that the operating physician would have the best knowledge of the patient’s condition.¹⁴ Dr. Dacre further testified that patients in the midst of treatment are not generally transferred among surgeons.¹⁵

¶ 14 On February 1, 2010, Dr. Dacre found that Dostal had a solid fusion, but that she needed to continue using prescription medications. Dr. Dacre opined that Dostal could return to some form of work with a lifting restriction. Dr. Dacre recommended that Dostal follow up with her primary care physician for her prescriptions, but noted he

¹¹ Pretrial Order, Uncontested Facts, at 2; Ex. 3 at 154-55.

¹² Dacre Dep. 75:19 – 76:3.

¹³ Dacre Dep. 76:19 – 77:15.

¹⁴ Dacre Dep. 30:14 – 31:9.

¹⁵ Dacre Dep. 70:2-13.

would continue to see her on an as-needed basis.¹⁶ At the time of trial, Dostal had not treated with Dr. Dacre since the February 1, 2010, appointment.¹⁷

¶ 15 On April 29, 2010, Dostal began to treat for her low back with Rosemary Youderian, FNP, a nurse practitioner who practices in Stanford.¹⁸ Dostal testified that since she last saw Dr. Dacre in February 2010, her pain has increased and has spread from her low back down into her legs and higher into her back.¹⁹ She has also experienced an increased burning sensation in her feet.²⁰ Dostal reported these symptoms to Youderian.²¹

¶ 16 In her deposition, Youderian testified that she asked William Holmes, M.D., to review Dostal's chart to help Youderian make some decisions regarding Dostal's care. On March 30, 2010, Dr. Holmes recommended that Youderian refer Dostal to a pain management specialist.²² However, the UEF did not authorize the referral.²³

¶ 17 On June 22, 2010, Youderian noted that Dostal reported increasing back pain. Dostal requested an MRI and Youderian noted that she would seek authorization for it. However, she later amended her medical note, stating:

After reviewing the lumbar myelogram report from Billings dated 1-22-2009, it would be in her best interest to have Dr. Dacre re-evaluate before any imaging studies are ordered. We will try to get authorization for her to see Dr. Dacre again.²⁴

¶ 18 Youderian believed Dostal's MRI request was appropriate because of her change in back pain.²⁵ However, Youderian testified that she did not believe she should order this test without having Dostal evaluated by someone with more expertise, so she recommended that Dostal return to Dr. Dacre.²⁶ Youderian further noted that in

¹⁶ Ex. 3 at 206.

¹⁷ Trial Test.

¹⁸ Youderian Dep. 6:9-14; Trial Test.

¹⁹ Trial Test.

²⁰ Trial Test.

²¹ Trial Test.

²² Youderian Dep. 8:6-21.

²³ Youderian Dep. 9:12-14.

²⁴ Ex. 4 at 9.

²⁵ Youderian Dep. 14:10-20.

²⁶ Youderian Dep. 15:4-9.

reviewing Dostal's medical records, she realized Dostal would need a myelogram rather than an MRI because Dostal has hardware in her back.²⁷

¶ 19 On August 19, 2010, Youderian examined Dostal and found muscle spasm just above her surgical incision, limited lateral movement and twisting, and diminished reflexes. Youderian noted, "I feel the best option would be to get her back to the orthopedic surgeon (Dr. Dacre) for a re-evaluation."²⁸

¶ 20 Youderian also noted during the August 19, 2010, visit that Dostal was reporting worsening back pain.²⁹ Youderian observed evidence of muscle spasm and diminished DTRs, or deep tendon reflexes.³⁰ Youderian again suggested that Dostal return to Dr. Dacre for reevaluation.³¹ Youderian sent a request for authorization to the UEF, but Rice denied the authorization.³²

¶ 21 On August 23, 2010, Youderian sent a request for authorization to the UEF asking for authorization for a referral to Dr. Dacre to evaluate Dostal's back and neck pain. Rice denied the authorization the same day.³³

¶ 22 On September 21, 2010, Youderian wrote a letter to Rice, which said:

I am writing to request authorization for Ms. Ginger Dostal to be seen by Dr. Dacre or another orthopedic specialist for reevaluation of her back.

Ms. Dostal has increased pain and disability, potentially related to instability and strain at the level above her fusion. Increased pain is resulting in decreased physical activity, decreased conditioning and co-morbid health conditions.

Due to previous surgeries I recommend that she been [sic] seen by Dr. Dacre who will be able to most efficiently and economically evaluate her complaints and recommend treatment.

²⁷ Youderian Dep. 15:1-6.

²⁸ Ex. 4 at 15.

²⁹ Youderian Dep. 16:13 – 17:7.

³⁰ Youderian Dep. 17:8-17.

³¹ Youderian Dep. 17:21-24.

³² Youderian Dep. 18:3-13.

³³ Ex. 4 at 16.

Please grant this request so Ms. Dostal can receive appropriate care for her back injury.³⁴

¶ 23 Youderian testified that she remains of the opinion she expressed to Rice in her September 21, 2010, letter: that Dr. Dacre is the best referral for Dostal due to his previous experience in Dostal's case.³⁵ Youderian testified that the only reason Rice ever gave for refusing to authorize treatment with Dr. Dacre was that the UEF would not cover Dostal's mileage.³⁶

¶ 24 On October 12, 2010, Youderian noted that she was again recommending to the UEF that Dostal begin physical therapy and receive a referral to an orthopedic or neurology specialist for an evaluation of her back pain.³⁷ On October 12, 2010, Rice approved a referral for one month of physical therapy.³⁸ On October 21, 2010, Youderian noted that she spoke with Rice and that Rice "will let us know when and where appointment is made for Ginger with orthopedic or neuro specialist. Their office is setting up that appointment."³⁹

¶ 25 On February 18, 2011, Youderian wrote to Rice and explained that Dostal had been reporting increased back pain and that the best way to objectively assess her symptoms was "through certain imaging studies which have been denied." Youderian further stated that she was unable to assess the effectiveness of Dostal's medications because Dostal was only authorized for appointments every six months. Finally Youderian opined that a pain specialist might be the best solution to manage Dostal's condition and she asked Rice to respond "if that would be an acceptable solution to your concerns."⁴⁰

¶ 26 Youderian testified that she wrote to Rice on February 18, 2011, and requested that Dostal receive authorization for a referral to a pain specialist because, "I was running into a brick wall in trying to get her to the orthopedic people. So a pain specialist was her next option."⁴¹ Youderian testified that she was seeking a referral for

³⁴ Ex. 4 at 18.

³⁵ Youderian Dep. 19:8-18.

³⁶ Youderian Dep. 29:16-24.

³⁷ Ex. 4 at 20.

³⁸ Ex. 4 at 19.

³⁹ Ex. 4 at 20.

⁴⁰ Ex. 4 at 26.

⁴¹ Youderian Dep. 23:6-21.

Dostal because Dostal “continued to have pain that I didn’t feel I was managing well for her.”⁴²

¶ 27 On May 2, 2011, a handwritten note in Youderian’s medical records for Dostal states that Rice called to discuss a recent approval for laboratory testing, which Rice approved in writing. Rice informed Youderian’s office that she would approve a referral to Dr. McDowell. The note further states, “Will not approve Dr. Dacre because will not cover mileage.”⁴³

¶ 28 Youderian testified that she repeatedly stated that Dostal needed more evaluation and treatment than Youderian could offer. Youderian testified that she felt like she made no progress in Dostal’s care for a year, so she had been requesting follow-up care.⁴⁴ Youderian testified that her further treatment recommendation for Dostal is that Dostal be seen by a specialist.⁴⁵

¶ 29 On August 24, 2011, Dostal’s counsel wrote to the UEF and stated that Dostal was willing to see Dr. McDowell, noting, “The reason for this is that the UEF has denied her medical treatment with any other provider, including her treating medical provider, nurse Youdarian [sic] and her treating surgeon, Dr. Dacre.”⁴⁶

¶ 30 On September 6, 2011, Dostal’s counsel repeated her request as the UEF had not responded to her August 24, 2011, letter.⁴⁷

¶ 31 On September 20, 2011, the UEF indicated in a discovery response that the UEF had called Dr. McDowell’s office on September 1, 2011, to schedule an appointment, had followed up with additional phone calls on September 6 and 8, 2011, and was still awaiting a response from Dr. McDowell’s office.⁴⁸

¶ 32 On September 27, 2011, the UEF informed Dostal’s counsel that the UEF had set an appointment with Dr. McDowell for November 8, 2011.⁴⁹ Dostal testified that the UEF has denied her further treatment with Youderian.⁵⁰ Dostal testified that she agreed

⁴² Youderian Dep. 23:22-24.

⁴³ Ex. 4 at 30.

⁴⁴ Youderian Dep. 79:6-15.

⁴⁵ Youderian Dep. 80:4-5.

⁴⁶ Ex. 16.

⁴⁷ Ex. 17.

⁴⁸ Ex. 18.

⁴⁹ Ex. 19.

⁵⁰ Trial Test.

to attend an appointment with Dr. McDowell because that was the only treatment the UEF would authorize.⁵¹

¶ 33 Bernadette Rice testified at trial. I found her to be a credible witness. Rice has worked as a workers' compensation claims examiner for the UEF since 1993. Rice's job duties include adjudicating workers' compensation claims, authorizing indemnity payments, and testifying in court. Rice determines whether the UEF accepts or denies a claim.⁵²

¶ 34 Rice acknowledged that Dostal had a "long standing" relationship with Dr. Dacre, and that she treated with him for six years, including three surgeries.⁵³

¶ 35 Rice testified that she authorized Dostal to treat with Youderian, but she did not authorize a referral to Dr. Malters or to a pain management specialist.⁵⁴ Rice testified that, although Youderian mentioned in her treatment notes that she wanted to refer Dostal to Dr. Dacre, Youderian never sent a request for authorization to the UEF, and therefore Rice did not grant or deny a referral.⁵⁵ However, Rice also testified that when she received Youderian's request for authorization for a referral to Dr. Dacre on August 23, 2010, she denied the request. Rice did not provide Youderian with a reason for her denial.⁵⁶

¶ 36 Rice testified that on October 12, 2010, she received a request from Youderian to authorize referral to a physical therapist. Rice approved one month of physical therapy. However, Youderian's subsequent treatment notes indicate that Dostal's condition did not improve after physical therapy.⁵⁷

¶ 37 Rice testified that her practice is to require a request for authorization in writing from a medical provider and she will then either approve or deny the authorization and fax the request back to the provider. Rice testified that if she reviewed a medical note where a provider referenced the need for a procedure, Rice would wait for a written request for authorization and would not treat the medical note as a request for authorization. Rice testified that she does not know of any doctors who do not send in

⁵¹ Trial Test.

⁵² Trial Test.

⁵³ Trial Test.

⁵⁴ Trial Test.

⁵⁵ Trial Test.

⁵⁶ Trial Test.

⁵⁷ Trial Test.

requests for authorization.⁵⁸ Rice further testified that she does not recall ever having a situation where she has gotten a request for authorization from a medical provider that was not written on an authorization form, but she believes she would need to have a written request for authorization before she would consider authorizing a medical treatment.⁵⁹ Rice further testified that there is no statute which requires the UEF to only consider requests for authorization that are submitted in writing on a form to the UEF, and she is not aware of any administrative rule or written policy at the department or at the UEF that requires this. She further testified that the UEF does not have a written authorization form of its own.⁶⁰ Rice testified that if a medical provider sent a request for authorization in the form of a letter rather than on a form, she might consider that sufficient if the letter is specific enough in its request. However, the letter would need to come from the treatment provider; Rice testified that a letter from a claimant's attorney pointing out a referral for treatment in a provider's medical record would be insufficient for her to consider it as a request for authorization.⁶¹

¶ 38 Rice testified that on several occasions, she reviewed Youderian's medical notes and saw that Youderian believed Dostal should see an orthopedist. However, Rice did not act upon the recommendation because Youderian did not send in a form requesting authorization for the referral. Rice testified that, if the UEF discovers a recommendation in a treatment note, it is not the UEF's policy to contact providers and inform them that they must send in a separate, written request for authorization in order for the UEF to consider authorizing the treatment. Rice testified that there is no indication that she or anyone at the UEF ever informed Youderian's office that Youderian would need to submit a written request for authorization form in order to have the UEF consider Youderian's treatment recommendations.⁶²

¶ 39 Rice admitted that she based her May 3, 2011, letter to Youderian in which she agreed to authorize Dostal's referral to Dr. McDowell on Youderian's October 12, 2010, request for a referral to an orthopedist – which she found in Youderian's treatment note of that date and for which Youderian did not send a separate, written request for authorization.⁶³ Rice offered no explanation for why she chose to deviate from her usual practice in this particular instance, but not in other instances, while adjusting Dostal's claim.

⁵⁸ Trial Test.

⁵⁹ Trial Test.

⁶⁰ Trial Test.

⁶¹ Trial Test.

⁶² Trial Test.

⁶³ Trial Test.

¶ 40 Rice testified that on August 10, 2011, she denied a request for Dostal to see Youderian after Dostal reported increased back pain. Rice stated that she did so because in May 2011, Youderian stated that she did not have other treatment to offer Dostal at that time. While Rice acknowledged that it is possible that Dostal's condition may have changed between May and August 2011, she still refused to allow Dostal to return to Youderian.⁶⁴

¶ 41 Although Rice testified that she did not intend to refuse to authorize any medical treatment for Dostal until Dostal agreed to see Dr. McDowell, Rice did in fact refuse to authorize all other medical treatment Dostal requested from the time Dostal refused to see Dr. McDowell until Dostal agreed to see him. Rice then scheduled an appointment with Dr. McDowell for November 8, 2011. Rice testified that she did not characterize Dr. McDowell's pending examination as an independent medical examination (IME), but rather as the orthopedic referral Youderian had requested.⁶⁵

¶ 42 Rice testified that the UEF would not object to Dostal treating with Dr. Dacre if Dr. Dacre resumed travelling to Lewistown, and that the sole objection the UEF has to Dostal treating with Dr. Dacre is the travel to Billings.⁶⁶

¶ 43 Rice admitted that it would not entail any significant travel expense to allow Dostal to treat with Dr. Dacre in Billings.⁶⁷ Rice testified that she was concerned about Dostal traveling to Billings to see Dr. Dacre since she had reported that driving in a car aggravated her condition. However, she never asked Youderian or Dr. Dacre if it would be appropriate for Dostal to travel to Billings for medical appointments.⁶⁸

The parties' disputes regarding photocopy charges

¶ 44 On March 3, 2010, Megan Miller, a paralegal at Dostal's counsel's firm, wrote to Rice and requested a copy of Dostal's claim file. Miller asked Rice to contact the firm prior to providing the copy if the charge for the copying was expected to exceed \$100.⁶⁹ Rice informed Miller that the charge would exceed \$100. Miller confirmed that the firm still wanted a complete copy of the file.⁷⁰

⁶⁴ Trial Test.

⁶⁵ Trial Test.

⁶⁶ Trial Test.

⁶⁷ Trial Test.

⁶⁸ Trial Test.

⁶⁹ Ex. 6.

⁷⁰ Ex. 7.

¶ 45 Rice testified that since the UEF is not an insurer, she does not believe the UEF is obligated to make copies of its claims files available to claimants. However, the UEF copies files upon request.⁷¹ On April 15, 2010, Rice provided Dostal's counsel's firm with a copy of the claim file, along with a bill for \$1,012 for 2024 photocopies – a rate of \$.50 per page.⁷² Rice testified that Dostal's claim file was “several feet thick” and that it took a UEF employee over 40 hours to copy it.⁷³

¶ 46 On May 27, 2010, Dostal's counsel wrote to Rice and disputed the UEF's fee of \$.50 per page for photocopies. Dostal's counsel, relying on *Stewart v. MACo Workers' Compen. Trust*,⁷⁴ contended that copies of claims files should be provided at the prevailing rate for copies in the community where the claim file is maintained. Dostal's counsel stated that her office had called several copy shops and determined that the prevailing cost for photocopies was \$.10 per copy. Dostal's counsel further noted that of the 2024 pages provided, 252 were duplicates. Dostal's counsel enclosed a check for \$177.20 for 1,772 copies at \$.10 per page.⁷⁵

¶ 47 Rice acknowledged that Dostal's counsel returned 252 pages as duplicates and tendered a check for \$177.20. Rice testified that she did not contact Dostal's counsel to inform her that the reduced payment was unacceptable because Dostal's counsel was aware that the reduced payment was unacceptable.⁷⁶

¶ 48 Rice testified that the UEF charges \$.50 per page for copies because the Secretary of State's office charges \$.50 per page. Rice did not investigate what charge would be sufficient to recover the cost of the material and time expended to make the copies.⁷⁷ Rice testified that no written policy states that the UEF's or the department's copy charge is \$.50 per page. Rice further testified that she did not investigate how much it would cost to have the claim file copied by a private copy shop. She stated that no statute or rule either prohibits or permits having a private copy shop copy a claims file. However, the UEF is required to maintain confidentiality.⁷⁸

⁷¹ Trial Test.

⁷² Ex. 8.

⁷³ Trial Test. Considering that a ream of photocopy paper consists of 500 pages and is approximately 2" thick, if Rice's estimate is accurate, I can only surmise that Dostal's file was either carved upon clay tablets or maintained in very, very thick folders.

⁷⁴ 2008 MTWCC 22.

⁷⁵ Ex. 9.

⁷⁶ Trial Test.

⁷⁷ Trial Test.

⁷⁸ Trial Test.

¶ 49 On July 8, 2010, Dostal's counsel wrote to Rice about new developments in the dispute between her firm and the UEF regarding the UEF's copy charges for Dostal's claim file. She stated:

Recently, you refused payment for services related to another claim for another worker, which is being handled by my partner, Stacy Tempel-St. John, in lieu of the remaining balance you feel is still owed on the bill for Ms. Dostal's claim file. We have received no correspondence from you in response to the payment we submitted indicating payment was not accepted or sufficient.⁷⁹

¶ 50 Rice acknowledged that another UEF claimant who is represented by an attorney in the same firm as Dostal's counsel was denied reimbursement of a test fee because of the dispute over the copy fees in Dostal's case.⁸⁰ However, the UEF reimbursed the test fee in the other claim after Tempel-St. John filed a petition for mediation.⁸¹

¶ 51 On April 13, 2011, Dostal's counsel sent the UEF a bill for \$214.40 and a letter requesting payment for copying documents in response to a subpoena duces tecum.⁸² The invoice reflected three copies of a 200-page document (\$60), one copy of a 944-page document (\$94.40), and a \$60 fee for "excess time."⁸³ Rice admitted that the UEF received the bill and has refused to pay it.⁸⁴

¶ 52 In the Pretrial Order, the UEF contended that the amount billed for the copies it requested is incorrect. The UEF contends it agreed to pay \$.10 per page, but the firm billed it for more copies than the UEF received, and further added a handling charge which the UEF did not agree to. The UEF explained:

The photo copy bill from Petitioner's counsel's firm reflects that there were three copies of 200 pages; however this was a copy of Exhibit No. 52 in WCC No. 2010-2598, which was 190 pages, not 200 pages. The bill also reflects that there was one copy of 944 pages at .10 [sic] cents for an amount of \$94.40. However, this was a copy of Exhibit No. 57 in WCC No. 2010-2598, which was 878 pages, not 944. The bill also included an amount of \$60.00 for a copy time fee, which the UEF did not agree to pay.

⁷⁹ Ex. 10.

⁸⁰ Trial Test.

⁸¹ Trial Test.

⁸² Ex. 13.

⁸³ Ex. 13 at 2.

⁸⁴ Trial Test.

Thus, the UEF contends that the actual photo copy amount owing for the copies provided by Petitioner's counsel's firm is: \$144.80, not \$214.40.⁸⁵

¶ 53 Karla K. Kyweriga testified at trial. I found her to be a credible witness. Kyweriga owns a print shop in Great Falls. Kyweriga has been in the photocopying business for approximately 35 years. She testified that her shop typically charges \$.10 per page for one-sided, black-and-white copies on 8.5" by 11" paper. Additional charges apply for larger sheets and color copies. For complicated jobs, her shop adds a surcharge of \$20 per hour in addition to the per-page copy charge. Kyweriga testified that she recently copied a complex job which took approximately three hours to copy 944 pages. She further testified that she would consider the claim file in this case to be a complex job and she would charge the \$20 per hour surcharge in addition to the per-page fee to reproduce it.⁸⁶

¶ 54 Steve Davison, the owner and manager of Action Print in Helena, testified via deposition.⁸⁷ Davison testified that he has been involved in the copying business in Helena for 20 years.⁸⁸ His business occasionally makes photocopies for state agencies.⁸⁹ Davison testified that for a job which consists of multiple boxes of documents and requires removing staples and restapling documents, he would typically charge \$.10 per copy plus \$30 per hour of time.⁹⁰ Davison testified that for his business to copy files at its Helena location, the files need to be allowed to leave the state agency for copying purposes.⁹¹ However, on occasion, his company has taken a photocopier to an agency and made the copies onsite.⁹²

¶ 55 Toni Broadbent, the owner of Allegra Marketing Print and Web (Allegra), testified via deposition.⁹³ Allegra performs commercial and digital printing services, including photocopying.⁹⁴ Broadbent testified that Allegra regularly makes photocopies for state agencies.⁹⁵ Broadbent testified that for a complex job that requires "special handling" –

⁸⁵ Pretrial Order at 7-8.

⁸⁶ Trial Test.

⁸⁷ Davison Dep. 4:14-22.

⁸⁸ Davison Dep. 5:2-4.

⁸⁹ Davison Dep. 5:5-6.

⁹⁰ Davison Dep. 6:2-11.

⁹¹ Davison Dep. 7:22-24.

⁹² Davison Dep. 8:7-15.

⁹³ Broadbent Dep. 4:13-18.

⁹⁴ Broadbent Dep. 4:19-25.

⁹⁵ Broadbent Dep. 5:4-6.

including unstapling and restapling documents, removing and replacing documents in binders, and dealing with different sizes of original documents – Allegra typically charges between \$.15 and \$.25 per copy, plus a \$100 per hour handling fee.⁹⁶

Post-Trial Developments

¶ 56 As noted in the findings above, at the time of trial, Rice had scheduled an appointment for Dostal to be seen by Dr. McDowell. On November 4, 2011, I convened a conference call with the parties to make an oral ruling concerning Dostal's ongoing medical treatment.

¶ 57 During the conference call, I granted Dostal's request to continue treating with Dr. Dacre. I noted that Dr. Dacre might be able to address two issues: Whether the UEF should authorize referral to a pain management specialist, and whether the UEF should authorize a lumbar spine MRI. I ordered the parties to provide a status report regarding these issues to the Court following Dostal's appointment with Dr. Dacre. I further ordered the November 8, 2011, appointment with Dr. McDowell cancelled.⁹⁷

¶ 58 On November 22, 2011, the UEF notified the Court that Dr. Dacre had refused to see Dostal, stating that he had nothing further to offer Dostal and suggesting that Dostal seek another opinion.⁹⁸

¶ 59 On January 24, 2012, the UEF informed the Court that Dostal would be seen by a neuro-specialist on March 1, 2012, to seek the opinion recommended by Dr. Dacre.⁹⁹ On January 26, 2012, Dostal's counsel informed the Court that Dostal would obtain a CT lumbar/myelogram on January 27, 2012, and was scheduled to see Dr. John VanGilder on March 1, 2012.¹⁰⁰

¶ 60 On March 22, 2012, the UEF informed the Court that Dr. VanGilder had recommended that Dostal receive L4-5 bilateral facet joint injections, and that the UEF had authorized the treatment. The UEF contended that the issue of whether it should authorize a referral to Dr. Dacre was now moot.¹⁰¹

⁹⁶ Broadbent Dep. 5:12 – 6:5.

⁹⁷ See Minute Book Hearing No. 4342, Docket Item No. 34.

⁹⁸ Nov. 22, 2011, Letter From Coles to Clara Wilson, Clerk of Court, Docket Item No. 35.

⁹⁹ E-Mail From Coles to Jackie Poole, Deputy Clerk of Court, Docket Item No. 36.

¹⁰⁰ Status Report, Docket Item No. 37

¹⁰¹ E-Mail From Coles to Wilson, Docket Item No. 42.

¶ 61 The UEF further contended that the issue of whether it should authorize a lumbar MRI was also moot because both Dr. VanGilder and Youderian had indicated that Dostal could not undergo an MRI because of hardware in her back.¹⁰²

¶ 62 The UEF further contended that the issue of whether it should authorize a referral to a pain management specialist was moot because Dr. VanGilder had not recommended a referral.¹⁰³

¶ 63 On March 29, 2012, Dostal filed a status report in which she stated that the issues regarding the referral to Dr. Dacre and authorization for a lumbar MRI were resolved. Dostal maintains that the issue of whether she was entitled to referral to a pain management specialist remains an issue for determination. Dostal noted that while Dr. VanGilder did not recommend a referral to a pain management specialist, he was not asked whether he believed such a referral was necessary.¹⁰⁴

¶ 64 On August 10, 2012, the UEF filed a status report with the Court in which it stated:

Based on Dr. VanGilder's recommendations, the UEF has authorized a CT Lumbar/Myelogram, L4-5 bilateral facet joint injections, and a referral for psychological counseling. Additionally, since Dr. VanGilder has indicated that Ms. Dostal is again not at MMI for her industrially related back condition, the UEF has started payment of TTD benefits.¹⁰⁵

CONCLUSIONS OF LAW

¶ 65 This case is governed by the 1991 version of the Workers' Compensation Act (WCA) since that was the law in effect at the time of Dostal's industrial accident.¹⁰⁶

¶ 66 Dostal bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.¹⁰⁷ Dostal has met her burden of proof.

Issue One: Whether Respondent should have to reimburse Petitioner's counsel's firm for copying charges totaling \$214.40.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Petitioner's Status Report to Court, Docket Item No. 43.

¹⁰⁵ Uninsured Employers' Fund's Status Report, Docket Item No. 44.

¹⁰⁶ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¹⁰⁷ *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

Issue Two: Whether Petitioner’s counsel must reimburse Respondent \$1,012 for copy charges.

¶ 67 Both parties allege that the other party charged them an unreasonable amount for photocopies. Dostal contends that she was incorrectly charged for duplicate copies. The UEF contends that it was charged for more copies than it received. Neither party has provided any evidence to dispute the other’s contentions regarding the number of copies each should have been respectively charged for: Dostal does not argue that the UEF’s count of 1,068 photocopies is inaccurate and the UEF does not dispute Dostal’s contention that, excluding duplicates, she received 1,772 copies from the UEF – nor does the UEF dispute Dostal’s contention that she should not be held liable for payment for duplicative copies.

¶ 68 Therefore, I conclude that Dostal is liable to the UEF for the cost of 1,772 photocopies while the UEF is liable to Dostal for the cost of 1,068 photocopies. However, I now must determine what constitutes a reasonable charge for the copies.

¶ 69 In *Stewart v. MACo Workers’ Compen. Trust*, I was faced with a dispute regarding the charges an insurer levied against a claimant for a copy of his claim file.¹⁰⁸ In *Stewart*, the insurer argued:

Montana law recognizes the charging for copies in a number of statutory references, including the State Auditor’s office, which is required to charge 50¢ per page for furnishing photostatic copies of securities information (§ 30-10-107, MCA); clerks of district courts are required to charge \$1 per page for the first ten pages and 50¢ for each additional page for copies of papers on file in the clerks’ offices (§ 25-1-201, MCA); and the Secretary of State’s office, which charges \$1 per page for copies of information from the Secretary’s office, with a minimum of \$5 due (ARM 1.2.104).¹⁰⁹

¶ 70 I rejected the use of the insurer’s proposed “guidelines,” concluding instead that an insurer may charge a “reasonable amount” – the same amount as is commonly charged by businesses in the community which offer photocopy services to the public where the claim file is maintained.¹¹⁰

¹⁰⁸ 2008 MTWCC 22.

¹⁰⁹ *Stewart*, ¶ 5 (footnote deleted).

¹¹⁰ *Stewart*, ¶ 11.

¶ 71 Rice testified that she does not believe *Stewart* applies to the UEF because the UEF is not an insurer.¹¹¹ As set forth above, Rice testified that she believes that WCA statutes which refer to “the department” are applicable to the UEF because the UEF is a part of the Department of Labor and Industry.

¶ 72 Section 39-71-205(1), MCA, provides that “the department” shall have power and authority to charge and collect a fee for copies of papers and records sufficient to recover the cost of the material and the time expended, as fixed by the department. By Rice’s own testimony, however, the UEF did not set its fee for copies based on the cost of material and time expended. Rather, the UEF used as a “guideline” that which I rejected in *Stewart*. Rice has provided no evidence as to the cost of material nor the cost of the time expended. Since it is clear that the UEF did not set its copying fees based upon § 39-71-205(1), MCA, I find its argument that the Court should do so to be unpersuasive.

¶ 73 The parties presented the testimony of three business owners who provide photocopying services to the public. Each testified that, in addition to a per-page copying charge, they would charge an hourly rate for a complex copying job – one which required stapling and unstapling, and other “special handling.” Given the size and age of Dostal’s claim file, I find it reasonable to infer that her file would be considered “complex” or require “special handling” if it had been taken to any of these three businesses for copying. Likewise, I find it reasonable to infer that the documents Dostal copied for the UEF in response to a subpoena duces tecum required similar “special handling.”

¶ 74 Therefore, I conclude that an hourly fee, in addition to a per-page charge for copies, is reasonable in the present case. While Rice contends that it took a UEF employee forty hours to copy Dostal’s claim file, I find that time estimate excessive. As noted above, Kyweriga testified that she recently copied a complex job which took approximately three hours to copy 944 pages – or, approximately 315 pages per hour. I therefore conclude that it is more probable than not that the 1,772 non-duplicated pages of Dostal’s claim file could have been copied in six hours. I further conclude that it is more probable than not that Dostal could have copied 1,068 pages for the UEF in three and one-half hours.¹¹²

¹¹¹ I note that the UEF further argued that it has no obligation to provide a claimant with a copy of her claim file under § 39-71-107(3), MCA, because it is not an insurer. Section 39-71-107, MCA, did not exist in the 1991 WCA and therefore the question of whether this statute now applies to the UEF is not relevant to Dostal’s case and I do not consider that argument here.

¹¹² I have rounded up the estimates in both instances to the nearest half-hour increment.

¶ 75 In considering the amounts each copy shop owner testified he or she would charge for these kinds of copying charges, I note that Kyweriga and Davison would charge similar amounts while Broadbent's hypothetical charges would be significantly higher. I therefore have split the difference between Kyweriga's and Davison's estimates for the present case: I hold that a reasonable amount for the parties to charge each other for these photocopies is \$.10 per page plus \$25 per hour for handling. Therefore, the UEF owes Dostal \$194.30 for photocopying charges¹¹³ and Dostal owes the UEF \$327.20 for photocopying charges.¹¹⁴

Issue Three: Whether Respondent should authorize an MRI of Petitioner's lumbar spine.

Issue Four: Whether Respondent should authorize a referral to Dr. Dacre.

¶ 76 As indicated in the findings above, these issues have been resolved to the satisfaction of both parties and therefore I need take no further action.

Issue Five: Whether Respondent should authorize a referral to a pain management specialist.

¶ 77 Dostal argues that she is entitled to referral to a pain management specialist, as recommended by Youderian, her treating physician. The UEF states that Youderian became Dostal's treating physician sometime on or after March 30, 2010.¹¹⁵ However, in spite of Youderian's repeated requests for referral to a pain management specialist, the UEF has refused to authorize the referral. It is not entirely clear to the Court on which specific grounds the UEF bases this denial. The UEF has contended that under § 39-71-605, MCA, it is entitled to refuse to authorize any further treatment for Dostal until she submits to an evaluation with Dr. McDowell.¹¹⁶ However, it does not appear from the record that the UEF requested Dostal to attend an evaluation with Dr. McDowell until May 3, 2011.¹¹⁷ Therefore, this cannot be the grounds upon which the UEF denied the referral to a pain management specialist from March 30, 2010, until May 3, 2011 – over a year later.

¹¹³ $(1,068 \times \$.10) + (3.5 \times \$25) = \$194.30$.

¹¹⁴ $(1,772 \times \$.10) + (6 \times \$25) = \$327.20$.

¹¹⁵ Pretrial Order at 7.

¹¹⁶ Pretrial Order at 8.

¹¹⁷ See Ex. 4 at 32.

¶ 78 The UEF further contends that it need not provide “services and treatment” to Dostal unless the request is supported by objective medical findings. However, the UEF acknowledges that, unlike its present-day counterpart, § 39-71-704, MCA (1991), did not require objective medical findings.¹¹⁸ The UEF argues, however, that Youderian’s initial request for authorization for referral to a pain specialist was properly denied because it was not supported by any objective medical findings.¹¹⁹ The UEF maintains that Dr. Holmes needed to have provided objective medical findings to support his recommendation that Dostal see a pain management specialist.¹²⁰ The UEF further argues that Youderian testified that she was unsure what treatment she could offer Dostal other than referral to a specialist, but that Youderian’s basis for recommending a referral was because of Dostal’s worsening pain and not due to objective medical findings.¹²¹

¶ 79 As I noted in previous litigation regarding Dostal’s claim, the 1991 statutes control this case, and the UEF cannot read into the 1991 statutes additional requirements which the legislature added in later years.¹²² Therefore, the UEF cannot require that the request for a pain management referral be supported by objective medical findings. Regardless, Youderian did make objective medical findings which would support her referral requests. During the same time period as Youderian repeatedly requested referral to a pain management specialist, she noted objective medical findings including muscle spasm and diminished reflexes.

¶ 80 Additionally, the UEF has also argued that it need not consider Youderian’s referral requests which she made in her chart notes if she did not also submit a separate request for authorization form. As the record indicates, from Youderian’s perspective, her referral requests fell upon deaf ears. She had no way of knowing that Rice was withholding the referral because Youderian did not specifically tie the request to the objective medical findings she made. She further had no way of knowing that Rice was ignoring referral recommendations which Youderian had written into her medical notes – even though Rice reviewed those treatment notes – because Youderian had not submitted a separate, written request for referral, preferably on a form (although the UEF offered no such form) but possibly acceptable if in the form of a letter written by the provider and not by the claimant’s attorney. As Rice further noted,

¹¹⁸ Although the UEF maintains that “the term was used in case law at that time,” it does not cite a single example nor does it allege that, simply because the term “was used” that it was used in any manner applicable to supporting the UEF’s position in this instance.

¹¹⁹ Uninsured Employers’ Fund’s Trial Brief (UEF’s Trial Brief), Docket Item No. 29, at 1-2.

¹²⁰ UEF’s Trial Brief at 5.

¹²¹ UEF’s Trial Brief at 9.

¹²² See, e.g., 2010 MTWCC 38, ¶ 21.

this is her practice and she is aware of no statute or rule which requires requests for authorization to be submitted in this manner in order to be considered. It is patently absurd that, apparently, several of Youderian's requests for referral went unheeded because Youderian did not know that she was supposed to create a "Request for Authorization" form in addition to requesting the referral within the body of her treatment notes.

¶ 81 I find that the UEF has presented no plausible basis for denying the referral to a pain management specialist requested by Youderian. Therefore, I conclude Dostal is entitled to authorization for this referral.

Issue Six: Whether Respondent has acted unreasonably in its handling of Petitioner's claim such that Petitioner is entitled to attorney fees and penalties.

¶ 82 Section 39-71-611(1), MCA, provides:

The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:

(a) the insurer denies liability for a claim for compensation or terminates compensation benefits;

(b) the claim is later adjudged compensable by the workers' compensation court; and

(c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

Section 39-71-2907(1), MCA, provides:

The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

¶ 83 Dostal argues that the UEF has acted unreasonably in handling her claim and that she is entitled to an attorney fee and penalties, while the UEF denies that it acted

unreasonably and further argues that it is not subject to the attorney fee and penalty statutes within the WCA.¹²³

¶ 84 As to the specific issues before the Court, I do not see any evidence that Dostal's benefits were delayed, denied, terminated, or affected in any way by the dispute over the photocopy charges, nor do I conclude that the photocopy charges owed to Dostal's counsel's firm constitute a "benefit" under § 39-71-2907, MCA. Therefore, it is immaterial whether the UEF acted unreasonably or not regarding the photocopy charge disputes as it would not be statutorily liable for attorney fees or a penalty for the photocopy charge disputes.

¶ 85 As to Issue Three, the medical evidence presented clearly indicates that Dostal was ineligible for an MRI because of the existing hardware in her back; therefore, the UEF cannot have unreasonably denied treatment which Dostal would never have been able to receive.

¶ 86 As to Issue Four, I find that the UEF unreasonably delayed and denied a referral to Dr. Dacre. Dr. Dacre had treated Dostal over a long period of time and had performed multiple surgeries on her back. Dr. Dacre testified that, barring extraordinary circumstances, he would not transfer care of such a patient to another physician, even one within his own practice. The evidence further indicates that as Dostal's complaints increased, Youderian repeatedly requested a referral to Dr. Dacre. However, the UEF would not authorize the referral. Rice testified that the UEF refused to authorize the referral solely because it would have required Dostal to travel to Billings to be seen by Dr. Dacre. However, the UEF had previously authorized Dostal to travel to Billings to be seen by Dr. Dacre, and her back surgeries were performed by Dr. Dacre in Billings. The UEF offered no plausible explanation as to why it had suddenly decided it was no longer going to authorize Dostal for any medical treatment in Billings when it had been authorizing medical treatment in Billings since 2004.

¶ 87 In order to recover attorney fees pursuant to § 39-71-611, MCA, a party must have her denied claim adjudged compensable by this Court. If benefits are paid prior to an adjudication, attorney fees are not available.¹²⁴ However, an adjudication of compensability is not a prerequisite for a penalty.¹²⁵

¶ 88 In *Vanbouchaute v. Montana State Fund*, I held that I could not award the claimant his attorney fees where, at the close of trial, I advised the parties as to how I

¹²³ See *Dostal v. UEF*, 2012 MTWCC 42, in which I held that the UEF could be held liable for attorney fees and a penalty in Dostal's case.

¹²⁴ *Vanbouchaute v. Montana State Fund*, 2007 MTWCC 37, ¶ 39.

¹²⁵ *Vanbouchaute*, ¶ 40.

intended to rule on the compensability of the claim but did not actually issue a ruling prior to the insurer's accepting and paying the claim.¹²⁶ The situation in *Vanbouchaute* is distinguishable from the present case as I orally ruled regarding the referral to Dr. Dacre on November 4, 2011. I therefore conclude that both attorney fees and a penalty are available to Dostal regarding this issue and she is entitled to both.

¶ 89 As to Issue Five, I have concluded that Dostal is entitled to the referral she has sought to a pain management specialist. As the pertinent findings and conclusions indicate, I am not entirely certain as to the specific grounds upon which the UEF based its refusal to refer Dostal. Since the UEF has failed to enunciate a clear, defensible reason for denying Dostal this referral, I find that it has been unreasonable in denying Dostal this benefit. I therefore conclude Dostal is entitled to her attorney fees and a penalty on this issue.

JUDGMENT

¶ 90 Respondent shall reimburse Petitioner's counsel's firm for copying charges totaling \$194.30.

¶ 91 Petitioner's counsel shall reimburse Respondent \$327.20 for copying charges.

¶ 92 Issues Three and Four have been resolved, as set forth above.

¶ 93 Respondent shall authorize referral to a pain management specialist.

¶ 94 Petitioner is not entitled to her attorney fees or a penalty regarding Issues One, Two, and Three.

¶ 95 Petitioner is entitled to her attorney fees and a penalty regarding Issues Four and Five.

¶ 96 Petitioner shall have 10 days from the date of this Judgment to submit a verified statement of costs and attorney fees.

¶ 97 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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¹²⁶ *Vanbouchaute*, ¶ 39.

DATED in Helena, Montana, this 4th day of December, 2012.

(SEAL)

JAMES JEREMIAH SHEA
JUDGE

c: J. Kim Schulke
Leanora O. Coles
Submitted: November 4, 2011