

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 4

WCC No. 2011-2734

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DAWN ERVING

Petitioner

vs.

HARTFORD ACCIDENT & INDEMNITY COMPANY

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner contends that she suffered aggravations or injuries to her right knee and low back arising out of and in the course of her employment and that Respondent should be liable for those conditions. Respondent denied liability. Petitioner further contends that Respondent unreasonably denied her claim and she is therefore entitled to a penalty and attorney fees.

**Held:** Petitioner has not met her burden of proof and Respondent is therefore not liable for her claim. Petitioner is not entitled to a penalty and attorney fees.

**Topics:**

**Proof: Burden of Proof: Generally.** Where at the end of trial, the Court remained unclear as to Petitioner's theory of her case, the Court concluded that she had not met her burden of proof. While Petitioner argued that it was Respondent's responsibility to accept her claim and sort out the particulars, the Court noted that Respondent was not the insurer at risk for a previous, potentially contributory, claim and that the burden of proof ultimately lies with the claimant.

**Remedies: Additional Relief.** This Court cannot fashion a remedy for unspecified "additional relief."

¶ 1 The trial in this matter occurred on September 21, 2011, in Missoula, Montana. Petitioner Dawn Erving was present and was represented by Steve M. Fletcher. Joe C.

Maynard represented Respondent Hartford Accident & Indemnity Company (Hartford). Claims adjuster Cindy Berglind-Grooms also attended on behalf of Hartford.

¶ 2 Exhibits: I admitted Exhibits 1 through 20 without objection.

¶ 3 Witnesses and Depositions: The depositions of Dawn Erving, Arminthia Rennert Wright, Jesse Curry, Angela K. Lowe, Nicole Shockley, and Terry Smith, M.D., were submitted to the Court and are considered part of the record. Shockley, Berglind-Grooms, and Erving were sworn and testified.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:<sup>1</sup>

Issue One: Petitioner's entitlement to medical benefits, temporary total disability benefits, and further indemnity benefits as provided by law.

Issue Two: Increased award of 20% of all delayed benefits pursuant to § 39-71-2907, MCA.

Issue Three: Reasonable attorney fees and costs pursuant to § 39-71-611, MCA.

Issue Four: Any additional relief as the Court may deem just and equitable.

#### FINDINGS OF FACT

¶ 5 Erving testified at trial. I found Erving to be an earnest but not entirely credible witness. As the findings below indicate, Erving's testimony about the chronology of events was inconsistent and she had difficulty recalling details about the symptoms she experienced which are pertinent to her present claim. Erving was an unreliable historian in relating her symptoms and incidents to her treating physician and gave varying explanations as to why she failed to report non-work-related incidents to her treating physician.

¶ 6 Erving resides in Plains, Montana. She worked for Town Pump for approximately seven years. In 2006, Erving filed a claim for a work-related knee injury at Town Pump.<sup>2</sup> Although the record is not entirely clear, it appears that Town Pump was insured by one of the Liberty insurance companies at that time, and that it accepted liability for the claim.

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<sup>1</sup> Pretrial Order at 4, Docket Item No. 25.

<sup>2</sup> Trial Test.

¶ 7 In approximately March 2008, Erving underwent surgery on her knee. She returned to work in May 2008. Erving testified that she wore a knee brace for about six months after surgery and eventually ceased wearing it.<sup>3</sup> Erving testified that she stopped seeking medical treatment for her knee in 2008 because Liberty ceased authorizing treatment and she had no other insurance coverage.<sup>4</sup>

¶ 8 Erving testified that she has taken ibuprofen and Aleve on an ongoing basis since she had her knee surgery.<sup>5</sup> She further testified that she has experienced continual swelling in her knee since the surgery, unless she takes two or three days off work and rests it.<sup>6</sup> Although she was initially given less strenuous duties, Erving eventually returned to her job as a cashier in late 2009. Once Erving returned to her job duties as a cashier, her knee problems increased. Erving's knee throbbed before changes in the weather and she would limp for a few days. Erving testified that she pursues few activities outside of work that require her to stand for any length of time, but she has noticed that her knee is painful and swollen after shopping.<sup>7</sup> Erving testified that at one time, she could stand for an hour or an hour and a half before her knee began to swell, but by the time of her deposition on August 17, 2011, her knee would start to swell if she stood for 20 minutes.<sup>8</sup>

¶ 9 At some point after she returned to her cashier duties, Erving began working the graveyard shift. Her job duties included heavier cleaning than she had performed on the other shifts. She began wearing a knee brace because the cleaning duties bothered her knee. Erving testified that she attempted to discuss her difficulties with her supervisor Lowe, but Lowe was unwilling to discuss it. By fall 2010, Erving observed swelling and discoloration in her knee and pain and burning sensations from her knee down into her ankle and foot.<sup>9</sup>

¶ 10 On September 2, 2010, Erving signed a Town Pump Counseling Report which stated that Erving had had a conversation with Lowe and with another manager about Erving's job duties on the graveyard shift. The report states that Erving reported

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<sup>3</sup> Trial Test.

<sup>4</sup> Trial Test.

<sup>5</sup> Erving Dep. 13:3-12.

<sup>6</sup> Erving Dep. 13:13-16.

<sup>7</sup> Trial Test.

<sup>8</sup> Erving Dep. 13:17-25.

<sup>9</sup> Trial Test.

difficulty with mopping and sweeping. The three of them decided Erving would rotate shifts.<sup>10</sup>

¶ 11 During her deposition, Erving testified that in September 2010, she was washing dishes at home when she felt heat in her right knee when she turned to put a dish in the drying rack. She stated that her knee was not painful, but had a strange feeling in it. That night at work, her knee felt irritated and she knew she was having a flare-up.<sup>11</sup> Erving stated that she does not attribute the start of this flare-up to doing the dishes or to any other particular activity.<sup>12</sup> Erving testified that from this time forward, she occasionally had numbness in her leg.<sup>13</sup> At trial, Erving testified that the incident which occurred while she was washing dishes may have been in May or July of 2010, and she felt a pop in her knee. However, Erving was sure it was not until September that she began to feel numbness and tingling in that leg.<sup>14</sup>

¶ 12 Erving testified that in November 2010, her knee condition “flared up again.” She testified that she did not seek medical treatment because she does not like doctors.<sup>15</sup>

¶ 13 One of the tasks Erving performed at Town Pump was carrying firewood bundles for customers. Erving testified that the bundles weigh approximately five pounds each. Erving guessed that she had carried a bundle for a customer at Town Pump once in November 2010. Erving acknowledged that carrying firewood is not a required job duty, but the outdoor bin where the wood is stored gets wet from runoff from the roof and customers complain that the wood bundles are frozen together.<sup>16</sup> Erving testified that she attempted to tell Lowe that she had felt a “pull” in her leg when she reached into the bin to retrieve a bundle, but Lowe told her that it was not her responsibility to retrieve wood for customers. Erving testified that in spite of Lowe’s admonition, she continued to retrieve firewood bundles for customers because she believed it was good customer service to do so.<sup>17</sup> Erving further explained that she preferred to retrieve firewood bundles because she believed customers might take more wood than they paid for.<sup>18</sup>

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<sup>10</sup> Ex. 2.

<sup>11</sup> Erving Dep. 53:13 – 55:5.

<sup>12</sup> Erving Dep. 57:3-9.

<sup>13</sup> Trial Test.

<sup>14</sup> Trial Test.

<sup>15</sup> Erving Dep. 15:11-17.

<sup>16</sup> Trial Test.

<sup>17</sup> Erving Dep. 65:5-19.

<sup>18</sup> Erving Dep. 66:9-12.

¶ 14 Erving testified that in November 2010, she shoveled snow at work on several occasions. Erving agreed that Town Pump had a policy which required employees to note on a “snow log” if they shoveled snow at work, but she stated that she often failed to log snow removal. The Town Pump snow log indicates that Erving shoveled snow once in November. Also, for the first two weeks of November, she and other employees did not fail to fill out the log, but rather specifically wrote “no snow” on each date.<sup>19</sup>

¶ 15 Erving stated that in mid-November 2010, she was having difficulty climbing her stairs at home.<sup>20</sup> Erving testified that in late November<sup>21</sup> 2010, she was carrying some firewood into her home inside of a canvas bag when the bag collided with a support post on her porch. The impact caused Erving’s hip to “go out.” Erving testified that her hip had “gone out” on a previous occasion and she was not concerned about it.<sup>22</sup> Erving testified that she walked with an exaggerated limp for a few days after her hip “went out.” Eventually, her hip “popped in” again. Erving testified that the pain in her right leg also worsened after this incident. In late November 2010, Erving also began to experience swelling in her leg, ankle, and foot and she had increased pain from walking and standing. Erving testified that once, she sat on a low crate for a group photo and her hip “locked” and she was unable to stand up without assistance.<sup>23</sup>

¶ 16 Erving further testified that at the time of the wood-carrying incident at home, she already had an appointment scheduled with Terry Smith, D.O., for December 13, 2010. Erving testified that she had set this appointment because of problems she was having with her knee and that was the earliest appointment slot he had available.<sup>24</sup> Erving testified that she did not file a workers’ compensation claim at that time because she believed Liberty would cover her doctor’s appointment under her previous claim.<sup>25</sup> However, Erving also testified that she did not know how to file a workers’ compensation claim and so she did not do so after her appointment with Dr. Smith.<sup>26</sup>

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<sup>19</sup> Trial Test.; Ex. 3 at 1.

<sup>20</sup> Trial Test.

<sup>21</sup> Erving was inconsistent in her testimony as to whether this incident occurred in November or December 2010. Based on her testimony, her medical records, and the testimony of her co-workers, I find this incident occurred in November.

<sup>22</sup> Trial Test.

<sup>23</sup> Trial Test.

<sup>24</sup> Trial Test.

<sup>25</sup> Erving Dep. 52:9-15.

<sup>26</sup> Erving Dep. 70:16-21.

¶ 17 Erving testified that she shoveled snow at Town Pump several times in December 2010, although the December snow log does not reflect that she ever shoveled snow prior to December 13, 2010.<sup>27</sup>

¶ 18 Erving testified that in December 2010, she fell on her stairs at home when her “bad leg” gave out on her and she hit her head on something when she fell, causing a bump on her head.<sup>28</sup> At trial, Erving testified that she told Dr. Smith about this incident, but she thinks he did not record it in his notes because neither of them took the incident seriously.<sup>29</sup>

¶ 19 At her deposition, Erving testified that she probably told Dr. Smith about the wood-carrying incident at home when she saw him on December 13, 2010, but she does not think the incident was important and she thinks he did not mention it in his notes because he did not find it important, either.<sup>30</sup> However, at trial, Erving testified that she did not tell Dr. Smith about the wood-carrying incident at home because she did not hurt herself, and that she did not tell him that she had experienced a pop and strange sensation in her knee while doing dishes. She further testified that she did not tell him about falling on the stairs at home and that she did not tell him that she hit her head in that incident. Erving further testified that she did tell Dr. Smith that she fell twice at home, and that the two incidents she was referring to were the stairs incident and an incident where she fell while turning away from her refrigerator.<sup>31</sup>

¶ 20 Terry Smith, D.O., is board-certified in internal medicine and practices general internal medicine and general practice in Plains.<sup>32</sup> Dr. Smith first saw Erving for complaints pertinent to the present case on December 13, 2010.<sup>33</sup> Although Erving was focused on her knee as the source of her pain, Dr. Smith believed her pain was more related to her back.<sup>34</sup> Dr. Smith diagnosed Erving with right knee pain with a history of degenerative lumbar radiculopathy.<sup>35</sup>

¶ 21 On December 13, 2010, Dr. Smith noted that Erving was experiencing back and hip pain which had started about a week and a half previously and which originated with

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<sup>27</sup> Trial Test.; Ex. 3 at 2.

<sup>28</sup> Trial Test.

<sup>29</sup> Trial Test.

<sup>30</sup> Trial Test.

<sup>31</sup> Trial Test.

<sup>32</sup>Smith Dep. 7:2-8.

<sup>33</sup> Smith Dep. 10:17-24.

<sup>34</sup> Smith Dep. 12:3-10.

<sup>35</sup> Smith Dep. 18:14-19.

a burning sensation in her knee. Dr. Smith noted that Erving's knee had continued to bother her since her surgery, although the latest symptoms were "a little different." Dr. Smith noted a new onset of lumbar and right sciatic pain with a possible right lumbar radiculopathy.<sup>36</sup> Erving testified that Dr. Smith has told her on several occasions that he believes her primary problem is her back, but she does not believe him.<sup>37</sup> Erving testified that her back has never hurt.<sup>38</sup>

¶ 22 On January 6, 2011, Dr. Smith assessed Erving with chronic knee pain secondary to previous injury and suspicion of right lumbar radiculopathy. Dr. Smith noted that Erving wondered if her knee and back problems were related. He stated:

Seems that when her knee hurts she has a more severe abnormal gait which causes increasing back and buttock problems, therefore, it does seem like they are related and that the knee could be a causative factor in her developing some chronic problems with her lumbar spine.<sup>39</sup>

¶ 23 On January 6, 2011, an Outpatient Authorization Form from Clark Fork Valley Hospital & Family Medicine Network indicated that Dr. Smith ordered an MRI for Erving. At the bottom of the form, a handwritten note states, "1-18-11 @ 0900 – Leah @ Liberty denied this MRI request."<sup>40</sup>

¶ 24 Erving signed a First Report of Injury or Occupational Disease on January 11, 2011. The First Report contends that Erving has developed an occupational disease in her right knee, and that "[p]rolonged standing, lifting, working and stooping has aggravated the right knee." Erving listed "December 2010/ongoing" as the date disability began.<sup>41</sup>

¶ 25 Erving received this form from her attorney. She testified that she does not know who filled out the form; she simply signed it.<sup>42</sup> She did not know why the form indicated a date of injury of November 29, 2010.<sup>43</sup> Erving testified that she decided to file this claim because "they had denied my MRI." Erving testified that she does not know who

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<sup>36</sup> Ex. 9 at 21.

<sup>37</sup> Trial Test.

<sup>38</sup> Erving Dep. 22:18-21.

<sup>39</sup> Ex. 9 at 20.

<sup>40</sup> Ex. 9 at 1.

<sup>41</sup> Ex. 1.

<sup>42</sup> Erving Dep. 73:8-14.

<sup>43</sup> Erving Dep. 74:6-10.

denied her MRI, but she received a phone call cancelling her MRI appointment because “they’re denying it.”<sup>44</sup>

¶ 26 On January 25, 2011, Dr. Smith noted that Erving was having significant knee problems with severe burning pain that worsened with standing. Dr. Smith noted, “She feels that her back pain came on as she started having more problems with her knee and notes when the knee is sore she limps which causes an abnormal gait and increases her back pain.” Dr. Smith assessed Erving with a sprained right knee with post-traumatic osteoarthritis.<sup>45</sup>

¶ 27 On February 22, 2011, Erving saw Dr. Smith for a follow-up appointment regarding her right knee pain. Dr. Smith assessed Erving with right knee pain “reminiscent of the pain she had after a 2006 injury.” Dr. Smith surmised that Erving might have a recurrence of a patellar bone spur, and she had symptoms suggestive of lateral meniscus pathology. Dr. Smith further assessed Erving with low back pain without history of lumbar injury, suggestive of right lumbar radiculopathy. Dr. Smith further stated:

I have recommended MRI scan of the right knee and lumbar spine. I have discussed with Dawn that although it is possible that her lumbar problems are related to her right knee because of change in gait and change in activity, this would be difficult to prove. . . . Certainly, it is not unusual for a person with a knee injury severe enough to change their gait and activity to develop lumbar spine problems and, therefore, may be related to her knee injury.<sup>46</sup>

¶ 28 On April 26, 2011, Dr. Smith wrote a letter to Erving’s counsel, Thomas C. Bulman, in response to a letter Bulman had sent to Dr. Smith regarding Erving’s case. Dr. Smith stated:

When Dawn started developing right leg pain she was certain that it was related to her knee condition. . . . She stated to me that she had been . . . shoveling snow and the leg seemed to be worse after this activity . . . at a local convenience store. It is my impression that Dawn was suffering new onset of low back pain and right lumbar radicular pain and, indeed [it] appeared to be related to her work. She also had concurrent right knee pain related to her previous 2006 injury. Dawn has also noted that at

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<sup>44</sup> Erving Dep. 72:25 – 73:7.

<sup>45</sup> Ex. 9 at 18.

<sup>46</sup> Ex. 9 at 17.



times she limps and favors the right leg and this has changed her gait. It is not unusual for one to develop knee or hip problems and subsequent back problems related to change in normal motion dynamics.<sup>47</sup>

¶ 29 Dr. Smith further opined that, based on Erving's medical history, she reached maximum medical improvement (MMI) for her preexisting knee condition prior to December 2010. Dr. Smith based this conclusion on the fact that Erving had not required follow-up visits for her knee and had no major complaints about limitations or pain due to her knee prior to December 2010.<sup>48</sup> I do not give Dr. Smith's opinion as to Erving's MMI status any weight because he reached this conclusion based on beliefs which are not supported by the record. According to Erving's own testimony, she has had continuous problems with her knee since her surgery, and she only stopped treating because Liberty stopped authorizing payment for her medical care. Erving testified that she had swelling, burning, and pain, and that she began to experience numbness in her leg at least as far back as September 2010.

¶ 30 On May 10, 2011, Dr. Smith saw Erving for a follow-up appointment. He noted that Erving reported experiencing severe back pain if she stood for more than three hours and that she continued to have knee pain related to her previous knee problems, exacerbated by standing. Dr. Smith assessed Erving as having low back pain with right lumbar radiculopathy and traumatic osteoarthritis of the right knee.<sup>49</sup>

¶ 31 Dr. Smith took Erving off work at Town Pump in May 2011. She has not returned to work since then.<sup>50</sup> Erving testified that her condition has worsened since she stopped working, although after five months off work, she felt better.<sup>51</sup>

¶ 32 On August 1, 2011, Erving saw Dr. Smith to get an updated status note for Town Pump. Erving had been on a leave of absence since May 10, 2011. Dr. Smith noted that Erving's problems dated to her 2006 knee injury, and that her activities were limited due to knee pain. Dr. Smith further noted that Erving had back pain which began in December 2010 when her knee gave out while she was mopping. Dr. Smith reported that he initially treated Erving for this injury on December 13, 2010, and that the incident "was reported and was covered under her first claim." Dr. Smith further noted that Erving shoveled snow and carried "a lot of firewood" for her job at Town Pump, and that she denied doing strenuous or heavy-duty work at home and further denied any injuries

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<sup>47</sup> Ex. 9 at 15.

<sup>48</sup> Ex. 9 at 15.

<sup>49</sup> Ex. 9 at 11.

<sup>50</sup> Trial Test.

<sup>51</sup> Trial Test.

at home. Dr. Smith attributed Erving's back pain to her snow shoveling and wood-carrying job duties.<sup>52</sup> Dr. Smith wrote a letter in which he stated that Erving could not return to her job at Town Pump.<sup>53</sup> In many ways, this treatment note illustrates the difficulty with Erving's account of events as related to Dr. Smith: for the first time, Dr. Smith reports that Erving's back pain began from a December 2010 incident when her knee gave out while she was mopping. This is an entirely new account of events which is inconsistent with the previous, varied accounts of the evolution of Erving's back and knee problems. It is clear that Dr. Smith's opinions are based upon an unreliable history of events as related to him by Erving. Therefore, I cannot give much weight to his causation opinions regarding Erving's conditions.

¶ 33 On August 10, 2011, Dr. Smith assessed Erving with degenerative arthritis in her right knee precipitated by an injury in 2006 and right lumbar radiculopathy that started after "heavy physical labor and lifting, mainly shoveling snow and carrying firewood . . . at Town Pump."<sup>54</sup> Dr. Smith reiterated that he believed Erving needed an MRI and noted:

[H]er workman's compensation is denying the back portion of the claim even though it is quite clear that she was indeed shoveling snow and carrying firewood. . . . [A] lot of her current problems with the right leg relates to the back pain and the back pain is related to her work and it is more problem [sic] than not that she injured her back at work doing the above activities.<sup>55</sup>

¶ 34 Angela K. Lowe is the manager at the Plains Town Pump.<sup>56</sup> At her deposition, Lowe testified that she had never seen Erving's January 11, 2011, first report of injury until it was shown to her by counsel at the deposition.<sup>57</sup> Lowe testified that she knew that Erving was having problems with her hip and her back from approximately November 27 or 28 of 2010, but she was not aware that Erving had any problems with her knee.<sup>58</sup> Lowe testified that she was not aware of Erving suffering any work-related

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<sup>52</sup> Ex. 9 at 9.

<sup>53</sup> Ex. 9 at 10.

<sup>54</sup> Ex. 9 at 8.

<sup>55</sup> Ex. 9 at 8.

<sup>56</sup> Lowe Dep. 5:15-22.

<sup>57</sup> Lowe Dep. 16:9-18.

<sup>58</sup> Lowe Dep. 16:20 – 17:11.

injuries around November 29, 2010.<sup>59</sup> However, around that date, Erving told Lowe that she slipped on ice while carrying firewood at home and hurt her hip and back.<sup>60</sup>

¶ 35 Nicole Shockley testified at trial. I found her to be a credible witness. Shockley has worked at Town Pump for the last year and a half. Shockley testified that at Town Pump, employees are supposed to log every time they shovel snow. Shockley testified that she has never carried wood for Town Pump customers and she is not aware of any Town Pump employees carrying wood for customers. Shockley testified that she is not aware of Erving suffering any work-related injuries, but Erving told Shockley that she hurt her back at home when she tripped over a stump while bringing in firewood.<sup>61</sup>

¶ 36 Shockley testified that prior to November 2010, Erving did not limp at work, but after November 2010, she walked with a pronounced limp, sometimes dragging one leg behind her. Erving also complained about problems with her knee. Shockley testified that after November 2010, Erving complained about pain, could not stand up from a sitting position without assistance, and needed help to complete some of her job duties, such as mopping and sweeping.<sup>62</sup>

¶ 37 Cindy Berglind-Grooms testified at trial. I found her to be a credible witness. Berglind-Grooms has been a claims adjuster for approximately seven years and has worked for Hartford since January 2011. Berglind-Grooms denied Erving's claim.<sup>63</sup>

### CONCLUSIONS OF LAW

¶ 38 This case is governed by the 2009 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Erving's industrial accident.<sup>64</sup>

#### **Issue One: Petitioner's entitlement to medical benefits, temporary total disability benefits, and further indemnity benefits as provided by law.**

¶ 39 Erving bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.<sup>65</sup> I have concluded Erving has not met her burden.

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<sup>59</sup> Lowe Dep. 23:16-19.

<sup>60</sup> Lowe Dep. 23:23 – 24:5.

<sup>61</sup> Trial Test.

<sup>62</sup> Trial Test.

<sup>63</sup> Trial Test.

<sup>64</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶ 40 Erving's makes two contentions that go to the substantive facts of her claim:

That during the months of September, October, November, and December 2010, Petitioner suffered aggravation injuries to her right knee and low back arising out of and in the course of her employment . . . .

. . . . Petitioner contends that her past and future medical expenses submitted to Respondent are directly related to her injuries and should be paid by Respondent.<sup>66</sup>

¶ 41 At trial, Erving further argued that it was Hartford's responsibility to accept liability for her claim and then file an indemnification claim against Liberty.

¶ 42 From the evidence presented, I cannot determine whether Erving ever reached MMI for her knee claim. What I do know is that Erving has an accepted liability claim for her 2006 knee injury with Liberty. When Liberty denied Erving's request for an MRI, Erving then filed a new workers' compensation claim against Hartford in which she alleged she suffered an occupational disease to her knee. However, her treating physician opined that her current symptoms are related to her back and not her knee, although he suggested that her back problems may in fact have been caused by her knee condition. Erving testified that she does not believe she has a back injury and that she has never suffered back problems.

¶ 43 From the evidence presented, I have not been able to ascertain precisely what Erving's theory of her case is. Her testimony was inconsistent and contradictory, and her treating physician's notes based on Erving's reports were contradictory with Erving's testimony and in many instances were internally inconsistent. Having heard all the evidence presented and the arguments of counsel, I still cannot discern whether Erving is arguing that her claim is a new occupational disease of her knee, an aggravation to her previous knee injury, a back injury, or an occupational disease of her back caused by her previous knee injury. Erving's argument is essentially that it is Hartford's job to accept her claim and figure this out. However, Hartford was not the insurer at risk for the previous knee injury and the burden of proof in this case ultimately lies with the claimant. Erving has not met that burden. I therefore conclude she is not entitled to the benefits she seeks.

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<sup>65</sup> *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).

<sup>66</sup> Pretrial Order at 2.

**Issue Two: Increased award of 20% of all delayed benefits pursuant to § 39-71-2907, MCA.**

**Issue Three: Reasonable attorney fees and costs pursuant to § 39-71-611, MCA.**

¶ 44 Since Erving is not the prevailing party, she is not entitled to her costs, attorney fees, or a penalty.<sup>67</sup>

**Issue Four: Any additional relief as the Court may deem just and equitable.**

¶ 45 As this Court has previously held, this Court cannot fashion a remedy for unspecified “additional relief.”<sup>68</sup> Erving’s request for “additional relief” is therefore denied.

#### JUDGMENT

¶ 46 Petitioner is not entitled to medical benefits, temporary total disability benefits, or further indemnity benefits.

¶ 47 Petitioner is not entitled to her costs, attorney fees, or a penalty.

¶ 48 Petitioner is not entitled to additional relief.

¶ 49 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.

DATED in Helena, Montana, this 13<sup>th</sup> day of January, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA

JUDGE

c: Thomas C. Bulman/Steve M. Fletcher  
Joe C. Maynard

Submitted: September 21, 2011

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<sup>67</sup> See §§ 39-71-611, -2907, MCA.

<sup>68</sup> *Wright v. Ace American Ins. Co.*, 2010 MTWCC 11, ¶ 82 (*aff'd* 2011 MT 43).