IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2007 MTWCC 60

WCC No. 2006-1651

BOBBY DRIGGERS

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Appealed to Montana Supreme Court 01/28/2008;
Appeal Dismissed 03/14/08

Summary: Petitioner moved this Court for summary judgment, arguing that he was injured in the course and scope of his employment because he was injured while driving to work in a vehicle furnished by his employer and for which the employer paid for gas, oil, maintenance, and insurance. Respondent opposed the motion and cross-motioned for summary judgment, contending that Petitioner failed to satisfy both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA. Petitioner further requested an award of attorney fees, costs, and a penalty.

Held: Petitioner's motion for summary judgment is granted and Respondent's cross-motion for summary judgment is denied. Respondent is correct that both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA, must be satisfied for Petitioner's injury to be compensable. Petitioner satisfies the first part of the test because he was injured while driving a vehicle furnished by his employer. Petitioner satisfies the second part of the test, that the travel was necessitated by and on behalf of the employer as an integral part or condition of his employment, based upon the well-established case law in Montana regarding the exceptions to the going and coming rule. This Court fails to appreciate any notable distinctions between the present case and the cases of *McMillen*, *Ellingson*, and *Gordon*, which establish that an employee is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to

and from his job. To the extent that there is any distinction between the present case and the Montana Supreme Court's decisions in *McMillen*, *Ellingson*, and *Gordon*, it may be only that the incident in this case is even more squarely within the scope of the exception to the going and coming rule. Therefore, the Court also finds Respondent's denial of Petitioner's claim unreasonable and he is entitled to attorney fees, costs, and a penalty.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Where Petitioner was injured while driving to work in a vehicle furnished by his employer and for which the employer paid for gas, oil, maintenance, and insurance, the Court held Petitioner was injured in the course and scope of his employment based on the two-part test set forth at § 39-71-407(3)(a)(I), MCA. Petitioner satisfies the first part of the test because he was injured while driving a vehicle furnished by his employer. Petitioner satisfies that second part of the test, that the travel was necessitated by and on behalf of the employer as an integral part or condition of his employment, based upon the well-established case law in Montana regarding the exceptions of the going and coming rule.

Employment: Course and Scope: Coming and Going. Where Petitioner was injured while driving to work in a vehicle furnished by his employer and for which the employer paid for gas, oil, maintenance, and insurance, the Court held Petitioner was injured in the course and scope of his employment based on the two-part test set forth at § 39-71-407(3)(a)(I), MCA. Petitioner satisfies the first part of the test because he was injured while driving a vehicle furnished by his employer. Petitioner satisfies that second part of the test, that the travel was necessitated by and on behalf of the employer as an integral part or condition of his employment, based upon the well-established case law in Montana regarding the exceptions of the going and coming rule.

Attorney fees: Reasonableness of Insurer. Where the Court failed to appreciate any notable distinctions between the present case involving an employee driving an employer furnished vehicle to work and the cases of *McMillen, Ellison,* and *Gordon,* which establish that an employee is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job, to the extent there is any distinction between the present case and the well-established case law, it may be only that the incident in the present case is even more squarely within the scope of the exception to the going and

coming rule. Therefore, the Court finds Respondents denial of Petitioner's claim unreasonable and he is entitled to attorney fees, costs, and a penalty.

Penalties: Insurers. Where the Court failed to appreciate any notable distinctions between the present case involving an employee driving an employer furnished vehicle to work and the cases of *McMillen, Ellison,* and *Gordon,* which establish that an employee is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job, to the extent there is any distinction between the present case and the well-established case law, it may be only that the incident in the present case is even more squarely within the scope of the exception to the going and coming rule. Therefore, the Court finds Respondents denial of Petitioner's claim unreasonable and he is entitled to attorney fees, costs, and a penalty.

¶ 1 Petitioner Bobby Driggers moved this Court for summary judgment, arguing that he was injured in the course and scope of his employment because he was injured while driving to work in a vehicle furnished by his employer and for which the employer paid for gas, oil, maintenance, and insurance. Respondent Liberty Northwest Insurance Corporation opposed Petitioner's motion and cross-motioned for summary judgment, contending that Petitioner has failed to satisfy both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA. Petitioner further requests an award of attorney fees, costs, and a penalty.

Facts[1]

¶ 2 Petitioner is a registered nurse and a certified correctional healthcare professional.

¶ 3 At the times relevant to this case, Petitioner was employed by Flathead County as a medical officer in the Flathead County Sheriff's Department.

¶ 4 Petitioner's main job duties were taking care of the medical needs of inmates incarcerated in the Flathead County Detention Center and in the Flathead County Juvenile Detention Center, including passing out medications to inmates, ensuring that the detention centers met sanitary standards, and taking DNA samples.

[1] The Facts originate in Petitioner's Brief in Support of Motion for Summary Judgment. Respondent stipulated to the accuracy of Petitioner's Statement of Uncontroverted Facts but objected to the facts set forth at ¶¶ 12-13 as irrelevant. None of the facts set forth in these two paragraphs bear on my disposition of these motions.

¶ 5 Petitioner started his work shifts between 9:00 and 9:30 a.m., and usually worked more than eight hours in a single shift.

¶ 6 Petitioner regularly worked Monday through Friday, but was on call when he was not working his regular hours. At times he was called in on weekends and evenings.

¶ 7 Flathead County provided Petitioner with a cell phone, in part so he could be contacted when he was not working his regular shift.

¶ 8 Flathead County provided Petitioner with a vehicle to use. Flathead County paid for the gas and oil used in the vehicle, maintenance, and liability insurance.

¶ 9 Petitioner understood that he could not use the vehicle for personal use.

¶ 10 At the time of the accident Petitioner lived at 535 West Seventh, Whitefish, Montana.

¶ 11 Petitioner used the vehicle to drive to and from work. To go to work, Petitioner drove from his home in Whitefish to the Flathead County Detention Center, which is located at 920 South Main in Kalispell, via U.S. Highway 93. He generally took the same route home. Petitioner's workplace was located approximately 15 miles from his home.

¶ 12 While going to and from work, Petitioner oftentimes ran errands for work, including driving to Stoick's Drugstore to pick up medications for inmates, driving to the Flathead County Landfill to dispose of needles that had been used at the detention centers, and driving to Kmart to pick up supplies.

¶ 13 Petitioner also drove the vehicle to Kalispell Regional Medical Center, which is located on the north side of Kalispell, and to North Valley Hospital, which is located in Whitefish, to speak with Dr. James Dusing, who serves as the physician for the detention centers, and other physicians. Petitioner would also stop at the hospitals for labs.

¶ 14 Petitioner had also stopped at accidents and "officers-in-need-of-assistance" calls while going to and from work in the vehicle.

¶ 15 On Friday, March 17, 2006, at 9:30 a.m., Petitioner was rear-ended while driving to work in the vehicle Flathead County provided to him. The accident occurred on U.S. Highway 93, near its intersection with Wyoming Street, in Kalispell.

¶ 16 Petitioner suffered injuries in the motor vehicle accident and, consequently, missed six weeks of work.

¶ 17 At the time of Petitioner's motor vehicle accident, Flathead County was enrolled under Plan II of the Workers' Compensation Act with Respondent as its workers' compensation insurer.

¶ 18 Petitioner timely notified his employer of the accident, and timely filed a claim for benefits.

¶ 19 Respondent has denied liability on the grounds that Petitioner's injuries did not arise out of the course and scope of his employment with Flathead County.

ANALYSIS AND DECISION

¶ 20 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's injury.[2]

¶ 21 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[3] The material facts necessary for disposition of this case are undisputed. Accordingly, this case is susceptible to summary disposition.

¶ 22 The central issue in this case is whether Petitioner's injury, sustained while traveling to work in a vehicle provided by his employer, falls within an exception to the going and coming rule. If it does fall within such an exception, then Petitioner's injury is compensable.

¶ 23 The statute which determines the outcome of this dispute is § 39-71-407, MCA. Specifically, this dispute centers around the exception to the going and coming rule codified at § 39-71-407(3)(a)(i), MCA, which reads, in pertinent part:

> (3)(a) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:
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> (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or

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

[3] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton,* 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

> lodging as a part of the employee's benefits or employment agreement and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment . . . .

¶ 24 Respondent argues that this statute effectively sets forth a two-part test, both of which must be satisfied in order for Petitioner's injury to fall within an exception to the going and coming rule. I agree. For Petitioner's injury to fall within this exception, it is not enough that his employer furnished the transportation in which he was traveling at the time of his injury or that he was reimbursed for his travel, gas, and oil as a part of his employment agreement. If that were so, there likely would be no dispute here since the parties agree that Flathead County provided Petitioner with the vehicle he was driving at the time of his injury and that Flathead County paid for the gas used in the vehicle, maintenance of the vehicle, and liability insurance. Rather, the dispute in this case centers around whether Petitioner's travel to and from work satisfies the second part of the test – that the travel was necessitated by and on behalf of the employer as an integral part or condition of Petitioner's employment.

¶ 25 In determining whether travel to or from work satisfies the second part of the test, there are several cases which are determinative of this issue.

¶ 26 In *McMillen v. Arthur G. McKee & Co.,*[4] two brothers were each paid four dollars per day as a "travel allowance" to travel to and from their job.[5] While driving to work, the brothers were seriously injured in a car accident.[6] The Montana Supreme Court found their injuries were compensable because of the specific allowance they received to travel to and from their job.[7] In doing so, the Supreme Court noted that its decision was "consistent with the majority rule in the United States that a workman is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job."[8] The Supreme Court went on to cite with approval, Professor Larsen's treatise on workers' compensation that, "in the majority of cases involving a deliberate and substantial payment for the expense of travel, or the provision

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[4] *McMillen*, 166 Mont. 400, 533 P.2d 1095 (1975).

[5] *McMillen,* 166 Mont. at 402, 533 P.2d at 1096.

[6] *McMillen,* 166 Mont. at 402-403, 533 P.2d at 1096.

[7] *McMillen,* 166 Mont. at 407, 533 P.2d at 1098.

[8] *McMillen,* 166 Mont. at 406, 533 P.2d at 1098.

of an automobile under the employee's control, the journey is held to be in the course of employment."[9]

¶ 27 Although the *McMillen* Court specifically noted that it was limiting its decision to the facts of the case before it,[10] the Supreme Court noted in *Ellingson v. Crick Co.*[11] that, in *McMillen*, it had:

> adopted the general rule that:
>
> ' * * * a workman is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job.'[12]

Following this general rule, the Supreme Court in *Ellingson* held that the claimant was in the course and scope of his employment when he was injured driving his own vehicle to work because he had received a five-dollar-per-day "travel allowance."[13]

¶ 28 Finally, in *Gordon v. H.C. Smith Construction Co.,*[14] a worker was killed when traveling from work in his personal vehicle.[15] Even though he had stopped at a bar for approximately four hours before the accident occurred and was not headed in the direction of his lodging at the time of his accident, the Supreme Court ruled that the incident was in the course and scope of his employment because his employer had paid a subsistence allowance and he was traveling from the job site at the time of his accident.[16] Again, the Supreme Court cited with approval, the language from Larsen that, "in the majority of cases involving a deliberate and substantial payment for the expense of travel, or the provision of an automobile under the employee's control, the journey is held to be in the course of

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[9] *Id.*

[10] *McMillen,* 166 Mont. at 407, 533 P.2d at 1098.

[11] *Ellingson*, 166 Mont. 431, 533 P.2d 1100 (1975).

[12] *Ellingson*, 166 Mont. at 433, 533 P.2d at 1101.

[13] *Ellingson*, 166 Mont. at 432, 434, 533 P.2d at 1101, 1102.

[14] *Gordon*, 188 Mont. 166, 612 P.2d 668 (1980).

[15] *Gordon,* 188 Mont. at 168, 612 P.2d at 669.

[16] *Gordon*, 188 Mont at 171-72, 612 P.2d at 671.

employment."[17] The Supreme Court went on to hold that, "The language of Montana cases is clear that travel to and from work is covered and that injuries sustained en route are compensable."[18]

¶ 29 I fail to appreciate any notable distinctions between the three Supreme Court precedents set forth above and the case at bar. All three cases involved injuries or deaths which occurred traveling either to or from work. In all three cases, the Supreme Court found the workers to be within the course and scope of their employments because the employer paid, at least to some degree, for the employee's travel to and from work. To the extent that there is any distinction at all, it may be only that the incident in this case is even more squarely within the scope of the exception to the going and coming rule because, in this case, Petitioner's employer not only furnished him with the car, but also paid for gas, oil, maintenance, and liability insurance. Moreover, unlike the facts in *Gordon*, it is an undisputed fact that Petitioner was driving to work at the time of his injury and was not on any kind of personal deviation.

¶ 30 In addressing these precedents, Respondent argues only that:

> There is no need to dwell on the three Montana Supreme Court decisions cited by [Petitioner], *McMillen, Ellingson,* and *Gordon,* because in each, the Court found the claimant was paid a travel allowance. That is the controlling fact in those cases and it is not in the instant case. Also they all predate the repeal of the liberal construction statute, MCA § 39-71-104 (1985) repealed Sec. 68, Ch. 464, L. 1987.[19]

This argument is without merit.

¶ 31 Both the Montana Supreme Court and this Court have long recognized that the enactment of § 39-71-407, MCA, was a codification of the going and coming rule, and the exceptions to that rule, that had evolved in the case law prior to the statute's enactment – i.e., *McMillen, Ellingson,* and *Gordon*.[20]

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[17] *Gordon,* 188 Mont. at 171, 612 P.2d at 670.

[18] *Gordon,* 188 Mont. at 173, 612 P.2d at 671.

[19] Respondent's Reply Brief in Support of its Motion for Summary Judgment at 2.

[20] *State Compensation Mut. Ins. Fund v. James*, 257 Mont. 348, 350, 849 P.2d 187, 188-89 (1993); *Heath v. MMIA*, 1997 MTWCC 52; *Bentz v. Liberty Northwest*, 2002 MT 221, ¶ 13, 311 Mont. 361, 57 P.3d 832 (*citing*, *State Compensation Mut. Ins. Fund v. James*, 257 Mont. 348, 350, 849 P.2d 187, 188-89 (1993)).

¶ 32 In *Heath v. MMIA*, this Court noted that, "In *State Compensation Mut. Ins. Fund v. James,* 257 Mont. 348, 849 P.2d 187 (1993), the Supreme Court construed [§ 39-71-407, MCA] as codifying existing law, ***both as to the exceptions adopted in prior Court decisions*** and the general rule that coverage exists only where the travel is in the course and scope of employment."[21]

¶ 33 Most recently, the Supreme Court reiterated this view in *Bentz v. Liberty Northwest*, when it stated:

> The Montana Legislature adopted the travel provisions at § 39-71-407(3), MCA (1999), of the Workers' Compensation Act in 1987, recognizing this "going and coming" rule ***and the exceptions to the rule which had evolved over the years***.[22]

¶ 34 Among the exceptions to the going and coming rule which were codified in 1987 is the two-part test now found at § 39-71-407(3)(a)(i), MCA. The first part of that test is whether "the employer furnishes the transportation ***or*** the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging . . . ."[23] Either the furnishing of transportation or the reimbursement from the employer for the cost of travel, gas, or oil will suffice to satisfy the first part of the test set forth in the statute. Indeed, as I noted above, this issue is not in dispute since the parties agree that Petitioner's employer provided him with the car ***and*** paid for gas, oil, and maintenance of the vehicle. Respondent's reliance on the payment of a travel allowance as a distinguishing factor, therefore, is misplaced.

¶ 35 As far as Respondent's argument that the precedential value of these cases is abrogated by the repeal of the liberal construction statute, other than noting that the cases predate the statute's repeal, Respondent fails to explain how the liberal construction statute may have, in any way, impacted the outcome of these decisions. Indeed, when one considers what the liberal construction statute actually required, it does not logically follow that its 1987 repeal would have any impact on the outcome of any of these cases.

¶ 36 The statute which Respondent cites, § 39-71-104, MCA (1985), stated as follows:

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[21] *Heath v. MMIA*, 1997 MTWCC 52 at 4 (emphasis added).

[22] *Bentz v. Liberty Northwest*, 2002 MT 221, ¶ 13, 311 Mont. 361, 57 P.3d 832 (emphasis added) (*citing*, *State Compensation Mut. Ins. Fund v. James*, 257 Mont. 348, 350, 849 P.2d 187, 188-89 (1993)).

[23] § 39-71-407(3)(a)(i), MCA (emphasis added).

> **39-71-104. Court to give liberal construction to chapter.** Whenever this chapter or any part or section thereof is interpreted by a court, it shall be liberally construed by such court.

¶ 37 As discussed above, the going and coming rule, and the exceptions to that rule, were codified in 1987 – the same year that the liberal construction statute was repealed. The cases which predated the codification of the going and coming rule could not have been construing a nonexistent statute – liberally or otherwise. Therefore, the liberal construction statute was irrelevant to their determination. The subsequent repeal of the statute is likewise irrelevant.

¶ 38 It also bears noting that, of the three cases at issue, the two most recent – *Ellingson* and *Gordon* – do not even mention the liberal construction statute in any way. As for *McMillen*, the only mention of the liberal construction statute is contained in a quotation from a different case[24] and in the Supreme Court's rejection of a constitutional challenge to the attorney fees and costs statute.[25]

¶ 39 Finally, I find it persuasive that in *Borglum v. Hartford Ins. Co. of the Midwest*[26] – one of the cases principally relied upon by Respondent – this Court found that an employee who was killed while driving to work was in the course and scope of his employment because he was reimbursed $20 per day for his travel.[27] In interpreting the same statute[28] at issue in this case, this Court relied exclusively on *McMillen, Ellingson*, and *Gordon* in reaching its decision even though this Court was obviously aware that these cases predated the enactment of § 39-71-407, MCA.[29]

¶ 40 Respondent argues that, "The result of accepting [Petitioner's] argument is that the going and coming rule will be abolished."[30] On the contrary, this Order simply applies the

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[24] *McMillen*, 166 Mont. at 405, 533 P.2d at 1097.

[25] *McMillen,* 166 Mont. at 408, 533 P.2d at 1099.

[26] *Borglum*, 2002 MTWCC 16.

[27] *Borglum*, ¶ 10.

[28] Although *Borglum* involved the interpretation of the 1999 version of § 39-71-407(3)(a)(i), MCA, the 2005 version of this statute is substantively identical.

[29] *Borglum*, ¶ 7. *See, also*, *Heath v. MMIA*, 1997 MTWCC 52.

[30] Liberty's Brief in Opposition to Petitioner's Motion for Summary Judgment and Liberty's Motion for Summary Judgment and Supporting Brief at 6.

well-established general rule that "a workman is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job."[31] This is a rule that has been in existence for more than thirty years and which both the Montana Supreme Court and this Court have long recognized was codified by the Legislature in 1987.[32]

¶ 41 Petitioner has satisfied both parts of the test set forth at § 39-71-407(3)(a)(i), MCA. Accordingly, I conclude that the incident in question falls within the exception to the going and coming rule and his injuries are compensable. Petitioner's motion for summary judgment, therefore, is granted and Respondent's cross-motion for summary judgment is denied.

ATTORNEY FEES, COSTS, AND PENALTY

¶ 42 Petitioner has requested an award of attorney fees and costs pursuant to § 39-71-611, MCA, and a penalty pursuant to § 39-71-2907, MCA. Petitioner notes that the issue before this Court has been decided multiple times by both this Court and the Supreme Court and that Respondent cannot reconcile its denial of benefits to these previous decisions. Respondent characterizes this case as a case of first impression and argues that its denial of the claim was therefore not unreasonable. Specifically, Respondent notes that, "This is the first case in which a Montana court has been asked to find that an injury going to and from work in a company vehicle is per se compensable . . . ."[33] I am not persuaded by Respondent's argument.

¶ 43 As discussed above at length, it has been the well-established general rule that a worker is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job. To the extent that Respondent seeks to hang its proverbial hat on the company vehicle as the distinguishing feature that makes this a case of first impression, I find this distinction unpersuasive.

¶ 44 In explaining its rationale for applying this exception to the going and coming rule, the Supreme Court cited, on multiple occasions, the language from Professor Larsen that, "in the majority of cases involving a deliberate and substantial payment for the expense of

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[31] *See, McMillen* and *Ellingson, supra*.

[32] *State Compensation Mut. Ins. Fund v. James*, *supra*.; *Heath v. MMIA*, *supra*.; *Bentz v. Liberty Northwest*, *supra*. (*citing*, *State Compensation Mut. Ins. Fund v. James*, 257 Mont. 348, 350, 849 P.2d 187, 188-89 (1993)).

[33] Respondent's Reply Brief in Support of Its Motion for Summary Judgment at 3.

travel, ***or the provision of an automobile under the employee's control***, the journey is held to be in the course of employment."[34] More compelling, § 39-71-407(3)(a)(i), MCA, itself states that if the employer furnishes the transportation, this satisfies the first part of the test to exclude an injury from the going and coming rule.

¶ 45 The Supreme Court has stated that "as a general rule, where a court of competent jurisdiction has clearly decided an issue regarding compensability in advance of an insurer's decision to contest compensability, the clear applicability of the earlier decision constitutes substantial evidence supporting a finding by the Workers' Compensation Court that the contest over compensability is unreasonable."[35] As I noted above, to the extent that there is any distinction between this case and the Supreme Court's decisions in *McMillen*, *Ellingson*, and *Gordon*, it may be only that the incident in this case is even more squarely within the scope of the exception to the going and coming rule. I therefore find Respondent's denial of Petitioner's claim to be unreasonable.

¶ 46 Pursuant to § 39-71-611(1), MCA, an insurer shall pay reasonable costs and attorney fees if it denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and in the case of attorney fees, this Court determines that the insurer's actions in denying liability were unreasonable. Having adjudged Petitioner's claim compensable and determined Respondent's denial of Petitioner's claim unreasonable, Petitioner is entitled to his attorney fees and costs.

¶ 47 With regard to a penalty, where either the material facts or the law applicable to a case is reasonably debatable, the parties are entitled to present the case to this Court and no penalty shall attach to that presentation.[36] In this case, the material facts are undisputed and I find there is no reasonable debate regarding the applicable law. I have found Respondent's denial of Petitioner's claim unreasonable. Accordingly, Petitioner is entitled to a penalty award of 20% of the full amount of benefits due pursuant to § 39-71-2907, MCA.

ORDER AND JUDGMENT

¶ 48 Petitioner's motion for summary judgment is **GRANTED.**

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[34] *McMillen*, 166 Mont. at 406, 533 P.2d at 1098 (emphasis added); *Gordon,* 188 Mont. at 171, 612 P.2d at 670 (emphasis added).

[35] *Marcott v. Louisiana Pacific Corp.*, 275 Mont. 197, 205, 911 P.2d 1129, 1134 (1996).

[36] *Briney v. Pac. Employers Ins. Co.*, 1997 MTWCC 55.

¶ 49 Respondent's cross-motion for summary judgment is **DENIED.**

¶ 50 Petitioner's request for costs, attorney fees, and a penalty is **GRANTED.**

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

¶ 52 Any party to this dispute may have twenty days in which to request reconsideration of this Order and Judgment.

DATED in Helena, Montana, this 31st day of December, 2007.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: David M. Sandler
Larry W. Jones
Submitted: October 30, 2006