

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 16

WCC No. 2018-4426

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JEFFREY HERMAN, JR.

Petitioner

vs.

MONTANA CONTRACTOR COMPENSATION FUND

Respondent/Insurer.

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ORDER GRANTING RESPONDENT'S MOTIONS  
FOR PARTIAL SUMMARY JUDGMENT  
AND  
DENYING PETITIONER'S CROSS-MOTION  
FOR PARTIAL SUMMARY JUDGMENT

**Summary:** Petitioner filed his Petition for Trial and for Declaratory Judgment seeking, *inter alia*, a ruling designating a particular physician as his treating physician, a ruling that Respondent is liable for medical benefits and for his attorney's *Lockhart* fees, and a declaration that § 39-71-1101(2), MCA — which allows an insurer to designate a physician as an injured worker's treating physician — is unconstitutional. Within days, Respondent designated the particular physician as Petitioner's treating physician and conceded that it was liable for Petitioner's medical benefits and his attorney's *Lockhart* fees. Respondent moved for partial summary judgment, arguing that this Court no longer has subject matter jurisdiction over these claims under § 39-71-2905(1), MCA, and *Thompson v. State of Montana*, because there is no longer a dispute concerning benefits. In the alternative, Respondent argues that this Court does not have jurisdiction over these claims because they are moot. Petitioner cross-moved for partial summary judgment, arguing that this Court has subject matter jurisdiction over his claim that § 39-71-1101(2), MCA, is unconstitutional because, after *Thompson*, the Legislature made this Court a court of record. Petitioner asserts that, as a court of record, this Court has jurisdiction to issue declaratory judgments absent a dispute concerning benefits under the Uniform Declaratory Judgments Act. Petitioner also argues that these claims are not moot

because Respondent's conduct is capable of repetition yet evading review and because Respondent's "voluntary cessation" does not render the claims moot. Petitioner also asserts that he is entitled to summary judgment on his penalty claim under § 39-71-2907, MCA, because Respondent unreasonably delayed payment of benefits, and on his claim that he is entitled to attorney fees under the private attorney general doctrine. In a separate partial summary judgment motion, Respondent argues that it is entitled to summary judgment on Petitioner's claim for attorney fees under § 39-71-611, MCA, because it has conceded liability for the benefits at issue and, therefore, this Court will not adjudicate the dispute over whether it is liable for these benefits. Petitioner asserts that he can obtain attorney fees under §§ 39-71-611 and -612, MCA, because Respondent has incorrectly and unreasonably calculated the amounts of medical benefits due under the fee schedules and has therefore not paid the full amount of benefits owing.

**Held:** Respondent's motion for partial summary judgment on Petitioner's claims to designate the particular physician as his treating physician, to rule that Respondent is liable for medical benefits and *Lockhart* attorney fees, and to declare § 39-71-1101(2), MCA, unconstitutional is granted because this Court no longer has subject matter jurisdiction over these claims. This Court is a court of limited jurisdiction which only has "such power as is expressly conferred by statute." Under § 39-71-2905(1), MCA, and *Thompson*, this Court's jurisdiction is limited to "dispute[s] concerning any benefits" under the Workers' Compensation Act. A dispute concerning Respondent's liability for benefits no longer exists because Respondent has designated the particular physician as Petitioner's treating physician and conceded that it is liable for the medical benefits at issue and for *Lockhart* attorney fees. This Court does not have subject matter jurisdiction to issue a declaratory judgment in the absence of a dispute concerning benefits because the specific grant of jurisdiction in the Workers' Compensation Act controls over a general grant of jurisdiction in the Uniform Declaratory Judgments Act. Because this Court does not currently have subject matter jurisdiction over Petitioner's constitutional challenge to § 39-71-1101(2), MCA, this Court does not address his challenge nor his claim for attorney fees under the private attorney general doctrine. This Court does not reach Petitioner's justiciability arguments because this Court must first have subject matter jurisdiction before it can rule on justiciability. Respondent's motion for partial summary judgment on the issue of claimant's entitlement to attorney fees is granted because Respondent has conceded its liability for the benefits at issue and this Court cannot award attorney fees under § 39-71-611, MCA, unless it adjudicates a dispute over an insurer's liability for benefits and finds that the insurer's denial of liability was unreasonable. This Court does not address Petitioner's argument under § 39-71-612, MCA, because Petitioner did not make a claim under this statute. Petitioner's motion for partial summary judgment on his penalty claim is denied because there are issues of fact as to whether Respondent's initial denials of liability for medical benefits were reasonable.

¶ 1 Petitioner Jeffrey Herman, Jr. filed a Petition for Trial and for Declaratory Judgment seeking: (1) an order directing Respondent Montana Contractor Compensation Fund (MCCF) to designate Aaron Flanagan, MD, as his treating physician; (2) a ruling that MCCF is liable for medical benefits for Dr. Flanagan's services and treatments; (3) a ruling that MCCF is liable for his attorney fees on the medical benefits under *Lockhart v. New Hampshire Ins. Co.*;<sup>1</sup> (4) a judgment declaring that § 39-71-1101(2), MCA — which provides, in relevant part, that “after acceptance of liability by an insurer, the insurer may designate or approve a treating physician” — is unconstitutional and a ruling that he is entitled to his attorney fees for prevailing on this claim under the private attorney general doctrine; (5) a ruling that MCCF is liable for his attorney fees under § 39-71-611, MCA; and (6) a ruling that MCCF is liable for a penalty under § 39-71-2907, MCA.

¶ 2 By two motions, MCCF moves for partial summary judgment. In its first motion, MCCF asserts that this Court no longer has subject matter jurisdiction to order it to designate Dr. Flanagan as Herman's treating physician, to rule that it is liable for Herman's medical benefits and for Herman's attorney fees under *Lockhart*, or to declare § 39-71-1101(2), MCA, unconstitutional. A few days after Herman filed his Petition for Trial and for Declaratory Judgment, MCCF designated Dr. Flanagan as Herman's treating physician and conceded that it was liable for medical benefits for the medical services that Dr. Flanagan has prescribed and for *Lockhart* attorney fees. Thus, MCCF asserts that this Court does not currently have subject matter jurisdiction over these claims under § 39-71-2905(1), MCA, and *Thompson v. State of Montana*,<sup>2</sup> because there is no longer a dispute concerning benefits. In the alternative, MCCF asserts that this Court does not have jurisdiction over these claims because they are now moot. In its second motion, MCCF argues that it is entitled to summary judgment on Herman's claim for attorney fees under § 39-71-611, MCA, because it has conceded that it is liable for the benefits and, therefore, this Court will not adjudicate the dispute.<sup>3</sup>

¶ 3 Herman opposes MCCF's motions for partial summary judgment and cross-moves for partial summary judgment. Herman argues that his claims are justiciable because MCCF's conduct is capable of repetition yet evading review and because MCCF's “voluntary cessation” of its refusal to designate Dr. Flanagan as his treating physician and pay medical benefits and *Lockhart* fees does not render these issues moot. Herman

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<sup>1</sup> 1999 MT 205, 295 Mont. 467, 984 P.2d 744 (holding that medical benefits recovered due to the efforts of an attorney in a workers' compensation claim are benefits to which an attorney fee lien can attach).

<sup>2</sup> 2007 MT 185, 338 Mont. 511, 167 P.3d 867.

<sup>3</sup> At a hearing on, *inter alia*, the parties' motions for summary judgment, this Court ordered MCCF “to respond to Herman's Audit of MCCF's Medical Benefit Payments chart” and allowed Herman the opportunity to file a reply. This Court subsequently granted Respondent's Motion for Leave to File Motion to Strike portions of Herman's Reply Brief re Petitioner's Audit of Respondent MCCF's Medical Bill Payments and deemed the Motion to Strike filed. In its Motion to Strike, MCCF argues that the aforementioned reply brief contains inadmissible evidence, factual misrepresentations, new arguments, and goes beyond the scope of MCCF's response brief. Because, as this Court stated in its Order Granting Respondent's Motion for Leave to File Motion to Strike, “[t]his Court has afforded the parties wide latitude in presenting their positions,” the Motion to Strike is **denied**.

argues that this Court has subject matter jurisdiction to decide whether § 39-71-1101(2), MCA, is unconstitutional because this Court is now a court of record and can issue declaratory judgments under the Uniform Declaratory Judgments Act in absence of a dispute concerning benefits. Herman also argues that he can recover attorney fees under the Workers' Compensation Act (WCA) if this Court finds that MCCF's conduct was unreasonable and under the private attorney general doctrine if this Court rules that § 39-71-1101(2), MCA, is unconstitutional. Herman also asserts that he is entitled to summary judgment on his penalty claim.

¶ 4 As explained below, this Court grants MCCF's motions for partial summary judgment and denies Herman's cross-motion. Because this Court no longer has subject matter jurisdiction over Herman's claim for a declaratory judgment that § 39-71-1101(2), MCA, is unconstitutional, this Court does not address the merits of this claim, nor Herman's claim that he is entitled to attorney fees for prevailing on this claim under the private attorney general doctrine. The Clerk of this Court will issue a new Scheduling Order setting this case for trial on Herman's remaining claim.

### FACTS

¶ 5 On June 23, 2016, Herman was injured when a trench box landed on his left foot and ankle.

¶ 6 MCCF accepted liability for Herman's claim and began paying benefits.

¶ 7 On March 9, 2017,<sup>4</sup> Herman underwent an independent medical examination (IME) with Mark Rotar, MD, and Robert J. Vincent, MD. The panel opined that Herman was "not . . . a candidate for any surgery of any kind" and recommended "referral to a qualified podiatrist as for fitting of appropriate orthotics."

¶ 8 On April 25, 2017, Herman began treating with Daniel G. Hodson, DPM. Dr. Hodson indicated that "surgery was . . . an option to repair [his] torn ligament and/or tendon."<sup>5</sup>

¶ 9 On July 19, 2017, Mel Pozder, Claims Examiner for MCCF, wrote a letter to the IME panel asking, *inter alia*: "[I]s surgery warranted for [Herman's] chronic ATFL [anterior talofibular ligament] tear?"<sup>6</sup>

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<sup>4</sup> Per the heading of the WellCare IME, the date of evaluation was 03/24/2017; however, the Introduction paragraph of the report states Herman was evaluated on 03/09/2017.

<sup>5</sup> Alteration added.

<sup>6</sup> Alterations added.

¶ 10 On August 7, 2017, the IME panel responded that “in the absence of proven lateral instability, [ankle surgery] will be unsuccessful and may worsen the situation.”<sup>7</sup> The panel recommended that Herman get “another opinion from an orthopedic foot and ankle specialist before proceeding with any surgery.”

¶ 11 On December 12, 2017, Herman saw Vilma A. Herrera, NP, at the Primary Care Pain Clinic at Benefis, on referral from Dr. Hodson. Herrera noted “Joint pain, Joint swelling, Muscle weakness, Muscle spasms on the LEFT calf and ankle,” as well as “Extremity weakness, Gait disturbance, [and] Numbness in extremity.”<sup>8</sup> She referred Herman to Dr. Flanagan “for recommendation of treatment for left ankle pain, suggestions for bracing and possible interventional modalities.”

¶ 12 Thereafter, the Benefis Pain Management Care Team reviewed Herman’s case, and, in a letter dated December 22, 2017, recommended “referral to Dr. Flanagan for left ankle treatment recommendations.”

¶ 13 On January 18, 2018, Herman returned to see Herrera. She noted the same left-leg symptoms as Herman had during the previous visit. She further noted that Herman was awaiting insurance approval for referral to Dr. Flanagan.

¶ 14 Meanwhile, for the second surgical opinion, Herman chose to be evaluated at the Foot and Ankle Clinic at the University of Washington’s Harborview Medical Center (Harborview), and saw Andrew D. Gudwin, ARNP, on January 26, 2018.

¶ 15 Gudwin recommended that Herman continue with “physical therapy to work on muscle strengthening” and undergo an evaluation with “neurology for neuropathic pain treatment.” After consulting with Michael E. Brage, MD, Gudwin advised that left foot/ankle “surgery is not indicated nor will be helpful.”

¶ 16 On January 29, 2018, Herman’s attorney sent MCCF the Benefis records, and requested that it approve the referral to Dr. Flanagan and a prescription for Voltaren gel.

¶ 17 On February 14, 2018, Pozder responded by letter to Herrera, with a copy to Herman’s attorney, indicating it was pursuing Gudwin’s recommendations for physical therapy and a neurological evaluation, and denying the referral to Dr. Flanagan. Regarding Voltaren gel, the letter states:

A review of the Utilization and Treatment Guidelines indicates that [Voltaren gel] is appropriate to treat acute musculoskeletal conditions. It does not appear to be appropriate for treatment of neuropathic pain.

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<sup>7</sup> Alteration added.

<sup>8</sup> Capitalization in original. Alteration added.

¶ 18 On March 20, 2018, Pozder wrote again to Herrera, with a copy to Herman's attorney, indicating that Herman was going to begin physical therapy at Benefis and had an appointment scheduled with Eliad Culcea, MD, at Atlas Neurology, for April 17, 2018.

¶ 19 Notwithstanding MCCF's position on Dr. Flanagan, Herman began treating with him on March 30, 2018. Montana Medicaid paid for the treatment.

¶ 20 That day, Dr. Flanagan assessed Herman as having chronic ankle pain as well as pain in his foot due to "metatarsal fractures and crush injury, chronic ATFL sprain, subsequent ankle instability, [and] possible neuropathic component,"<sup>9</sup> and prescribed Voltaren gel. Of the prescription, Dr. Flanagan wrote:

He states that this is [sic] been declined in the past as he was told that his pain is neuropathic and this would not be appropriate. I strongly disagree. He certainly has a somatic component to his pain as well from the very obvious case of a crush injuries [sic] with fracture and ligament sprain and subsequent instability and mechanical deformity.

I will go ahead and order a new lace up brace for the patient to use as needed for outdoor activities when he is walking on uneven ground.

We will bring the patient back for an ankle injection under ultrasound guidance as well.

¶ 21 On April 12, 2018, Herman's attorney wrote to Pozder, requesting that Dr. Flanagan be officially designated as Herman's treating physician as he met the statutory requirements and was willing to treat Herman and coordinate his care.

¶ 22 On April 17, 2018, Herman saw Dr. Culcea per Gudwin's referral. Dr. Culcea noted, "Patient description of the pain it [sic] is consistent with neuropathic pain and in my opinion is related to the crush injury. I explained to the patient at this time we can use [sic] neuro-modulating pain medications to control the pain." Dr. Culcea prescribed Lamictal and told Herman to follow up in six weeks.

¶ 23 On April 18, 2018, MCCF's attorney notified Herman's attorney that MCCF was denying Herman's request to designate Dr. Flanagan, stating: "The specialist at Harborview that Mr. Herman chose to see determined that he needed to be seen by a neurologist for neuropathic pain tx. Dr. Culcea is proving [sic] that treatment and is considered Mr. Herman's treating physician."

¶ 24 On April 27, 2018, Herman's attorney sent MCCF's attorney Herman's March 30, 2018, medical record from Dr. Flanagan. She requested that MCCF authorize a

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<sup>9</sup> Alteration added.

prescription for Voltaren gel, a new lace-up brace, injections, and follow-up care with Dr. Flanagan, and reiterated Herman's previous demand that Dr. Flanagan be deemed his treating physician.

¶ 25 On May 10, 2018, MCCF's attorney responded: "Dr. Culcea is the treating physician and treatment with Dr. Flanagan is not authorized."

¶ 26 On May 30, 2018, Herman returned to see Dr. Culcea. Dr. Culcea noted, "So far he has not been having any side effects [from the Lamictal] but no benefits. He continues to have significant joint pain and swelling of the joint."<sup>10</sup> Dr. Culcea indicated that he would continue treating Herman's neuropathic pain, but that because he did not have expertise treating joint issues, he could not be the primary provider for Herman's injury; he recommended that Dr. Flanagan be Herman's primary provider.

¶ 27 The same day, Herman's attorney forwarded Pozder and MCCF's attorney Herman's medical record from Dr. Culcea. She asked for MCCF to authorize Dr. Culcea's referral to Dr. Flanagan and designate Dr. Flanagan to be Herman's treating physician.

¶ 28 On July 11, 2018, Herman returned to see Dr. Flanagan, who re-ordered the lace-up brace, for which Montana Medicaid paid, and scheduled the ankle injection for the following day.

¶ 29 On July 12, 2018, Dr. Flanagan injected Kenalog into Herman's left-ankle joint under ultrasound guidance, "to decrease pain and improve tolerance for walking and standing."

¶ 30 On August 2, 2018, based on Herman's report of "excellent" relief from the injection, Dr. Flanagan noted:

[T]he results of this procedure strongly support that this is not in fact purely neuropathic pain as has been suggested. We again discussed that even if there are neuropathic processes occurring, this can lead to altered mechanics of the foot as well as decreased structural integrity of the foot if this is causing muscle weakness, which could in turn lead to somatic pain and joint pain.

Dr. Flanagan prescribed Voltaren gel, for which Montana Medicaid paid. Dr. Flanagan documented the following: (1) chronic pain of the left ankle with mortise joint pain improved after ultrasound-guided injection on July 12, 2018; (2) sprain of the left ATFL, sequela; (3) left calcaneal bursitis with consideration of future ultrasound-guided injection; and (4) peroneal tendinitis of left lower extremity and prescription for Voltaren gel with consideration of future ultrasound-guided tendon sheath injection.

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<sup>10</sup> Alteration added.

¶ 31 On August 6, 2018, Herman returned to see Dr. Culcea. Dr. Culcea noted that Herman had had “excellent pain relief with steroid injection into the left ankle and also Voltaren cream.” He recommended that Herman continue treatment with Dr. Flanagan.

¶ 32 On October 8, 2018, Herman returned to see Dr. Flanagan. Montana Medicaid paid this bill. Dr. Flanagan diagnosed, *inter alia*, peroneal tendinitis of the left lower extremity with consideration of ultrasound-guided tendon sheath injection if symptoms worsen; and Achilles tendinitis of left lower extremity with consideration of prolotherapy and/or referral for PRP injection. He refilled Herman’s prescription for Voltaren gel and recommended he continue Lamotrigine, which is the generic name for Lamictal, for neuropathic pain as prescribed by Dr. Culcea. Montana Medicaid paid for the Voltaren gel. MCCF paid for the Lamotrigine.

¶ 33 On October 9, 2018, Herman filed his Petition for Trial and for Declaratory Judgment.

¶ 34 On October 11, 2018, MCCF approved Dr. Flanagan as Herman’s treating physician.

¶ 35 On October 12, 2018, Herman’s attorney wrote to Pozder and MCCF’s attorney, asking whether MCCF was going to pay for retroactive treatment and her *Lockhart* lien on previously denied medical care. MCCF did not reply directly.

¶ 36 By letter dated October 19, 2018, Montana Medicaid indicated it received payment from MCCF of its September 24, 2018, lien for claim-related dates of service through August 2, 2018, totaling \$468.14.

¶ 37 MCCF issued a check dated October 26, 2018, for the *Lockhart* fees related to Herman’s March 30, 2018, date of service with Dr. Flanagan.

¶ 38 Herman’s attorney sent his claim-related out-of-pocket expenses for medical care to MCCF’s attorney on November 20, 2018. Although she initially documented over \$350 in expenses, she subsequently revised Herman’s request for reimbursement for out-of-pocket expenses to \$45.33.

¶ 39 Montana Medicaid issued a new lien on November 20, 2018, for claim-related dates of service from August 5, 2018, through October 12, 2018, totaling \$1,007.84.

¶ 40 By letter to MCCF’s attorney dated November 21, 2018, Herman’s attorney requested that MCCF pay this updated lien, and for all past office visits with Dr. Flanagan at the rate of 110% of the medical fee schedule.

¶ 41 MCCF concedes that it is liable for medical benefits for Dr. Flanagan’s services and treatments and asserts that it has paid these benefits in full. It also asserts that it has fully satisfied Herman’s attorney’s *Lockhart* lien. Although Herman has not amended his



Petition for Trial and for Declaratory Judgment to make a claim that MCCF has not paid his medical benefits in full, he asserts that MCCF still owes \$148.57 in medical benefits because it did not pay the benefits in accordance with the fee schedules.

### LAW AND ANALYSIS

¶ 42 This case is governed by the 2015 version of the WCA since that was the law in effect at the time of Herman's industrial accident.<sup>11</sup>

¶ 43 This Court renders summary judgment when the moving party demonstrates an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.<sup>12</sup> "After the moving party meets its initial burden to show the absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the party opposing summary judgment either to show a triable issue [of fact] or to show why the undisputed facts do not entitle the moving party to judgment."<sup>13</sup>

**Issue One: Does this Court currently have subject matter jurisdiction to order MCCF to designate Dr. Flanagan as Herman's treating physician, to rule that MCCF is liable for his medical benefits and *Lockhart* attorney fees, or to declare § 39-71-1101(2), MCA, unconstitutional?**

¶ 44 In his Petition for Trial and for Declaratory Judgment, Herman "contends he is entitled to: 1) have Dr. Flanagan be his primary treating physician; and 2) have MCCF approve authorization and pay for Dr. Flanagan's office visits and treatment recommendations." Herman also contends that his "counsel is entitled to a *Lockhart* fee on all past and future denied medical benefits related to this claim." Herman also seeks a judgment declaring that § 39-71-1101(2), MCA — which states, in relevant part, "Any time after acceptance of liability by an insurer, the insurer may designate or approve a treating physician who agrees to assume the responsibilities of the treating physician" — is unconstitutional under the Montana Constitution and United States Constitution.

¶ 45 MCCF moves for summary judgment on these claims, contending that this Court no longer has subject matter jurisdiction because it has designated Dr. Flanagan as Herman's treating physician; conceded that it is liable for medical benefits for Dr. Flanagan's services and treatments under § 39-71-704, MCA; and conceded that it is liable for Herman's attorney fees under *Lockhart*. MCCF argues that under § 39-71-

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<sup>11</sup> *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

<sup>12</sup> ARM 24.5.329(2); *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285 (citation omitted).

<sup>13</sup> *Amour v. Collection Prof'ls, Inc.*, 2015 MT 150, ¶ 7, 379 Mont. 344, 350 P.3d 71 (alteration added) (citation omitted).

2905(1), MCA, and *Thompson*, this Court does not currently have subject matter jurisdiction over these issues because there is no longer a dispute concerning benefits. In the alternative, relying on past cases from this Court, MCCF argues that this Court does not have jurisdiction because these claims are now moot.<sup>14</sup>

¶ 46 Herman argues that this Court has jurisdiction because *Thompson* is not controlling under current law. Herman points out that, after *Thompson*, the Legislature made this Court a court of record.<sup>15</sup> Herman argues that as a court of record, this Court has the jurisdiction to issue declaratory rulings in absence of a dispute concerning benefits pursuant to the Uniform Declaratory Judgments Act, §§ 27-8-101, *et seq.*, MCA (UDJA), and, specifically, under § 27-8-201, MCA, which provides:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

Herman also argues that his claims are not moot under *Heisler v. Hines Motor Co.*, in which the Montana Supreme Court held that an insurer's decision to designate the treating physician that the claimant wanted after the claimant commenced litigation did not moot "the issue of whether [the claimant] was constitutionally entitled to change his treating physician without the prior approval of the [insurer]," because the insurer's initial refusal to accept the claimant's choice of treating physician was capable of repetition but evading review.<sup>16</sup>

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<sup>14</sup> See *Thompson v. Liberty Nw. Ins. Corp.*, 2002 MTWCC 34, ¶ 61 (ruling, "Claimant's request for vocational job assistance is moot since Liberty has agreed to provide such assistance and it is in fact being provided."); *Johnson v. Transp. Ins. Co.*, 1998 MTWCC 88, ¶¶ 2, 6 (ruling that once claimant agreed to submit to IME, her appeal of the Department of Labor & Industry's order directing her to attend the IME was moot because, "Courts do not review judgments or administrative orders for the mental exercise or recreation. They do so only where the appella[nt] seeks and can be afforded meaningful relief from the judgment or order. Appellant in this case has agreed to submit to the IME and therefore agreed to comply with the Department's Order; thus, she is no longer seeking to nullify the Order." (alteration added)); *Manning v. Pierce Packing Co.*, WCC No. 8412-2761, 1985 WL 57230 (Order Adopting Findings of Fact and Conclusions of Law of Hearing Examiner and Judgment (Apr. 12, 1985) (ruling, "At the time of trial, the claimant stated, and the defendant agreed, that the defendant had paid the travel expenses that were the basis for issue number one; that issue is now moot.")). See also *Berry v. Mid Century Ins. Co.*, 2020 MTWCC 10, ¶ 86 (ruling that after insurer accepted liability for medical benefits, there was no longer a justiciable controversy because the issue of the medical benefits became a moot question; i.e., "one which existed once but because of an event or happening, it has ceased to exist and no longer presents an actual controversy." (citations omitted) (internal quotation marks omitted)).

<sup>15</sup> Compare § 3-1-102, MCA (2005) with § 3-1-102, MCA (2007).

<sup>16</sup> 282 Mont. 270, 272-73, 276, 937 P.2d 45, 46-48 (1997) (alterations added), *modified by Havre Daily News, LLC v. City of Havre*, 2006 MT 215, 333 Mont. 331, 142 P.3d 864.

¶ 47 MCCF replies that *Thompson* is still controlling because even after this Court became a court of record with the power to issue declaratory judgments, its subject matter jurisdiction under § 39-71-2905(1), MCA, is still limited only to cases with a dispute concerning benefits. MCCF also argues that *Heisler* is not controlling because in *Havre Daily News, LLC v. City of Havre*, the Montana Supreme Court explained that it had erred in *Heisler* by applying the capable of repetition yet evading review exception to the mootness doctrine.<sup>17</sup> Instead, the court explained that it should have applied the “voluntary cessation” exception, which applies when the defendant’s challenged conduct is of “indefinite duration” but the defendant has voluntarily terminated its allegedly wrongful behavior before a court has a chance to rule.<sup>18</sup> MCCF asserts that the issues are moot because there is insufficient evidence to determine that its “challenged conduct” will inevitably reoccur, which is necessary to invoke the “voluntary cessation” exception to the mootness doctrine.<sup>19, 20</sup>

¶ 48 This Court is a court of limited jurisdiction.<sup>21</sup> As such, it has “only such power as is expressly conferred by statute.”<sup>22</sup>

¶ 49 Section 39-71-2905(1), MCA, states that this Court has jurisdiction over disputes concerning workers’ compensation benefits:

If a claimant, an insurer, an employer alleged to be an uninsured employer, or the uninsured employers’ fund has **a dispute concerning any benefits** under this chapter, it may petition the workers’ compensation judge for a determination of the dispute after satisfying dispute resolution requirements otherwise provided in this chapter.<sup>23</sup>

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<sup>17</sup> *Havre Daily News*, ¶ 36.

<sup>18</sup> *Havre Daily News*, ¶¶ 34, 38 (citations omitted).

<sup>19</sup> See *Havre Daily News*, ¶¶ 38-39 (in case in which municipality initially refused to provide complete copy of police reports, holding that the “voluntary cessation” exception did not apply because its claim that there would be inevitable future violations of right to know was conjectural and conclusory).

<sup>20</sup> MCCF also argued that this Court should grant it partial summary judgment on the grounds that Herman missed the deadline to file his response brief by one day. However, when the time is calculated under this Court’s rules, Herman timely filed his response brief.

<sup>21</sup> *Thompson*, ¶ 24 (citation omitted). See also *Moreau v. Transp. Ins. Co.*, 2015 MT 5, ¶ 10, 378 Mont. 10, 342 P.3d 3 (recently explaining, “The Workers’ Compensation Court is a court with limited but exclusive jurisdiction to hear and determine disputes concerning workers’ compensation benefits.” (citations omitted)); *State ex rel. Uninsured Employers’ Fund, Div. of Workers’ Comp. v. Hunt*, 191 Mont. 514, 518-19, 625 P.2d 539, 541-42 (1981) (noting that this Court has decided cases “not strictly involving disputes between insurers and employees” and has jurisdiction over such cases because it has jurisdiction over “matters that go beyond the minimum determination of the benefits payable to an employee.”).

<sup>22</sup> *Thompson*, ¶ 24 (citation omitted). See also *Liberty Nw. Ins. Corp. v. State Comp. Ins. Fund*, 1998 MT 169, ¶ 11, 289 Mont. 475, 962 P.2d 1167 (stating, “The jurisdictional parameters of the Workers’ Compensation Court are defined by statute as interpreted, from time to time, by the decisions of this Court.”).

<sup>23</sup> Emphasis added.

¶ 50 In *Thompson*, the Montana Supreme Court addressed the issue of whether this Court has subject matter jurisdiction to declare statutes unconstitutional without an underlying dispute concerning workers' compensation benefits. Three injured workers filed a declaratory judgment action in this Court challenging the constitutionality of statutes providing that workers' compensation insurers could obtain an injured employee's health care information "without prior notice to the injured employee."<sup>24</sup> The workers conceded that "no benefits [were] at issue," but asserted that this Court nevertheless had jurisdiction to declare the statutes unconstitutional.<sup>25</sup> The Montana Supreme Court disagreed. It explained that, at that time, this Court was "an administrative tribunal governed by" the Montana Administrative Procedure Act (MAPA).<sup>26</sup> The court explained that although MAPA allows an administrative tribunal to issue a declaratory ruling,<sup>27</sup> MAPA and § 39-71-2905(1), MCA, when "[t]aken together . . . authorize the WCC to issue declaratory rulings only in the context of a dispute concerning benefits under the Workers' Compensation Act and only as to the applicability of any statutory provision, rule, or order of the agency to that dispute."<sup>28</sup> The court reasoned that because there was no dispute over benefits, this Court did not have subject matter jurisdiction:

Here, the Workers' Petition did not demand benefits or a declaratory judgment concerning the applicability of workers' compensation statutes to a particular dispute over benefits. Indeed, the Workers concede in their brief that "[h]ere, no benefits are at issue." Therefore, we hold that the WCC did not have jurisdiction to issue a declaratory judgment holding §§ 39-71-604(3) and 50-16-527(5), MCA, unconstitutional in the context of this case.<sup>29</sup>

¶ 51 Since *Thompson*, this Court has consistently held that it does not have jurisdiction over a claim unless there is a dispute over benefits and the claim is within the context of that dispute.<sup>30</sup>

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<sup>24</sup> *Thompson*, ¶ 5 (citing § 39-71-604(3), MCA (2003), § 50-16-527(5), MCA (2003)).

<sup>25</sup> *Thompson*, ¶¶ 27-34.

<sup>26</sup> *Thompson*, ¶ 24.

<sup>27</sup> *Thompson*, ¶ 25 (citing § 2-4-501, MCA, which states, "Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A copy of a declaratory ruling must be filed with the secretary of state for publication in the register. A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases.").

<sup>28</sup> *Thompson*, ¶ 25.

<sup>29</sup> *Thompson*, ¶ 26. See also *Thompson*, ¶ 28 (explaining that the type of jurisdiction at issue was subject matter jurisdiction).

<sup>30</sup> *Newlon v. Teck Am., Inc.*, 2014 MTWCC 12, ¶ 71 (ruling that, under *Thompson*, this Court had jurisdiction to decide a claim brought in equity because "a dispute over benefits unquestionably exists"), *aff'd* 2015 MT 317, 381 Mont. 378, 360 P.3d 1134; *Miller v. Liberty Mut. Fire Ins. Corp.*, 2008 MTWCC 18, ¶ 8 (ruling that this Court had jurisdiction to rule upon a constitutional challenge to an administrative rule because there was a dispute over benefits); *Robinson v. Montana State Fund*, 2008 MTWCC 55 (ruling that, under *Thompson*, this Court did not have jurisdiction to rule upon Petitioner's challenge to statutes and administrative rules because they were outside the context of a dispute over benefits).

¶ 52 Under § 39-71-2905(1), MCA, and *Thompson*, this Court no longer has subject matter jurisdiction to decide that Dr. Flanagan is Herman's treating physician, or to decide that MCCF is liable for Herman's medical benefits or *Lockhart* attorney fees. After Herman filed his Petition for Trial and for Declaratory Judgment, MCCF designated Dr. Flanagan as Herman's treating physician, and agreed that it was liable for the medical benefits at issue and for Herman's attorney's *Lockhart* fees. MCCF continues to concede that Dr. Flanagan is Herman's treating physician, and that it is liable for the medical benefits Herman seeks and his attorney's *Lockhart* fees. In short, there is no longer a dispute concerning MCCF's liability for these benefits and this Court's ruling on these issues would not afford Herman meaningful relief. Because there is no longer a dispute concerning benefits, this Court does not currently have subject matter jurisdiction over these claims under § 39-71-2905(1), MCA, and *Thompson*.

¶ 53 Likewise, because there is no longer a dispute concerning whether Dr. Flanagan is Herman's treating physician, this Court does not currently have subject matter jurisdiction to issue a declaratory judgment on Herman's claim that § 39-71-1101(2), MCA, is unconstitutional. Again, MCCF has approved Dr. Flanagan to be Herman's treating physician and has conceded that it is liable for medical benefits for Dr. Flanagan's services and treatments under the WCA. Thus, even if this Court ruled that § 39-71-1101(2), MCA, is unconstitutional, Herman would still have Dr. Flanagan as his treating physician and he would not be entitled to any additional benefits under the WCA and, here again, this Court's ruling on this issue would not afford him any meaningful relief. As there is no present dispute over Herman's entitlement to designation of Dr. Flanagan as his treating physician, or over MCCF's liability for medical benefits, this Court currently lacks subject matter jurisdiction to make a declaration holding § 39-71-1101(2), MCA, unconstitutional in the context of this case.<sup>31</sup> Because this Court does not currently have subject matter jurisdiction to issue a declaratory judgment as to the constitutionality of § 39-71-1101(2), MCA, it will not address the merits of Herman's claim, nor Herman's claim for attorney fees under the private attorney general doctrine.

¶ 54 This Court is not persuaded by Herman's arguments that this Court still has subject matter jurisdiction over these claims.

¶ 55 First, this Court is not persuaded that the Legislature intended to expand this Court's jurisdiction when it made this Court a court of record. When this Court became a court of record, it came under the reach of the UDJA. However, the UDJA's broad grant of jurisdiction to issue declaratory rulings is at odds with the WCA's specific grant of jurisdiction to this Court in § 39-71-2905(1), MCA, to only decide disputes concerning benefits. This Court has explained:

Whenever a statute addresses a subject in general and comprehensive terms, and another statute addresses a part of the same subject in a more

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<sup>31</sup> See *Thompson*, ¶ 26.

minute and definite way, the two should be read together and harmonized, as much as possible, giving effect to each. [But if the statutes] cannot be harmonized to give effect to both, the specific statute controls over the general statute to the extent of the inconsistency.<sup>32</sup>

Here, the statutes cannot be harmonized; as such, this Court's jurisdiction to issue declaratory rulings is controlled by the specific statute, which is § 39-71-2905(1), MCA. This Court is convinced that if the Legislature intended to expand this Court's jurisdiction to allow this Court to issue declaratory judgments on workers' compensation issues in cases in which there was no dispute over benefits, it would have amended § 39-71-2905(1), MCA.

¶ 56 Second, Herman argues that because he now disputes MCCF's calculation of the amount of medical benefits that it owes under the fee schedules, there is a dispute concerning benefits. However, the dispute over whether MCCF has paid the correct amount of medical benefits is not currently before this Court because Herman did not make such a claim in his Petition for Trial and for Declaratory Judgment and has not filed an amendment to make such a claim.<sup>33</sup> Moreover, in *Thompson*, the Montana Supreme Court held that for this Court to have subject matter jurisdiction, the judgment sought must be within the "context of [the] dispute concerning benefits."<sup>34</sup> In *Robinson v. Montana State Fund*, this Court relied upon *Thompson* and ruled that it did not then have subject matter jurisdiction over several claims because "the disputed benefit has no relation to the declaratory judgment sought. Therefore, it is insufficient to confer jurisdiction for the declaratory judgment Petitioner seeks."<sup>35</sup>

¶ 57 Likewise, the judgments that Herman seeks are outside the context of the dispute concerning the calculation of the amount of benefits that MCCF owes under the fee schedules; i.e., Herman is not challenging the constitutionality of the way in which the amount of benefits due is calculated. Even if this Court declared § 39-71-1101(2), MCA, unconstitutional, Herman's medical benefits would be calculated under the fee schedules. And, the issue of whether MCCF is liable for the benefits Herman seeks, which MCCF no longer disputes, is different than the issue of whether MCCF properly calculated the amount of benefits due under the fee schedules. The dispute over whether MCCF properly calculated the amount of benefits due under the fee schedules does not confer subject matter jurisdiction to this Court to determine whether MCCF is liable for the

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<sup>32</sup> *Hopkins v. Uninsured Employers' Fund*, 2009 MTWCC 12, ¶ 11 (alteration added) (internal quotation marks omitted) (citing *Mont. Sports Shooting Ass'n, Inc. v. Mont. Dep't of Fish, Wildlife, and Parks*, 2008 MT 190, ¶ 41, 344 Mont. 1, 185 P.3d 1003).

<sup>33</sup> See ARM 24.5.301(1)(c) (stating that a Petition for Trial must contain "a short, plain statement of the petitioner's contentions").

<sup>34</sup> *Thompson*, ¶ 25.

<sup>35</sup> 2008 MTWCC 55, ¶ 5.

benefits, which MCCF has already conceded, because it too is outside the context of the dispute before this Court.

¶ 58 Third, despite Herman's claim, the Montana Supreme Court's decision in *Malcomson v. Liberty Northwest*<sup>36</sup> does not support his position that this Court can declare statutes unconstitutional in the absence of a dispute concerning benefits. In *Malcomson*, this Court ruled that one of the statutes at issue in *Thompson* was unconstitutional<sup>37</sup> and the Montana Supreme Court affirmed.<sup>38</sup> However, this Court had jurisdiction to rule on the constitutionality of the statute because, as the Supreme Court noted, there was a dispute concerning benefits and the constitutional challenge was in the context of that dispute. The Supreme Court pointed out that, "After Malcomson withdrew her consent to allow Liberty and its agents to have *ex parte* communications with her medical care providers, Liberty terminated her benefits, claiming that Malcomson's withdrawal of consent violated §§ 39-71-604 and 50-16-527, MCA (2007)."<sup>39</sup> Thus, under § 39-71-2905(1), MCA, and *Thompson*, this court had subject matter jurisdiction to decide the constitutional issue because it was in the context of a dispute over benefits; i.e., if Malcomson was correct that the statute was unconstitutional, then she would be entitled to reinstatement of her benefits.

¶ 59 As a final point, because this Court does not currently have subject matter jurisdiction under § 39-71-2905(1), MCA, and *Thompson*, it cannot address whether Herman's claims are moot. Although Herman conflates subject matter jurisdiction with the jurisdiction to consider only justiciable claims, the Montana Supreme Court has explained, "subject matter jurisdiction is the threshold power and authority of a court to hear and determine a claim or issue."<sup>40</sup> Thus, MCCF is correct that this Court must have subject matter jurisdiction pursuant to its statutory grant of authority in § 39-71-2905(1), MCA, before it can determine whether a justiciable controversy exists,<sup>41</sup> which is different than subject matter jurisdiction.<sup>42</sup>

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<sup>36</sup> 2014 MT 242, 376 Mont. 306, 339 P.3d 1235.

<sup>37</sup> *Malcomson v. Liberty Nw.*, 2013 MTWCC 21 (ruling that § 39-71-604(3), MCA (2007), violated Malcomson's right to privacy under Art. II, § 10, Mont. Const.).

<sup>38</sup> *Malcomson*, 2014 MT 242, ¶ 1.

<sup>39</sup> *Id.*

<sup>40</sup> *Alto Jake Holdings, LLC v. Donham*, 2017 MT 297, ¶ 28, 389 Mont. 435, 406 P.3d 937 (citation omitted).

<sup>41</sup> See *In re Estate of Big Spring*, 2011 MT 109, ¶ 23, 360 Mont. 370, 255 P.3d 121 (stating, "once a court determines that it lacks subject matter jurisdiction, it must dismiss the action." (citations omitted)).

<sup>42</sup> See *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881 (explaining that Montana's courts have jurisdiction only over justiciable controversies and that the limitation "derives in part from constitutional requirements and in part from policy or 'prudential' considerations." (citations omitted)); *Houden v. Todd*, 2014 MT 113, ¶ 25, 375 Mont. 1, 324 P.3d 1157 ("Article VII, Section 4 of the Montana Constitution confines our authority to justiciable controversies in the same way the case or controversy provision of the United States Constitution limits the federal courts."); *Montana Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 39, 366 Mont. 224, 286 P.3d 1161 ("The courts of Montana do not have the power to issue advisory opinions

¶ 60 Accordingly, because this Court does not currently have subject matter jurisdiction, this Court grants MCCF partial summary judgment on Herman's claims for a designation of Dr. Flanagan as his treating physician, a ruling that MCCF is liable for his medical benefits and his attorney's *Lockhart* fees, and a declaration that § 39-71-1101(2), MCA, is unconstitutional.

**Issue Two: Is MCCF entitled to summary judgment on Herman's claim for attorney fees under § 39-71-611, MCA?**

¶ 61 In his Petition for Trial and for Declaratory Judgment, Herman alleges, "Respondent's denials have been unreasonable, entitling Petitioner to an award of attorney fees . . . pursuant to § 39-71-611, MCA . . . ."

¶ 62 MCCF argues that it cannot be liable for attorney fees under § 39-71-611, MCA, because it designated Dr. Flanagan as Herman's treating physician and accepted liability for the benefits and *Lockhart* fees Herman seeks within days after Herman filed his Petition for Trial and for Declaratory Judgment. Thus, MCCF argues that this Court will not adjudicate these disputes.

¶ 63 Herman maintains that MCCF can still be liable for attorney fees under § 39-71-611, MCA, because it has not paid all medical bills and *Lockhart* fees at the correct rates. He cites *Doubek v. CNA Ins. Co.*<sup>43</sup> and *Beaulieu v. Human Dynamics Corp.*<sup>44</sup> in support of his position that this conduct amounts to an unreasonable delay or denial of medical benefits subject to attorney fees.

¶ 64 Section 39-71-611(1), MCA, provides, in pertinent part:

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

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

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

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

¶ 65 The Montana Supreme Court has held and this Court has ruled that under the plain language of this statute, a claimant cannot recover his attorney fees unless this Court

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or to decide moot questions. This limitation derives from the Montana Constitution, which limits the judicial power of Montana's courts to deciding only justiciable controversies." (citations omitted)).

<sup>43</sup> 2004 MTWCC 76.

<sup>44</sup> 2004 MTWCC 65.



actually adjudicates the dispute.<sup>45</sup> This Court has explained, “case law establishes that this Court cannot award attorney fees even in cases where the insurer accepted liability the day before trial, at the beginning of trial, or after the close of evidence.”<sup>46</sup>

¶ 66 Here, MCCF is correct that there will be no adjudication of compensability within the meaning of § 39-71-611, MCA, for Herman’s medical benefits for Dr. Flanagan’s services and treatments because MCCF has already conceded its liability for those medical benefits and for his attorney’s *Lockhart* fees. Thus, as a matter of law, Herman cannot recover attorney fees under § 39-71-611, MCA.

¶ 67 Both *Doubek* and *Beaulieu*, cited by Herman, are distinguishable from this case because, although this Court assessed attorney fees — in the former, against CNA, for unreasonably delaying processing of claimant’s hospital bills,<sup>47</sup> and in the latter, against Human Dynamics Corp., for unreasonably denying payment for claimant’s prescription medications,<sup>48</sup> — it did so only after first adjudicating the insurers’ liability for the hospital bills,<sup>49</sup> and prescription,<sup>50</sup> bills in controversy.

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<sup>45</sup> *Yearout v. Rainbow Painting*, 222 Mont. 65, 68, 719 P.2d 1258, 1259 (1986) (holding, “the statute authorizing attorney’s fees, § 39-71-611, MCA, is clear and unambiguous. If an insurer denies liability for a claim for compensation, the insurer is liable for attorney’s fees if the claim is later *adjudged* compensable by the Workers’ Compensation judge. It is clear from the language of the statute that there must be an adjudication of compensability before an award of attorney’s fees is authorized.”); *Cosgrove v. Indus. Indem. Co.*, 170 Mont. 249, 552 P.2d 622 (1976) (even when the WCA is construed liberally in favor of the claimant, no attorney fees are available under § 92-616, RCM — the predecessor to § 39-71-611, MCA — unless the claim is adjudicated); *Arneson v. Travelers Prop. Cas.*, 2006 MTWCC 7 (ruling that this Court could not award attorney fees where insurer paid outstanding, undisputed medical bills after claimant petitioned this Court, but prior to adjudication); *McNeel v. Holy Rosary Hosp.*, 228 Mont. 424, 742 P.2d 1020 (1987) (where insurer accepted the claim the day before trial, no attorney fees could be awarded under § 39-71-611, MCA, because no adjudication occurred); *Vanbouchaute v. Mont. State Fund*, 2007 MTWCC 37 (at the close of evidence at trial, this Court indicated that it intended to rule in the claimant’s favor regarding authorization of surgery, and the insurer authorized the surgery prior to this Court’s formal ruling, therefore, this Court could not award the claimant her attorney fees because the insurer authorized the surgery before the claim was adjudged compensable); *Stevens v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 1997 MTWCC 45, Conclusions of Law, ¶ 2 (although pre-1987 version of § 39-71-612, MCA, and its predecessor § 92-618, RCM, allowed attorney fees where a case resulted in a “settlement,” the legislature removed the “settlement” language, thereby allowing an award of attorney fees only when a case is adjudicated) (citing *Madill v. State Comp. Ins. Fund*, 280 Mont. 450, 930 P.2d 665 (1997)).

<sup>46</sup> *Sikkema v. Liberty Nw. Ins. Co.*, 2017 MTWCC 16, ¶ 14 (citations omitted).

<sup>47</sup> *Doubek*, ¶ 56 (ruling that CNA’s conduct was unreasonable where it delayed processing of the claim and did not reasonably evaluate it).

<sup>48</sup> *Beaulieu*, ¶ 63 (ruling that Human Dynamics Corp.’s conduct was unreasonable where it terminated payment for claimant’s prescriptions without notice to him, without giving a reason, after paying for them for several years, and with no defense except its attorney’s speculation that the prescriptions constituted secondary medical benefits).

<sup>49</sup> *Doubek*, ¶ 55 (ruling that CNA was liable for payment of claimant’s hospital bills where he met his burden of proving that the predominant condition leading to his hospitalization was a condition caused by the asbestosis for which CNA accepted liability).

<sup>50</sup> *Beaulieu*, ¶ 62 (ruling that Human Dynamics Corp. was liable for payment of claimant’s prescription medications where its position that they were secondary services was inconsistent with its denial that claimant was permanently totally disabled and its assertion that it was paying TTD benefits, and where it offered no evidence that the prescriptions were unnecessary to maintain claimant at MMI).

¶ 68 To be sure, under § 39-71-612, MCA, this Court can award attorney fees if an insurer pays less than what it owes under the WCA and this Court adjudicates the dispute and finds that the insurer was unreasonable.<sup>51</sup> However, as noted above, Herman has not made a claim that MCCF did not pay the full amount of medical benefits under the fee schedules. Moreover, this Court agrees with MCCF that, pursuant to ARM 24.5.301(3), Herman has not made a claim for attorney fees under § 39-71-612, MCA. ARM 24.5.301(3) provides:

The petitioner shall join and plead any claim for attorney fees . . . with respect to the benefits or other relief the petitioner seeks in the petition or amended petition. If the petitioner fails to join and plead a claim for attorney fees . . . with respect to the benefits or other relief the petitioner seeks in the petition or amended petition, the petitioner waives this claim and may not pursue any future claim with respect to these attorney fees . . . .

In his Petition for Trial and for Declaratory Judgment, Herman specifically prayed for this Court to award attorney fees pursuant to § 39-71-611, MCA, only. Thus, his claim for attorney fees is limited to § 39-71-611, MCA, and this Court does not address his arguments that he is entitled to attorney fees under § 39-71-612, MCA.

¶ 69 Accordingly, this Court grants MCCF summary judgment on Herman's claim for attorney fees under § 39-71-611, MCA.

**Issue Three: Is Herman entitled to summary judgment on his claim for a penalty under § 39-71-2907, MCA?**

¶ 70 In his Petition for Trial and for Declaratory Judgment, Herman alleges, "Respondent's denials have been unreasonable, entitling Petitioner to . . . a penalty pursuant to . . . § 39-71-2907, MCA."

¶ 71 Herman argues that he is entitled to summary judgment on his penalty claim because MCCF's delays in making payments were the result of its unreasonable conduct, including, for example, denying referrals to Dr. Flanagan despite its receipt of medical records that justified them; denying Dr. Flanagan's treatment recommendations despite his superior qualifications and experience; and delaying until after Herman filed a Petition for Trial and for Declaratory Judgment, its designation of Dr. Flanagan as treating physician despite Dr. Culcea's rejection of that role. Among other cases, Herman relies

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<sup>51</sup> *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 51, 303 Mont. 364, 15 P.3d 948 (stating that under the 1987-present version of § 39-71-612, MCA, "Costs and attorney fees may be assessed against an insurer by a workers' compensation judge when: 1) there is a payment or written offer of payment; 2) there is a controversy relating to the amount of compensation due; 3) the claim is brought before the court for adjudication; and 4) the judge's award is greater than that offered by the insurer."). See also *Lamb v. Missoula Imports, Inc.*, 230 Mont. 183, 187, 748 P.2d 965, 967 (1988) (where a dispute over the amount the insurer owes is resolved in favor of the claimant, an award of attorney fees is appropriate under § 39-71-612, MCA (citations omitted)).

on *S.L.H. v. State Compensation Mutual Ins. Fund*,<sup>52</sup> *Marcott v. Louisiana Pacific Corp.*,<sup>53</sup> *Stevens v. State Compensation Mutual Ins. Fund*,<sup>54</sup> *Lovell v. State Compensation Mutual Ins. Fund*,<sup>55</sup> and *Vanbouchaute v. Montana State Fund*<sup>56</sup> in support of his position.

¶ 72 MCCF contends that it has acted reasonably at all times and that this Court will have to resolve the question of its reasonableness at trial.

¶ 73 Although a delay in payment of benefits is a dispute concerning benefits over which this Court has jurisdiction under § 39-71-2905(1), MCA,<sup>57</sup> Herman is not entitled to summary judgment on his penalty claim because, given the physicians' disputes over what treatment was reasonable and necessary, there is an issue of fact as to whether MCCF's refusal to designate Dr. Flanagan as his treating physician or authorize his treatment recommendations was reasonable and, if so, an issue of fact over the period of unreasonableness. Moreover, because reasonableness is generally a question of fact,<sup>58</sup> summary judgment is not appropriate.<sup>59</sup> Herman's reliance on *S.L.H.*, *Marcott*, *Stevens*, *Lovell*, and *Vanbouchaute* is unavailing as each of those cases involves resolution of the penalty issue after trial rather than on summary judgment.<sup>60</sup>

¶ 74 Accordingly, this Court denies Herman summary judgment on his claim for a penalty under § 39-71-2907, MCA.

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<sup>52</sup> 2000 MT 362, ¶ 50.

<sup>53</sup> 275 Mont. 197, 210, 911 P.2d 1129, 1137 (1996).

<sup>54</sup> 268 Mont. 460, 467, 886 P.2d 962, 966 (1994), *overruled on other grounds by Kloefer v. Lumbermens Mut. Cas. Co.*, 272 Mont. 78, 899 P.2d 1081 (1995).

<sup>55</sup> 260 Mont. 279, 288, 860 P.2d 95, 101 (1993).

<sup>56</sup> 2007 MTWCC 37, ¶ 37.

<sup>57</sup> See *S.L.H.*, ¶ 52 (citing *Lovell*, 260 Mont. at 289, 860 P.2d at 102)) ("We have held that [p]ayment of unreasonably withheld benefits on the courthouse steps does not negate the insurer's potential liability for a penalty for unreasonable delay of benefits. To conclude otherwise would render the unreasonable delay provisions of the penalty statute moot." (internal quotation marks omitted)).

<sup>58</sup> *Begger v. Mont. Health Network WC Ins. Trust*, 2019 MTWCC 7, ¶ 21 (citing *Marcott*, 275 Mont. at 203, 911 P.2d at 1133). See also *Marshall v. Safeco Ins. Co. of Ill.*, 2018 MT 45, ¶ 19, 390 Mont. 358, 413 P.3d 828 ("Questions of reasonableness are generally factual matters properly answered by the finder of fact.").

<sup>59</sup> *Begger*, ¶ 21.

<sup>60</sup> See *S.L.H.*, 2000 MT 362 (upholding this Court's ruling, after trial, that penalties pursuant to § 39-71-2907, MCA, could not be awarded), *Marcott*, 275 Mont. 197 (substantial evidence supported this Court's ruling, after trial, that insurer's conduct was not unreasonable), *Stevens*, 268 Mont. 460 (substantial evidence supported this Court's adoption of Hearing Examiner's conclusion, after trial, that insurer's conduct was reasonable), *Lovell*, 260 Mont. 279 (sufficient basis supported this Court's finding, after trial, that insurer's conduct was unreasonable), *Vanbouchaute*, 2007 MTWCC 37 (finding, after trial, that insurer's denial of request for surgery was unreasonable).

ORDER

¶ 75 Partial Summary judgment is **granted** for MCCF on Herman's claims for a ruling designating Dr. Flanagan as his treating physician; a ruling that MCCF is liable for medical benefits and his attorney's *Lockhart* fees; a declaratory judgment that § 39-71-1101(2), MCA, is unconstitutional; and on his claim for attorney fees under § 39-71-611, MCA.

¶ 76 Partial Summary judgment is **denied** for Herman on his claim for a penalty under § 39-71-2907, MCA.

DATED this 2<sup>nd</sup> day of September, 2020.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Michele Reinhart Levine  
Kelly M. Wills/Shea A.B. Sammons

Submitted: April 24, 2019