IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2016 MTWCC 2

WCC No. 2013-3241

THE ESTATE OF ROBERT R. GREER, JR., DIANE BELCOURT, and KRB, minor child

Petitioners

vs.

LIBERTY NORTHWEST INS. CORP.

Respondent/Insurer.

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

Summary: Petitioners sought benefits after the decedent suffered a motor vehicle accident while traveling from Bozeman to Ekalaka for the start of his workweek at a construction jobsite. In addition to his wages, the decedent's employer paid him $60 per diem for each full day worked. Respondent denied liability, arguing that the decedent was not in the course and scope of his employment and therefore not entitled to benefits under § 39-71-407(3), MCA.

Held: The decedent received reimbursement for travel costs from the employer in the form of a per diem and his employment necessitated his travel. Therefore, his death arose out of and within the course of his employment under the travel allowance exception to the going and coming rule, as codified in § 39-71-407(3)(a)(i), MCA. The decedent was not excluded from coverage under § 39-71-407(3)(b), MCA, because the employer did not make the payment under the terms of a written document that designated the payment as an "incentive to work at a particular jobsite."

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407.** A worker who received a per diem payment for each full day worked but was not paid a wage for travel time, and whose employer hired workers from throughout Montana for employment on

jobsites in various locations in three states, was within the course and scope of his employment when he suffered a fatal motor vehicle accident while traveling from his home in Bozeman to a jobsite in Ekalaka at the beginning of his workweek.

Employment: Course and Scope: Coming and Going. A worker who received a per diem payment for each full day worked but was not paid a wage for travel time, and whose employer hired workers from throughout Montana for employment on jobsites in various locations in three states, was within the course and scope of his employment when he suffered a fatal motor vehicle accident while traveling from his home in Bozeman to a jobsite in Ekalaka at the beginning of his workweek.

Employment: Course and Scope: Travel. A worker who received a per diem payment for each full day worked but was not paid a wage for travel time, and whose employer hired workers from throughout Montana for employment on jobsites in various locations in three states, was within the course and scope of his employment when he suffered a fatal motor vehicle accident while traveling from his home in Bozeman to a jobsite in Ekalaka at the beginning of his workweek.

Employment: Course and Scope: Travel. Where the employer who maintained various jobsites in Montana, Wyoming, and North Dakota, paid its employees $60 per day as reasonably related to the employees' travel expenses in addition to their wages and withheld $100 per week out of the claimant's per diem payments as a share of the rent of a trailer the employer rented at a remote jobsite, the Court concluded that the claimant received reimbursement for travel within the meaning of § 39-71-407(3)(a)(i), MCA.

Employment: Course and Scope: Travel. Where the parties stipulated that the nature of the claimant's work necessitated his travel from his home in Bozeman to his employer's jobsite in Ekalaka, and where the employer did not require its new hires to permanently relocate to the various locations it maintained jobsites, the Court concluded that the claimant's travel was necessitated by his employment within the meaning of § 39-71-407(3)(a)(ii), MCA.

Wages: Travel Pay. The Court held that a $60 per diem which an employer paid its employees for each full day worked constituted travel pay where the employer admitted the amount was chosen because it was reasonably

related to the employee's actual travel expenses but would not require the bookkeeping burden of requiring employees to turn in travel-related receipts.

Wages: Per Diem Pay. The Court held that a $60 per diem which an employer paid its employees for each full day worked constituted travel pay where the employer admitted the amount was chosen because it was reasonably related to the employee's actual travel expenses but would not require the bookkeeping burden of requiring employees to turn in travel-related receipts.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. An employer need not pay a travel allowance under the terms of a written contract for the travel allowance exception to apply, where the claimant received per diem payments under the terms of an unwritten employment agreement.

Wages: Per Diem Pay. An employer need not pay a travel allowance under the terms of a written contract for the travel allowance exception to apply, where the claimant received per diem payments under the terms of an unwritten employment agreement.

Wages: Travel Pay. The manner in which travel pay is calculated is "not important." It may be paid as a flat rate and it need not be based upon how far the employee traveled. There is no requirement that the employee submit travel-related receipts, nor that the payment be made for specified travel-related expenses.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. Where the employer did not designate its per diem payment as an incentive nor identify a particular jobsite in any written document, the Court held that the claimant's motor vehicle accident, which occurred while he was traveling to the jobsite prior to the start of the workweek, was not excluded from coverage under the plain language of § 39-71-407(3)(b), MCA.

Employment: Course and Scope: Coming and Going. Where the employer did not designate its per diem payment as an incentive nor identify a particular jobsite in any written document, the Court held that the claimant's motor vehicle accident, which occurred while he was traveling to

the jobsite prior to the start of the workweek, was not excluded from coverage under the plain language of § 39-71-407(3)(b), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. The Court held that the legislative history did not support the insurer's argument that the Legislature intended to abolish the travel allowance exception to the going and coming rule for remote jobsites. Rather, the statutory amendments provided a mechanism by which employers could exclude employees from the course and scope of employment while traveling so long as the employer pays the travel allowance pursuant to a written document which designates the payment as an incentive to work at a particular jobsite.

Employment: Course and Scope: Coming and Going. The Court held that the legislative history did not support the insurer's argument that the Legislature intended to abolish the travel allowance exception to the going and coming rule for remote jobsites. Rather, the statutory amendments provided a mechanism by which employers could exclude employees from the course and scope of employment while traveling so long as the employer pays the travel allowance pursuant to a written document which designates the payment as an incentive to work at a particular jobsite.

Statutes and Statutory Interpretation: Legislative History. The Court held that the legislative history did not support the insurer's argument that the Legislature intended to abolish the travel allowance exception to the going and coming rule for remote jobsites. Rather, the statutory amendments provided a mechanism by which employers could exclude employees from the course and scope of employment while traveling so long as the employer pays the travel allowance pursuant to a written document which designates the payment as an incentive to work at a particular jobsite.

Attorney Fees: Cases Denied. Although the Court agreed with Petitioners that the case fell squarely under the exception to the going and coming rule in § 39-71-407(3)(a)(i), MCA, and that the case was indistinguishable from earlier case law, the Court concluded that the insurer's arguments to the contrary were reasonable in light of the legislative history, particularly since the case was already pending when this Court issued a similar decision in this area of law.

Attorney Fees: Unreasonable Denial or Delay of Benefits. Although the Court agreed with Petitioners that the case fell squarely under the exception to the going and coming rule in § 39-71-407(3)(a)(i), MCA, and that the case was indistinguishable from earlier case law, the Court concluded that the insurer's arguments to the contrary were reasonable in light of the legislative history, particularly since the case was already pending when this Court issued a similar decision in this area of law.

Penalties: Generally. Although the Court agreed with Petitioners that the case fell squarely under the exception to the going and coming rule in § 39-71-407(3)(a)(i), MCA, and that the case was indistinguishable from earlier case law, the Court concluded that the insurer's arguments to the contrary were reasonable in light of the legislative history, particularly since the case was already pending when this Court issued a similar decision in this area of law.

¶ 1 On October 10, 2013, Petitioners The Estate of Robert R. Greer, Jr., Diane Belcourt, and KRB, minor child (collectively "Greer's Estate"), filed a Petition for Hearing (Death) in this matter.[1] The parties subsequently moved for summary judgment and briefed their respective positions.[2] The parties also filed stipulated facts.[3] On February 3, 2015, while this matter was pending, this Court issued its decision in *Olson v. Montana State Fund*,[4] a case with similar facts. This Court then asked the parties to file supplementary briefing concerning the impact, if any, of *Olson* on the present matter.[5] The parties complied.[6]

---

[1] Docket Item No. 1.

[2] Respondent Liberty Northwest Ins. Corp.'s Motion for Summary Judgment, Docket Item No. 25; Liberty Northwest Ins. Corp.'s Brief in Support of Motion for Summary Judgment (Liberty's Opening Brief), Docket Item No. 26; Petitioner's Motion for Partial Summary Judgment and Supporting Brief (Estate's Opening Brief), Docket Item No. 29; Respondent Liberty Northwest Ins. Corp.'s Response to Petitioner's Motion for Summary Judgment (Liberty's Response Brief), Docket Item No. 32; Petitioner's Response Brief to Respondent's Motion for Summary Judgment (Estate's Response Brief), Docket Item No. 33; Liberty Northwest Insurance Corporation's Reply Brief in Support of Motion for Summary Judgment (Liberty's Reply Brief), Docket Item No. 35; Petitioner's Reply Brief in Support of Motion for Summary Judgment, Docket Item No. 38.

[3] Parties' Stipulation of Facts, Docket Item No. 27; Parties' Amended Stipulation of Facts, Docket Item No. 36.

[4] 2015 MTWCC 2.

[5] Order for Supplemental Briefing, Docket Item No. 34.

[6] Petitioner's Supplemental Brief Regarding *Olson v. Montana State Fund*, Docket Item No. 39; Liberty Northwest Ins. Corp. Supplemental Briefing Pursuant to Court's February 3, 2015 Order (Liberty's Supplemental Brief), Docket Item No. 40; Liberty Northwest Ins. Corp.'s Response Brief Pursuant to Court's February 3, 2015 Order, Docket Item No. 41; Petitioners' Response Brief Regarding *Olson v. Montana State Fund*, Docket Item No. 43.

¶ 2 Issues Presented: This Court restates the issues for resolution as follows:

Issue One: Did Robert R. Greer, Jr.'s April 25, 2011, fatal motor vehicle accident arise out of and in the course and scope of his employment?[7]

Issue Two: Was Greer excluded from coverage under § 39-71-407(3)(b), MCA?

Issue Three: Is Greer's Estate entitled to a penalty, attorney fees, and costs?

FACTS[8]

¶ 3 C&S Construction, Inc. (C&S), is a site contractor which builds infrastructure such as utilities, water, sewer, storm drains, building footings, and parking lots. Its principal office is in Billings. The company does not have an office in Ekalaka.

¶ 4 In 2010 and 2011, C&S performed work on jobsites in Montana, Wyoming, and North Dakota. The employees C&S hired in 2010 and 2011 came from various cities in Montana. C&S did not require its employees to relocate to the cities where C&S had jobsites, but C&S gave its employees the option to live at its jobsites. C&S informed its new hires that they would have to travel in order to fulfill their job duties.[9]

¶ 5 Robert R. Greer, Jr., resided in Bozeman. In October 2010, he began working for C&S on a "crushing crew," which crushes gravel on a jobsite. Greer worked on jobsites in Gillette, Wyoming, and Ekalaka.

¶ 6 C&S paid Greer $17 per hour. C&S did not pay Greer wages for the time spent travelling from Bozeman to the jobsites. However, C&S paid its employees, including Greer, per diem at the rate of $60 per day for each full day worked, which was an incentive to get employees from their homes to the jobsites. If the employee worked less than six hours in a day, C&S paid $30 in per diem for that day. C&S paid Greer his wages out of its payroll account. C&S paid Greer his per diem out of its general account, and did not take any taxes out of the per diem. From October 2010 through April 2011, C&S paid Greer $4,110 in per diem. C&S's employees could use the per diem payments at their discretion.

---

[7] *See* Estate's Opening Brief at 1.

[8] Facts are taken from the Parties' Amended Stipulation of Facts unless otherwise noted.

[9] Loose Dep. 21:21-25.

¶ 7 Gina Loose, C&S's M.R.Civ.P. 30(b)(6) designee, testified that C&S paid per diem as an incentive to get employees from their homes to remote jobsites. Loose testified that the job pool in small towns like Ekalaka was probably insufficient to fill C&S's needs.[10] Loose agreed that it would be "impractical" to expect employees to pay for the cost of travel as well as weekly lodging arrangements out of their hourly wages.[11] C&S paid a flat rate per diem, as opposed to requiring employees to turn in receipts for gas, meals, or lodging, because it made C&S's bookkeeping easier.[12] Loose testified that, after consulting with its accountant, C&S chose to pay $60 per day because it was reasonably related to the employee's actual travel expenses and thus would not be taxable income.[13]

¶ 8 For its Ekalaka jobsite, C&S rented a trailer from an individual who charged C&S $800 per month for its use. If an employee stayed in the trailer during the workweek, C&S withheld $100 per week from the employee's per diem payment, which C&S then used to pay the trailer rent. C&S paid the trailer rent out of the same account it used to pay its employees' per diem.[14] The employees who stayed in the trailer paid its utility bills.[15] C&S paid the per diem partly for the purposes of paying for lodging.[16]

¶ 9 C&S withheld $100 per week from Greer's per diem since he stayed in the trailer during the workweek in Ekalaka. On the check stub dated April 21, 2011, C&S indicated that it was paying Greer $300 for "Per diem" and then subtracted $100 for "1wk trlr rent."[17] Thus, the check was for $200.[18]

¶ 10 C&S had a written Travel Policy which only applied to employees driving a company vehicle, typically to move construction equipment to or from a jobsite.[19] C&S issued employees who drove a company vehicle a company credit card, which they used

---

[10] Loose Dep. 72:12-15.

[11] Loose Dep. 71:8-72:3.

[12] Loose Dep. 31:16-32:12.

[13] Loose Dep. 29:21-31:9.

[14] Loose Dep. 46:9-19.

[15] Loose Dep. 59:23-60:2.

[16] Loose Dep. 34:16-19.

[17] Parties' Amended Stipulation of Facts, Ex. 4 at 2.

[18] *Id.*

[19] Loose Dep. 57:2-7.

to pay their travel expenses.[20] Under the written Travel Policy, the driver received his hourly wage while traveling.[21]

¶ 11 On Sunday, April 24, 2011, Greer departed Bozeman in his personal vehicle and drove towards Ekalaka, where he was scheduled to work for C&S the following day. The nature of Greer's work for C&S necessitated his travel from Bozeman to Ekalaka. The distance between Bozeman and Ekalaka is approximately 401 miles. At approximately 2:30 a.m. on April 25, 2011, Greer suffered a fatal injury arising from a single-vehicle motor vehicle accident.[22] Greer was on Montana Highway 7 en route to Ekalaka at the time of the motor vehicle accident.[23]

¶ 12 C&S did not pay Greer any wages or per diem for April 24 or 25, 2011.[24] The last day Greer worked and received per diem was April 21, 2011.[25]

ANALYSIS AND DECISION

¶ 13 This case is governed by the 2009 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Greer's motor vehicle accident.[26]

¶ 14 Greer's Estate argues that Greer's death arose out of and within the course and scope of his employment under § 39-71-407(3)(a)(i), MCA, because C&S paid him per diem for his travel expenses, and because his travel was necessitated on behalf of his employer as an integral part or condition of his employment.[27] Greer's Estate also argues that the exclusion from coverage at § 39-71-407(3)(b), MCA, is inapplicable because C&S did not pay Greer's per diem under a document that designated the payment as "incentive" to work at the Ekalaka jobsite.[28] Greer's Estate further argues that Liberty has

[20] Loose Dep. 58:14-21.

[21] Loose Dep. 57:18-21.

[22] Parties' Amended Stipulation of Facts, Ex. 1 at 1.

[23] Parties' Amended Stipulation of Facts, Ex. 1.

[24] Loose Dep. 59:16-22.

[25] Liberty's Opening Brief at 3.

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

[27] Estate's Opening Brief at 6.

[28] Estate's Response Brief at 3-4.

unreasonably refused to pay benefits and it should be held liable for costs, attorney fees, and a penalty.[29]

¶ 15 Respondent Liberty Northwest Insurance Corporation (Liberty) contends that § 39-71-407(3)(a)(i), MCA, is inapplicable because the per diem payment was not "travel pay," and that Greer did not suffer an injury arising out of and within the course and scope of his employment under § 39-71-407(3)(a)(ii), MCA, because travel was not part of Greer's job duties.[30] Liberty also argues that Greer's death did not arise out of and within the course and scope of his employment because the per diem was an incentive to attract employees to a remote work site and is therefore specifically excluded under § 39-71-407(3)(b), MCA.[31]

Issue One: Did Robert R. Greer, Jr.'s April 25, 2011, fatal motor vehicle accident arise out of and in the course and scope of his employment?

¶ 16 Under the "going and coming rule," an employee traveling to and from work is not within the course and scope of employment.[32] Two exceptions to this rule are set forth in § 39-71-407, MCA, as follows:

> (3) (a) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:
>
> (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or 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; or
>
> (ii) the travel is required by the employer as part of the employee's job duties.

The Montana Supreme Court has explained that § 39-71-407(3), MCA, "encompasse[s] the historical 'going and coming' rule as well as the exceptions which [have] evolved to it over the years."[33]

¶ 17 Prior to its codification in § 39-71-407, MCA, the Montana Supreme Court applied the travel allowance exception to the "going and coming" rule in *McMillen v. Arthur G.*

---

[29] Estate's Opening Brief at 14-15.

[30] Liberty's Opening Brief at 5-7.

[31] Liberty's Opening Brief at 3-5.

[32] *See Heath v. Montana Mun. Ins. Auth.*, 1998 MT 111, ¶¶ 11-13, 288 Mont. 463, 959 P.2d 480.

[33] *Heath*, ¶ 13 (citations omitted).

McKee and Co.[34] The McMillen brothers lived in Butte and travelled to Anaconda for work.[35] Pursuant to a schedule in a union contract, the McMillens each received $4 per day as "travel pay or subsistence," because they lived between 25 and 50 miles from Anaconda.[36] After the brothers were seriously injured while driving to work,[37] the Montana Supreme Court adopted the majority 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."[38] The court rejected the insurer's argument that the claimant needed to be paid an hourly wage while traveling for his claim to be compensable[39] and relied upon the rationale for the exception as set forth in Larson's *Workers' Compensation Law*:

> [I]n 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 employment. This result is usually correct, because when the subject of transportation is singled out for special consideration it is normally because the transportation involves a considerable distance and therefore qualifies under the rule herein suggested: that employment should be deemed to include travel when the travel itself is a substantial part of the service performed. The sheer size of the journey is frequently the principal fact supporting this conclusion, as in the successful cases involving trips of eight miles, 20 miles, 22 miles, 30 miles, 50 miles, 54 miles, 60 miles, 120 miles, and 130 miles.[40]

Since the union contract "singled out for special consideration a travel allowance and testimony at the hearing indicated it was paid as an incentive to get men out on the job," the court held that the McMillen brothers were injured in the course and scope of their employment.[41]

---

[34] 166 Mont. 400, 533 P.2d 1095 (1975).

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

[36] *Id*.

[37] *Id*.

[38] *McMillen*, 166 Mont. at 406-07, 533 P.2d at 1098 (citation omitted).

[39] *McMillen*, 166 Mont. at 404-05, 533 P.2d at 1097-98 (rejecting insurer's argument that the case was distinguishable from *Guarascio v. Indus. Accident Bd.*, 140 Mont. 497, 501, 374 P.2d 84 (1962), where the court held that a tile worker was within the course and scope of his employment while traveling from Salt Lake City to Butte because he received an hourly wage while traveling and a travel allowance).

[40] *McMillen*, 166 Mont. at 406, 533 P.2d at 1098 (citing 1 Larson, *Workmen's Compensation Law* § 16.30).

[41] *McMillen*, 166 Mont. at 405-07, 533 P.2d at 1098.

¶ 18 In *Ellingson v. Crick Co.*,[42] the court relied upon *McMillen* and held that a highway construction worker was within the course and scope of his employment while driving from Helena to a construction site near Garrison because his employer paid him $5 per day as a "travel allowance."[43] The difference in the way the travel pay was calculated did not distinguish the case from *McMillen*:

> We cannot see where that distinction varies the applicability of the test enunciated in *McMillen*. The fact that the travel allowance here was based on a distance other than mileage between residence and jobsite is not important. The union contract singled out transportation as the subject of a specific allowance. When transportation is thus singled out in the employment contract, the travel to and from work is brought within the course of employment. Injuries sustained en[ ]route are therefore compensable.[44]

¶ 19 In *Gordon v. H.C. Smith Construction Co.*, the decedent was a union electrician from Butte who stayed in a hotel in Lewistown or with co-workers in Stanford while working near Denton.[45] He received $22 in "subsistence per day worked in lieu of any travel time or travel allowance" under his union contract when he worked more than 54 miles from Great Falls.[46] Relying upon *McMillen* and *Ellingson*, the court held that the payment was for travel and therefore the decedent's death arose out of and in the course and scope of his employment when he was traveling "from work" toward Stanford.[47]

¶ 20 In *Borglum v. Hartford Ins. Co. of the Midwest*,[48] this Court ruled that a construction worker who received $20 per day that was designated as "per diem" or "travel" was within the course and scope of his employment under § 39-71-407(3)(a)(i), MCA, while traveling to his home in Bozeman from a jobsite near Big Sky.[49] Relying upon *McMillan*, *Ellingson*, and *Gordon*, this Court stated that the "key factor in determining coverage is the fact that the employment agreement 'singles out for special consideration a travel allowance and it is paid as an incentive to get men onto jobs.'"[50] Thus, this Court ruled, "Since claimant

---

[42] 166 Mont. 431, 533 P.2d 1100 (1975).

[43] *Ellingson*, 166 Mont. at 432-34, 533 P.2d at 1101-02.

[44] *Ellingson*, 166 Mont. at 434, 533 P.2d at 1101-02.

[45] 188 Mont. 166, 167-68, 172-73, 612 P.2d 668, 669, 671 (1980).

[46] *Gordon*, 188 Mont. at 169, 612 P.2d at 669-70 (emphasis omitted).

[47] *Gordon*, 188 Mont. at 171-72, 612 P.2d at 670-71.

[48] 2002 MTWCC 16.

[49] *Borglum*, ¶ 10.

[50] *Borglum*, ¶ 8 (internal quotation marks omitted).

received reimbursement for his travel, section 39-71-407(3)(a)(i), MCA, is satisfied. Accordingly, he was in the course and scope of his employment at the time of the accident and his widow is entitled to death benefits."[51]

¶ 21 In *Olson v. Montana State Fund*,[52] Olson worked under a collective bargaining agreement which provided him with $61.50 per day as "subsistence in lieu of travel" when he worked more than 50 miles from the post office in Great Falls.[53] He was injured in a motor vehicle accident while on his way to work.[54] Relying on *McMillen*, *Ellingson*, and *Gordon*, this Court held that the $61.50 per day Olson received as "subsistence in lieu of travel" was reimbursement for travel expenses.[55] Thus, this Court concluded that Olson's injuries arose out of and within the course and scope of his employment under § 39-71-407(3)(a)(i), MCA.[56]

¶ 22 As in *McMillen*, *Ellingson*, *Gordon*, *Borglum*, and *Olson*, this case falls squarely under the travel allowance exception to the going and coming rule. The first factor of § 39-71-407(3)(a)(i), MCA — that the employee receive "reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement" — is satisfied because, in addition to wages, C&S paid Greer $60 per diem, which C&S intended to defray the costs of traveling to its jobsites.[57] Loose testified that C&S paid Greer the per diem because it could not expect employees, who lived in various cities in Montana, to travel to remote jobsites and pay for their travel expenses and lodging out of their wages.[58] Loose also testified that C&S chose to pay $60 per day because it was reasonably related to the employee's actual travel expenses and paying a flat rate without requiring receipts for actual travel expenses made C&S's bookkeeping easier.[59] The fact that C&S withheld $100 per week out of Greer's per diem and used that money to pay Greer's share of the rent for the trailer in Ekalaka is additional evidence that C&S intended the per diem to be a reimbursement for travel expenses. Although Liberty argues that the per diem was not a travel allowance, it does not offer

---

[51] *Borglum*, ¶ 10.

[52] 2015 MTWCC 2.

[53] *Olson*, ¶ 9.

[54] *See Olson*, ¶¶ 3, 4.

[55] *Olson*, ¶¶ 21, 25, 26.

[56] *Olson*, ¶ 26. *Olson* fell under the 2011 version of the WCA which codified this provision as § 39-71-407(4)(a)(i), MCA.

[57] *See* ¶ 6 above.

[58] *See* ¶ 7 above.

[59] *See* ¶ 7 above.

any alternative explanation as to why C&S paid its employees $60 per day in addition to their wages.

¶ 23 The second factor of § 39-71-407(3)(a)(i), MCA — that "the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment"— is also satisfied. Greer's Estate and Liberty stipulated that Greer could not have fulfilled his job duties from Bozeman and that "the nature of Greer's work necessitated his travel from Bozeman to Ekalaka."[60] At the time of the accident, Greer was traveling to Ekalaka, where he was required to be for work. There is no merit to Liberty's argument that Greer's travel to Ekalaka was not a necessary or integral part of his employment because he could have moved to Ekalaka.[61] C&S did not tell its new hires that they would need to permanently relocate; rather, C&S — which had jobsites in Montana, Wyoming, and North Dakota in 2010 and 2011 — hired employees throughout Montana and told them they would need to travel to fulfill their job duties.[62] Greer also worked at a jobsite in Gillette, Wyoming, and thus would have had to travel to C&S's jobsites regardless of where he lived.

¶ 24 Although C&S singled out for consideration a special allowance for travel, Liberty offers several arguments for why this case does not fall under the travel allowance exception to the going and coming rule. None holds water.

¶ 25 Liberty points out that C&S's written Travel Policy did not contain a provision for the per diem payments[63] and argues that this case is distinguishable from *McMillen*, *Ellingson*, *Gordon*, and *Olson* because the travel pay in those cases was paid under the terms of a written contract.[64] However, an employer need not pay a travel allowance under the terms of a written contract for the travel allowance exception to apply. Section 39-71-407(3)(a)(i), MCA, states that the exception to the going and coming rule may apply if "the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement." Under Montana law, even if no written employment agreement exists, "the relationship between employer and employee is a contractual one."[65] Thus, Greer received the per diem payments under the terms of an employment agreement, albeit an unwritten one.

---

[60] *See* ¶ 11 above.

[61] *See* Liberty's Reply Brief at 5.

[62] Estate's Response Brief at 6.

[63] *See* Liberty's Response Brief at 5.

[64] Liberty's Supplemental Brief at 4.

[65] *Harrington v. Energy W. Inc*., 2015 MT 233, ¶ 17, 380 Mont. 298, 356 P.3d 441.

¶ 26 Liberty also argues that Greer's case does not fall under § 39-71-407(3)(a)(i), MCA, because Greer received no per diem on the day of his accident since he did not arrive at work.[66] However, in *McMillen*, the employees were injured on their way to work on a Monday morning.[67] The Montana Supreme Court noted that "[n]either employee received any travel pay on the day of the accident" and nonetheless held that the accident arose out of and in the course and scope of employment since the employees had been paid $4 per day for each day worked in addition to their wages prior to the accident.[68] Likewise, Greer received the per diem payment for each day worked prior to his accident. Therefore, this case is factually indistinguishable from *McMillen* in this regard.

¶ 27 Liberty argues that this case is distinguishable from *McMillen*, *Gordon*, and *Olson*, because Greer's per diem was based on the number of hours he worked and "the per diem had absolutely no connection to how far away Greer was from a certain point."[69] However, in *Ellingson*, the Montana Supreme Court explained that the manner in which the travel pay is calculated is "not important" and ruled that compensation for travel at a flat rate brings the employee within the course and scope of his employment while traveling.[70] In *Borglum*, the claimant was paid $20 per day in per diem if he worked a full day, and $10 per day if he worked a half-day, and this Court ruled that the payment was a travel reimbursement.[71] In *Olson*, this Court stated, "The fact that the subsistence pay in this case was not based on the actual miles that Olson traveled to and from work each day, nor on the amount he spent on other travel expenses is, in the words of *Ellingson*, 'not important.'"[72] There is no requirement that a travel allowance be based upon how far the employee travelled.

¶ 28 Liberty also maintains that the per diem payment does not constitute "reimbursement" under § 39-71-407(3)(a)(i), MCA, because Greer never "received a specific reimbursement for mileage, gas, or oil," nor submitted travel-related receipts to C&S.[73] Liberty also argues that Greer could have used the per diem at his discretion and was not required to use it for travel-related expenses.[74] However, in *McMillen*, *Ellingson*, *Gordon*, *Borglum*, and *Olson*, the claimants received a set amount for travel which was

---

[66] *See* Liberty's Opening Brief at 1.

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

[68] *McMillen*, 166 Mont. at 403, 533 P.2d at 1096.

[69] Liberty's Supplemental Brief at 2-4.

[70] *Ellingson*, 166 Mont. at 434, 533 P.2d at 1101-02.

[71] *Borglum*, ¶¶ 3g, 10.

[72] *Olson*, ¶ 26.

[73] Liberty's Opening Brief at 5.

[74] Liberty's Opening Brief at 4.

not a direct reimbursement for any specific travel-related expense, and which they could have used at their discretion. In *Borglum*, this Court explained that § 39-71-407(3)(a)(i), MCA, does not require the payment to "cover actual travel costs."[75] There is no requirement that the employee submit travel-related receipts nor that the payment be made for specified travel-related expenses.

¶ 29 Liberty also maintains that the per diem payment Greer received cannot be considered "travel pay" because the payments were not made pursuant to C&S's Travel Policy and that this case is therefore distinguishable from *Olson* because C&S paid the per diem in addition to travel pay — not "in lieu of" it.[76] Although C&S did not pay Greer under the terms of its Travel Policy, which only applied to employees driving a company vehicle, the fact remains that C&S paid Greer $60 per diem to cover travel expenses. This case is indistinguishable from *Olson* because, like the claimant in *Olson*, Greer received a payment apart from his wages that was intended to reimburse his travel expenses.

¶ 30 Finally, Liberty relies upon *State Compensation Mutual Ins. Fund v. James*,[77] *Hampson v. Liberty Northwest Ins. Corp.*,[78] and *Charlson v. Montana State Fund*[79] and argues that Greer was outside the course and scope of his employment under § 39-71-407(3)(a)(ii), MCA, which provides that a claimant is within the course and scope of his employment if "the travel is required by the employer as part of the employee's job duties."[80] However, § 39-71-407(3)(a)(i) and -407(3)(a)(ii), MCA, are disjunctive and set forth two separate exceptions to the going and coming rule. Greer's Estate has brought its claim under § 39-71-407(3)(a)(i), MCA, and does not contend that Greer was in the course and scope of his employment under § 39-71-407(3)(a)(ii), MCA.[81] *James*, *Hampson*, and *Charlson* are inapplicable to this case because those claimants did not receive reimbursement for their travel expenses and therefore the issue was whether the claimants were within the course and scope of their employment under the exception codified at § 39-71-407(3)(a)(ii), MCA.[82]

---

[75] *Borglum*, ¶ 7.

[76] Liberty's Supplemental Brief at 5.

[77] 257 Mont. 348, 849 P.2d 187 (1993).

[78] 2002 MTWCC 57.

[79] 2011 MTWCC 7.

[80] Liberty's Opening Brief at 6-7.

[81] Estate's Opening Brief at 5-6; Estate's Response Brief at 1.

[82] *Charlson*, ¶¶ 7, 13, 15 (noting that the employer did not pay for travel and that the claimant alleged that his claim fell under the exception to the going and coming rule found at § 39-71-407(3)(a)(ii), MCA); *James*, 257 Mont. at

¶ 31 This case falls squarely under the travel allowance exception to the going and coming rule, as set forth in § 39-71-407(3)(a)(i), MCA. Accordingly, Greer's death occurred within the course and scope of his employment.

Issue Two: Was Greer excluded from coverage under § 39-71-407(3)(b), MCA?

¶ 32 Section 39-71-407(3)(b), MCA, states:

> A payment made to an employee under a collective bargaining agreement, personnel policy manual, or employee handbook or any other document provided to the employee that is not wages but is designated as an incentive to work at a particular jobsite is not a reimbursement for the costs of travel, gas, oil, or lodging, and the employee is not covered under this chapter while traveling.

¶ 33 Liberty argues that the per diem payment is excluded under § 39-71-407(3)(b), MCA, because it was an "incentive to get employees to work at remote travel sites."[83] Liberty notes that Loose testified that the per diem was an incentive to attract workers to remote jobsites,[84] and that Greer's Estate does not dispute that the per diem payment was an incentive.[85] Liberty maintains, "the per diem is the very same incentive referenced in § 39-71-407(3)(b) and Greer's death is the very same type of injury that the Montana Legislature specifically intended to exclude from coverage."[86]

¶ 34 However, as Greer's Estate points out, Liberty's argument fails under the plain language of the statute. In *Olson*, this Court ruled that under the plain language of § 39-71-407(3)(b), MCA, "a payment for travel falls under the travel reimbursement exception to the going and coming rule unless the written document providing for such payment designates the payment as an 'incentive' ***and*** sets forth the 'particular jobsite.'"[87] This Court held that although § 39-71-407(3)(b), MCA, created a way for the employer to avoid coverage for an employee traveling to or from work, Olson's employer did not meet the

---

351-52, 849 P.2d at 189-90 (internal quotation marks omitted) (noting that the claimant was not paid mileage for traveling to work and stating, "The resolution of this case turns on the meaning of travel required by the employer as part of the employee's job duties."); *Hampson*, ¶ 25 ("The parties agree . . . that the claimant was not reimbursed for his travel to and from work, hence [§ 39-71-407(3)(a)(i)] is not satisfied. The dispute is over whether he meets subsection [(3)(a)(ii)].").

[83] Liberty's Opening Brief at 4.

[84] *Id.*

[85] Liberty's Supplemental Brief at 6.

[86] Liberty's Opening Brief at 4.

[87] *Olson*, ¶ 29 (emphasis in original).

statutory requirement for the exception because the collective bargaining agreement which set forth the terms of the travel pay neither designated the payment as an "incentive" nor set forth the "particular jobsite."[88]

¶ 35 Like the employer in *Olson*, C&S did not "designate" the payment as "incentive" in any written document. Rather, on the per diem check, which is the only document to which Liberty points, C&S designated the payments as "per diem" — a designation that this Court held to be reimbursement for travel in *Borglum*[89] and, when used in this context, means a payment to defray an employee's travel expenses.[90] Moreover, C&S did not identify the "particular jobsite" on Greer's per diem check, or in any other written document. Thus, the requirements of § 39-71-407(3)(b), MCA, have not been met and Greer's accident is not excluded from coverage under § 39-71-407(3)(b), MCA.

¶ 36 Despite Liberty's argument, this Court has not "added language to the statute by requiring the employer to identify the actual worksite."[91] Liberty does not explain, and this Court does not know, how an employer would designate a payment "as an incentive to work at a particular jobsite" in a written document without identifying the jobsite. The phrase "that is identified" — which is the phrase Liberty claims this Court has added to the statute — would be redundant if added after the word "jobsite." Liberty is actually asking this Court to strike the phrase "but is designated as an incentive to work at a particular jobsite" from the statute, which this Court cannot do.[92]

¶ 37 Liberty also urges this Court to rely upon the legislative history to interpret § 39-71-407(3)(b), MCA, as abolishing the travel allowance exception to the going and coming rule for remote jobsites.[93] Liberty states:

> After the *Borglum* decision, in 2003, the Montana Legislature specifically amended Mont. Code Ann. § 39-71-407(3) to add subsection (b) in an effort

---

[88] *Olson*, ¶ 37.

[89] *Borglum*, ¶¶ 3h, 10.

[90] *See Borglum*, ¶¶ 3g, 3h (additional compensation of $20 per day, which could be used for travel, gas, or lodging at employee's discretion, was called "per diem" or "travel"). *See also* I.R.S. Publ'n 463, Travel, Entertainment, Gift, and Car Expenses 30 (2011) ("A per diem allowance is a fixed amount of daily reimbursement your employer gives you for your lodging, meals, and incidental expenses when you are away from home on business."); *Black's Law Dictionary* 1172 (8th ed. 2004) (defining "per diem" as a monetary allowance, usually provided to cover expenses).

[91] Liberty's Supplemental Brief at 6.

[92] § 1-2-101, MCA. ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.")

[93] Liberty's Opening Brief at 4.

> to avoid the scenario that occurred in *Borglum*. Mont. Sen. Comm. on Bus. and Lab., *Hearing on HB 410,* 58th Leg. (March 24, 2003). The legislative history indicates that the purpose of this bill was to avoid coverage when an employee was traveling to or leaving work at a remote worksite even if they received some travel pay. *Id.*[94]

¶ 38 This Court agrees with Liberty that the legislative history shows that HB 410's proponents were concerned about *Borglum* and that some of HB 410's proponents stated that the bill's purpose was to allow an employer to pay an allowance for traveling to and from a jobsite without bringing the employee within the course and scope of employment.[95] But this Court cannot use the legislative history to contradict the plain language of the statute.[96] Moreover, in her closing remarks at the March 24, 2003, hearing on HB 410 held before the Senate Committee on Business and Labor, the bill's sponsor, Representative Cindy Younkin, stated, "The payment for incentive needs to be in a collective bargaining agreement or employee handbook." Thus, Representative Younkin understood and conveyed that HB 410 created an exclusion from coverage that would be triggered only if the employer made the payment pursuant to the terms of a written document.

¶ 39 Moreover, the Legislature did not repeal § 39-71-407(3)(a)(i), MCA, thereby showing that it did not intend to abolish the travel allowance exception to the going and coming rule. "[W]hen possible all provisions of a statute or regulation must be read together to give meaning to all."[97] If, as Liberty also contends, the Legislature intended to abolish the travel allowance exception to the going and coming rule when it enacted § 39-

---

[94] *Id*.

[95] *See, e.g*., Statement of Jerry Driscoll, Montana State AFL-CIO, Hearing on HB 410, House Committee on Business and Labor (January 30, 2003) at 2 ("The intent of this bill is, when an employee leaves a job site, even though travel pay is given, the employee is not in the course of employment."); Statement of Representative Cindy Younkin, HD 28, Bozeman, Hearing on HB 410, Senate Committee on Business and Labor (March 24, 2003) at 5 (indicating that HB 410 was in response to a case from this Court, presumably *Borglum*, and stating, "If you're just giving a small stipend for travel expenses and you punch out and stop for dinner on the way home, drive the other 30 miles home, and get into an accident, that is not within the scope of your course of employment [sic]."); Statement of Cary Hegreberg of the Montana Contractors Association, Hearing on HB 410, Senate Committee on Business and Labor (March 24, 2003) at 5-6 (stating that HB 410 would allow employers to pay a stipend or a travel reimbursement to an employee to work at a remote jobsite without having the employee be within the course and scope of their employment while traveling).

[96] *See, e.g.*, *State v. Johnson,* 2012 MT 101, ¶ 26, 365 Mont. 56, 277 P.3d 1232 (citations omitted) ("We adhere to the rule of statutory construction that 'there is no reason for us to engage in a discussion of the legislative history to construe [a] statute when we have determined that the language of the statute is clear and unambiguous on its face.'").

[97] *Powell Cnty. v. Country Village, LLC*, 2009 MT 294, ¶ 15, 352 Mont. 291, 217 P.3d 508 (citation omitted). *See also* § 1-2-101, MCA (stating, in relevant part, "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.").

71-407(3)(b), MCA, then § 39-71-407(3)(a)(i), MCA, would be meaningless. When read together, these provisions create a "clear bright line"[98] rule: an employee who receives a travel allowance is within the course and scope of his employment while traveling to and from work ***unless*** the employer pays the travel allowance under a written document that designates the payment as an "incentive to work at a particular jobsite." Thus, contrary to Liberty's argument, the 2003 Legislature did not abolish the travel allowance exception to the going and coming rule or legislatively overrule *McMillen*, *Ellingson*, *Gordon*, and *Borglum*.[99] Rather, as this Court recognized in *Olson*, the Legislature created a workaround to the travel allowance exception.[100]

¶ 40 Finally, this Court rejects Liberty's argument that this Court should not require a construction company to set forth the particular jobsite in a written document because such a requirement is "unreasonably burdensome."[101] This argument is a policy argument that the Legislature should change the statute, and provides no basis for this Court to disregard the plain language of § 39-71-407(3)(b), MCA.[102]

¶ 41 Since C&S did not pay Greer's per diem under a collective bargaining agreement, personnel policy manual, employee handbook, or any other document provided to Greer which designated the per diem as an "incentive" to work at C&S's jobsite in Ekalaka, Greer was not excluded from coverage under § 39-71-407(3)(b), MCA.

Issue Three: Is Greer's Estate entitled to a penalty, attorney fees, and costs?

¶ 42 Pursuant to § 39-71-611, MCA, an insurer shall pay reasonable attorney fees if the insurer denies liability for a claim for compensation, the claim is later adjudged compensable by this Court, and this Court determines the insurer's actions in denying liability were unreasonable. Section 39-71-2907, MCA, provides that this Court may increase by 20% the full amount of benefits due a claimant when an insurer unreasonably delays or refuses to pay benefits prior or subsequent to an order granting benefits from this Court.

---

[98] *Montana State Fund v. Murray*, 2004 MTWCC 33, ¶ 50 n.4.

[99] Liberty's Response Brief at 4.

[100] *See Olson*, ¶ 31 ("The legislative history shows that the Legislature intended to create a way an employer could provide a payment to defray the costs of travel to a remote jobsite without bringing the employee within the course and scope of employment while traveling.").

[101] Liberty's Supplemental Brief at 6.

[102] *See* § 1-2-101, MCA.

¶ 43 Relying upon *Driggers v. Liberty Northwest Ins. Corp.*,[103] Greer's Estate argues that Liberty's position in this matter was unsupportable in light of the case law and that this Court should therefore award it the statutory penalty and its attorney fees for Liberty's unreasonable denial of benefits.[104] Driggers worked as a medical officer in the Flathead County Sheriff's Department.[105] The county provided him with a vehicle to use, and paid for its gas, oil, maintenance, and insurance.[106] Driggers was in a car accident while driving to work.[107] Liberty argued that Driggers' travel was not necessitated by or on behalf of Flathead County as an integral condition of his employment.[108] However, relying upon *McMillen*, *Ellingson*, and *Gordon*, this Court held that Driggers' accident arose out of and in the course and scope of his employment.[109] Moreover, this Court found Liberty's argument unreasonable because of the "clear applicability" of *McMillen*, *Ellingson*, and *Gordon*, assessed a penalty against Liberty, and awarded Driggers his attorney fees.[110]

¶ 44 This Court agrees with Greer's Estate that this case falls squarely under the exception to the going and coming rule in § 39-71-407(3)(a)(i), MCA, and that there is no meaningful way to distinguish this case from *McMillen*, *Ellingson*, *Gordon*, or *Borglum*. However, while this Court does not agree with Liberty's arguments regarding § 39-71-407(3)(b), MCA, its arguments were reasonable in light of the legislative history. This Court notes that in *Olson*, Montana State Fund likewise relied upon the legislative history of HB 410 in making the same argument Liberty made and this Court did not find Montana State Fund's argument unreasonable. This case was already pending when this Court issued its decision in *Olson* and therefore, Liberty's argument that Greer was excluded from coverage under § 39-71-407(3)(b), MCA, was more colorable at that time than it is post-*Olson*. Accordingly, this Court declines to award a penalty or attorney fees.

¶ 45 Since Greer's Estate is the prevailing party, it is entitled to its costs.[111]

---

[103] 2007 MTWCC 60.

[104] Estate's Opening Brief at 14-15.

[105] *Driggers*, ¶ 3.

[106] *Driggers*, ¶ 1.

[107] *Driggers*, ¶ 15.

[108] *Driggers*, ¶ 24.

[109] *Driggers*, ¶¶ 25-29, 41.

[110] *Driggers*, ¶¶ 45-47.

[111] § 39-71-611, MCA.

JUDGMENT

¶ 46 Greer's April 25, 2011, fatal motor vehicle accident arose out of and in the course and scope of his employment under § 39-71-407(3)(a)(i), MCA.

¶ 47 Greer was not excluded from coverage under § 39-71-407(3)(b), MCA.

¶ 48 Greer's Estate is entitled to its costs.

¶ 49 Greer's Estate is not entitled to its attorney fees or a penalty.

¶ 50 Greer's Estate's motion for summary judgment is **granted in part and denied in part**.

¶ 51 Respondent's motion for summary judgment is **denied**.

¶ 52 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 this 3rd day of February, 2016.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Daniel P. Buckley
Leo S. Ward and Morgan M. Weber
Submitted: March 11, 2015