IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2008-2103

2013 MTWCC 21

TINA MALCOMSON

Petitioner

vs.

LIBERTY NORTHWEST

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – 09/12/13
AFFIRMED – 09/10/14

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner withdrew her consent allowing Respondent to have *ex parte* communications with her medical providers. She then signed a release allowing Respondent to obtain relevant medical information, but requiring Respondent to give her the opportunity to participate in any communications. Respondent terminated Petitioner's benefits, arguing that it is entitled to pursue *ex parte* communications with an injured worker's medical providers pursuant to §§ 39-71-604(3) and 50-16-527(5), MCA. Petitioner petitioned this Court, arguing that these statutes unconstitutionally violate her right of privacy under Article II, Section 10, of the Montana Constitution, and her right to due process under Article II, Section 17, of the Montana Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution.

Held: As applied to the facts of Petitioner's claim, § 39-71-604(3), MCA, is unconstitutional under Article II, Section 10, of the Montana Constitution. Petitioner does not seek to limit Respondent's ability to obtain relevant healthcare information regarding her claim; she seeks only to be advised that the communications with her treating physicians are taking place and to be included in the communications in order to protect her constitutional right of privacy. Although its provisions are identical to the language of § 39-71-604(3), MCA, this Court lacks the jurisdiction to rule on the constitutionality of § 50-16-527(5), MCA, since it is not part of the Workers' Compensation Act.

Topics:

Constitutional Law: Constitutional Challenges: Burden. The right to receive workers' compensation benefits, in and of itself, is not a fundamental right. However, any constitutional claim involving a fundamental right which sounds in workers' compensation law is not somehow stripped of its status as a fundamental right simply because the statute is found within the WCA.

Constitutional Law: Privacy. By requiring the showing of a compelling state interest, the privacy clause invokes a strict scrutiny review and therefore Petitioner's privacy clause challenge shall be reviewed under strict scrutiny.

Jurisdiction: Workers' Compensation Court: Generally. Although the wording of § 39-71-604(3), MCA, and § 50-16-527(5), MCA, is substantially identical, this Court's jurisdiction, as set forth in § 39-71-2905, MCA, does not provide the authority to rule on the constitutionality of § 50-16-527(5), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 50-16-527. Although the wording of § 39-71-604(3), MCA, and § 50-16-527(5), MCA, is substantially identical, this Court's jurisdiction, as set forth in § 39-71-2905, MCA, does not provide the authority to rule on the constitutionality of § 50-16-527(5), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana State Constitution: Article II, Section 10. The Montana Supreme Court has long recognized that the privacy interests concerning a person's medical information implicates Article II, Section 10, of the Montana Constitution. Montanans' fundamental right of individual privacy is not absolute. When an injured worker files a claim, she relinquishes privacy rights to all medical records and information relevant to the claim. The State has a compelling interest in the orderly administration of its workers' compensation laws and as part of such administration, insurers have the right of access to a claimant's relevant medical information.

Physicians: Communicating With. Regardless of whether *ex parte* communications are more efficient, the standard is whether the statue is narrowly tailored to provide the least restrictive means of access, not necessarily the fastest means of access. Right of access must be

distinguished from method of access, and § 39-71-604(3), MCA, does not set forth a method of access for which a compelling state interest exists.

Medical Records: Relevance. The statutory definition of what constitutes relevant healthcare information is very broad, and within the breadth of that definition, what is or is not relevant can be highly subjective. Allowing unfettered access to a claimant's healthcare providers with no check to ensure that the information communicated is relevant means that under § 39-71-604(3), MCA, a claimant is unable to object to the sharing of arguably irrelevant information and may never learn what information has been shared.

Physicians: Communicating With. There are myriad methods of communicating in the current era which allow everyone to be part of the conversation in a time-efficient manner. While Respondent paints a picture in which the entire system grinds to a halt because of the theoretical need to coordinate everyone's calendars to schedule real-time conference calls if *ex parte* communication is prohibited, the use of e-mail allows all parties to be privy to communications and has the additional advantage of creating a written record.

Insurers: Claim Management. There are myriad methods of communicating in the current era which allow everyone to be part of the conversation in a time-efficient manner. While Respondent paints a picture in which the entire system grinds to a halt because of the theoretical need to coordinate everyone's calendars to schedule real-time conference calls if *ex parte* communication is prohibited, the use of e-mail allows all parties to be privy to communications and has the additional advantage of creating a written record.

Constitutions, Statutes, Regulations, and Rules: Montana State Constitution: Article II, Section 10. Although the State has a compelling interest in the orderly administration of the workers' compensation process, § 39-71-604(3), MCA, is not narrowly tailored to effectuate that interest. Rather, it abrogates a claimant's ability to safeguard his or her constitutional right of privacy in exchange for an arguably – and debatable – more efficient exchange of information between the insurer and the claimant's healthcare providers. As applied to the facts herein, § 39-71-604(3), MCA (2007), unconstitutionally violates the claimant's right of privacy under Article II, Section 10 of the Montana Constitution.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-604. Although the State has a compelling interest in the orderly administration of the workers' compensation process, § 39-71-604(3), MCA, is not narrowly tailored to effectuate that interest. Rather, it abrogates a claimant's ability to safeguard his or her constitutional right of privacy in exchange for an arguably – and debatable – more efficient exchange of information between the insurer and the claimant's healthcare providers. As applied to the facts herein, § 39-71-604(3), MCA (2007), unconstitutionally violates the claimant's right of privacy under Article II, Section 10 of the Montana Constitution.

Insurers: Claim Management. Insurers have a legitimate reason for wanting *ex parte* contact with medical providers and while they may not violate an injured worker's right to privacy by seeking *ex parte* contact to discuss medical issues, claims could be handled more expeditiously if strictly administrative actions are permissible, as such action does not violate a claimant's right to privacy. An insurer should be permitted to craft a release which allows a claimant to grant limited *ex parte* contact to expedite the administrative aspect of claims handling.

¶ 1 The trial in this matter began on September 14, 2011, in Missoula, Montana. Stacy Tempel-St. John represented Petitioner Tina Malcomson. Larry W. Jones represented Respondent Liberty Northwest (Liberty). Senior Claims Case Manager Anna Waller, Claims Specialist Michele Wheeler, Senior Inside Claims Specialist Tricia Bowman, and Unit Leader Jaimie Kern also attended on Liberty's behalf.

¶ 2 The trial continued via videoconference on November 17, 2011. The Court participated via the office of Charles Fisher Court Reporting and Video Conferencing in Helena; Tempel-St. John participated via the office of Charles Fisher Court Reporting and Video Conferencing in Great Falls; and Jones participated via the office of Charles Fisher Court Reporting and Video Conferencing in Missoula.

¶ 3 The trial continued again via videoconference on November 30, 2011. The Court participated via the office of Charles Fisher Court Reporting and Video Conferencing in Helena; Tempel-St. John participated via the office of Charles Fisher Court Reporting and Video Conferencing in Great Falls; and Jones participated via the office of Charles Fisher Court Reporting and Video Conferencing in Missoula.

¶ 4 The trial concluded on December 9, 2011. Tempel-St. John and Jones presented their closing arguments to the Court during a telephone conference.

¶ 5 Exhibits: I admitted Exhibits 1 through 37 without objection. During the course of the trial, I admitted Exhibits 38 through 45 without objection.

¶ 6 Witnesses and Depositions: The depositions of Malcomson, Steven S. Carey, and Michael Woods, M.D., were submitted to the Court and are considered part of the record. On September 14, Waller, Annie Young, RN, BSN, Dana Headapohl, M.D., Kathy Kleinkopf, CRC, and Malcomson were sworn and testified. On November 17, Kern was sworn and testified. On November 30, Carey was sworn and testified.

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

> I. Whether Petitioner is entitled to reinstatement of her medical benefits, which Respondent terminated after she refused to allow Respondent to communicate *ex parte* with her healthcare providers.
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> II. Whether § 39-71-604(3), MCA, and § 50-16-527(5), MCA (2007), unconstitutionally violate Petitioner's right of privacy under Article II, Section 10 of the Montana Constitution.
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> III. Whether § 39-71-604(3), MCA, and § 50-16-527(5), MCA (2007), unconstitutionally violate Petitioner's right to due process under Article II, Section 17, of the Montana Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution.

PROCEDURAL HISTORY

¶ 8 This case was initially submitted to the Court on Malcomson's motion for summary judgment. After considering the parties' respective briefs, I granted summary judgment in Malcomson's favor.[1] In my Order Granting Petitioner's Motion for Summary Judgment, I held that §§ 39-71-604(3) and 50-16-527(5), MCA, unconstitutionally violated Malcomson's right to privacy as applied to the facts of her case.[2]

¶ 9 Liberty subsequently moved for reconsideration of my decision, arguing that I had failed to accord it a hearing on the motion pursuant to ARM 24.5.329(5).[3] On April 13, 2011, I granted Liberty's motion and vacated my summary judgment order. I agreed that the parties could call witnesses at a future evidentiary hearing.[4] However, after

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[1] *Malcomson v. Liberty Northwest*, 2011 MTWCC 6.

[2] *Malcomson*, ¶ 50.

[3] Combined Motion for Hearing, Reconsideration, Clarification and Supporting Brief, Docket Item No. 50.

[4] Minute Book Hearing No. 4264, Docket Item No. 52; Order Granting Respondent's Motion for Reconsideration, Docket Item No. 53.

subsequent research, I determined that I could not resolve factual disputes in the context of a summary judgment hearing and I ordered this matter to proceed to trial.[5]

FINDINGS OF FACT

¶ 10 Malcomson filed a workers' compensation claim for injuries she sustained on December 21, 2007, while performing her duties as the manager of Freemo's Pizza in Missoula.[6]

¶ 11 On December 29, 2007, Annie Young, RN, BSN, a medical case manager for PACBLU Northwest, wrote a letter of introduction to Malcomson in which she explained that Waller had referred Malcomson's case to her "to assist in the coordination of your medical care which resulted from your worker's compensation injury." Young further stated, "My goal is to assess your medical condition and provide assistance during your recovery process. I will be available to address your concerns about your injury . . . ."[7] Young testified at trial. I found her to be a credible witness.

¶ 12 On January 3, 2008, Malcomson signed a release which authorized PACBLU to contact her healthcare providers and for those providers to release to PACBLU any medical information and records pertaining to her December 21, 2007, industrial injury, and further authorized PACBLU and her healthcare providers to communicate in any manner.[8] On January 7, 2008, Malcomson signed a release which authorized Liberty and/or its agents to contact her healthcare providers to provide relevant healthcare information without prior notice to Malcomson.[9]

¶ 13 On January 23, 2008, Young e-mailed Kathy Reid, Malcomson's physical therapist. She copied the e-mail to Liberty's claims adjuster Anna Waller, but did not provide it to Malcomson or Malcomson's counsel. In the e-mail, Young informed Reid that she had spoken with Malcomson about her condition. Young advised Reid that, "I would favor not making too many exceptions in your schedule to accommodate 'running late' 'running early' etc." Young further complained that Malcomson "spends a great deal of ***our*** time/efforts with repetitive information" and that Malcomson "[r]ambles on" when asking for Young's opinion regarding effective weight loss programs.[10] Young

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[5] Minute Book Hearing No. 4271, Docket Item No. 54; Order Incorporating Minute Entry, Docket Item No. 57.

[6] Pretrial Order, Uncontested Facts.

[7] Ex. 15.

[8] Ex. 4.

[9] Ex. 3.

[10] Ex. 22. (Emphasis added.)

testified that she considered this to be relevant healthcare information to communicate to Malcomson's medical provider.[11]

¶ 14 On March 12, 2008, Malcomson, through her counsel, revoked the releases via letter which stated in part that Liberty did not have permission to speak with her medical providers without prior notice to her attorney and an opportunity for a member of Malcomson's attorney's law firm to participate in the communication.[12]

¶ 15 Young periodically submitted invoices to PACBLU which listed her activities in connection with Malcomson's case. Pertinent to the present dispute, Young's invoices include the following itemizations:

> 3/13/2008 Phone call – Physician 0.3 [hours]
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> 3/14/2008 Phone call – Physician 0.2 [hours]
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> 3/17/2008 Phone call – Physician 0.3 [hours]
>
> 3/19/2008 Phone call – Physician 0.3 [hours]
>
> 3/27/2008 Phone call – Physician 0.3 [hours][13]

¶ 16 Malcomson's counsel asserts that neither Liberty nor its agents ever contacted her firm to allow her the opportunity to participate in any telephone calls to Malcomson's medical providers, nor did it advise her that such calls were occurring.[14] Malcomson's counsel further represents that Young made 32 *ex parte* telephone calls totaling 8.9 hours to Malcomson's medical providers on behalf of Liberty, including 1.4 hours of calls, noted above, which occurred after Malcomson revoked the *ex parte* release.[15] Young testified that she does not have any record of the specific content of her calls, but she believes she most likely spoke with a front desk person or secretary and not a physician. Young acknowledged that since Malcomson was not a part of these calls, Malcomson would have no way of knowing who Young spoke with or the subject matter of the conversations. Young further testified that she had *ex parte* conversations with

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[11] Trial Test.

[12] Ex. 5.

[13] Ex. 6.

[14] Ex. 7.

[15] *See* Petitioner's Motion for Summary Judgment and Brief in Support, Docket Item No. 29.

Reid, Malcomson's physical therapist, but that she considers physical therapists "adjuncts to the provider's care" and not medical providers.[16]

¶ 17 On March 31, 2008, Waller wrote to Malcomson's counsel on behalf of Liberty and gave 14 days' notice that Liberty would deny liability for future compensation benefits due to Malcomson's refusal to "allow the insurer ex parte communication as permitted by statute . . . ."[17]

¶ 18 On April 1, 2008, Malcomson's counsel wrote to Waller and stated that Liberty could speak to her healthcare providers, but that any communications must include notice to Malcomson's counsel and an opportunity for Malcomson and her counsel to participate.[18]

¶ 19 On April 4, 2008, Malcomson executed a new release, prepared by her counsel, which authorized Liberty to obtain copies of all relevant medical and billing records, but which did not permit Liberty to speak with any of her medical providers without prior notice to her and her counsel. Malcomson further requested reinstatement of her medical benefits.[19] On that same date, Waller refused to reinstate Malcomson's medical benefits and, asserting that "your limited authorization was not in compliance with the law," presented Malcomson with a new medical release for her signature.[20]

¶ 20 On April 8, 2008, Malcomson returned Liberty's release with her signature, but she added language which stated that she did not authorize Liberty or its agents to contact her healthcare providers without giving notice to her or her counsel. Along with the signed release, Malcomson's counsel also enclosed a letter in which she again requested reinstatement of medical benefits.[21] On April 9, 2008, Waller responded to Malcomson's counsel and refused to reinstate Malcomson's benefits, contending that the language Malcomson added to the release meant that the release "does not comply with the law."[22]

¶ 21 On April 10, 2008, Malcomson's counsel again wrote to Liberty regarding communications with her medical providers, stating in part:

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[16] Trial Test.

[17] Ex. 9.

[18] Ex. 10.

[19] Ex. 8.

[20] Ex. 11.

[21] Ex. 12.

[22] Ex. 13.

> Liberty does not have Ms. Malcomson's permission to have *ex parte* verbal communications with her medical providers without prior notice to her or her attorney and an opportunity to participate in the conversation. As we previously advised, if our office is included in such communication, we have no objection. Obviously, we have no objection to written correspondence to the medical providers if we are copied with the written correspondence. . . .[23]

¶ 22 Anna Waller, Senior Claims Case Manager at Liberty, testified at trial. I found her to be a credible witness. Waller is a certified workers' compensation adjuster in the state of Montana. Waller was the initial adjuster assigned to Malcomson's claim and she adjusted the claim until March 2010.[24]

¶ 23 Waller testified that she terminated Malcomson's benefits after Malcomson refused to allow Liberty *ex parte* communications with Malcomson's medical providers because the applicable statutes allow an insurer to have *ex parte* communications with an injured worker's medical providers. Waller testified that she understood that Malcomson did not bar Liberty from communicating with her medical providers, but rather insisted that she be given the opportunity to participate in those communications. Since the statute allows *ex parte* communications, Waller refused to continue paying Malcomson's benefits unless Malcomson agreed to permit *ex parte* communications. Waller testified that it "speeds up the process" when injured workers are excluded from communications between the insurer and a medical provider.[25]

¶ 24 Waller acknowledged that the release Malcomson executed which permitted Liberty to communicate with her healthcare providers so long as Malcomson and her counsel had the opportunity to participate did not prevent Liberty from obtaining relevant healthcare information. Waller further acknowledged that Malcomson signed a release which allowed Liberty to obtain copies of all her medical and billing records relevant to her back condition. Waller testified that she refused to reinstate Malcomson's benefits and to accept Malcomson's release because "[i]t could slow down the process" if Liberty wanted to contact a medical provider but was unable to reach Malcomson. Waller initially testified that Malcomson's release would have precluded Liberty from authorizing an emergency request; however, she admitted that under the applicable administrative rule, prior authorization is not required for emergency procedures. Waller testified that trying to coordinate the schedules of a doctor, nurse case manager, and

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[23] Ex. 14.

[24] Trial Test.

[25] Trial Test.

attorney could delay treatment. However, Waller admitted that it could be more efficient to have everyone participate in the conversation at the same time.[26]

¶ 25 Waller testified that she was able to adjust claims and gather relevant healthcare information between October 18, 2005, when this Court issued the *Thompson*[27] decision and August 17, 2007, when the Montana Supreme Court reversed that decision.[2829]

¶ 26 Dr. Headapohl testified at trial. I found her to be a credible witness. Dr. Headapohl is board-certified in occupational medicine and preventative medicine and is licensed to practice medicine in Montana. Dr. Headapohl testified that she does not need to have a private conversation with an insurance adjuster in order to make diagnoses or treatment recommendations regarding an injured worker's care and that she does not know what relevant medical information would come from an adjuster that would not be available to her through other channels. Dr. Headapohl testified, however, that medical history for seemingly unrelated conditions could be relevant to diagnosing and treating an injured worker. Dr. Headapohl noted that conditions such as depression or past drug or alcohol abuse could affect her treatment recommendations.[30]

¶ 27 Dr. Headapohl testified that in her experience, her practice and claims adjusters exchange most information in writing although telephone conversations are not uncommon. Dr. Headapohl noted that an adjuster might call to ask when she anticipates removing a work restriction. However, Dr. Headapohl acknowledged that communications such as these could be conducted in writing. Dr. Headapohl further testified that it is her practice to discuss her anticipated course of treatment with her patients and that she prefers to have the patient and other interested parties all participate in telephone conversations at the same time. Dr. Headapohl opined that it is more efficient for all parties to participate in the conversation rather than for her to relay information only to the adjuster or nurse case manager. Dr. Headapohl opined that having everyone participate in the discussion lessens the chance of confusion.[31]

¶ 28 Malcomson testified at trial. I found her to be a credible witness. Malcomson testified that after her industrial injury, Young presented her with a release form and told her she needed to sign it in order to receive medical treatment. Malcomson understood that she would not be entitled to workers' compensation benefits if she did not sign the

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[26] Trial Test.

[27] *Thompson v. State*, 2005 MTWCC 53.

[28] *Thompson v. State*, 2007 MT 185, 338 Mont. 511, 167 P.3d 867.

[29] Trial Test.

[30] Trial Test.

[31] Trial Test.

release. Later, after retaining counsel, Malcomson revoked the release because she believed she had the right to know when Liberty spoke with her doctor and she believed Liberty should allow her to be part of those discussions.[32]

¶ 29 Malcomson testified that Young's involvement in her medical care made her treatment confusing. Malcomson understood Young's role to be someone who would discuss medical treatment and explain things to her, and who would report back to the insurance company about Malcomson's case. Malcomson testified that she believed she had to allow Young attend appointments because Young informed her that it was her job to do so. Malcomson testified that on one occasion, she asked Young to leave an appointment, and Young left briefly but returned and began speaking with Malcomson's medical provider. Malcomson testified that on another occasion, the doctor never spoke to her, but directed all his comments to Young.[33]

¶ 30 Malcomson further explained that she wanted to attend physical therapy at Alpine Physical Therapy because it was a large facility with many training options, but Young informed Malcomson that she would attend physical therapy at PT Solutions because Young had determined it was a better match for her. Malcomson further testified that she wanted to treat with her primary care physician, Dr. Lindley, for her workers' compensation injury, but Young informed her that she needed to treat with Dr. Woods instead. Malcomson ultimately returned to Dr. Lindley's care. Malcomson testified that during her first appointment with Dr. Woods, she asked Young to leave so that she could have some privacy with her doctor, but Young remained in the examination room. Malcomson further testified that she could not express her concerns or ask questions about her condition when Young attended because Young would "override" her concerns and would redirect Malcomson's questions. Malcomson testified that for a majority of her appointments, she felt like it was Young's appointment and not hers.[34]

¶ 31 Malcomson testified that after she returned to light-duty work at her time-of-injury employer, she struggled to balance her work schedule and her physical therapy appointments. Occasionally, she asked Reid if she could move her appointment earlier or later and she sometimes arrived late for the appointments. Later, she discovered that Young had contacted Reid and asked Reid not to accommodate Malcomson's rescheduling requests.[35]

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[32] Trial Test.

[33] Trial Test.

[34] Trial Test.

[35] Trial Test.

¶ 32 Malcomson testified that approximately two weeks after her industrial injury, she was demoted from her position as store manager.[36] Malcomson testified that she was demoted because her injury precluded her from working her full job duties at the time, and her employer was unwilling to cover her shifts while she recovered.[37] She testified she later was terminated from her employment because she missed too much work due to medical appointments.[38]

¶ 33 Jaimie Kern, Unit Leader for Liberty, testified at trial. I found her to be a credible witness. Kern testified that in her experience, *ex parte* communications benefit the injured worker more than the insurer because it allows Liberty to make decisions more quickly, including authorizing treatment and paying benefits. Kern testified that after the *Thompson* decision, Liberty continued to send injured workers release forms to sign which, if signed, permitted Liberty or its agents to have *ex parte* communications with an injured worker's medical providers. Kern testified that Liberty could not deny someone benefits if they refused to waive this right, but she acknowledged that Liberty did not explain this to injured workers, but rather informed them that Liberty could not pay benefits without supporting medical documentation and that Liberty could not get supporting medical documentation without a release. Kern admitted that she did not know how an injured worker would know that he or she did not have to agree to waive this right in order to get benefits.[39]

¶ 34 Kern testified that Liberty cannot obtain any relevant healthcare information through *ex parte* communication which it cannot obtain through written correspondence or while an injured worker is included in the conversation. Kern testified, however, that *ex parte* communication may allow Liberty to obtain the information more quickly.[40]

¶ 35 Steven S. Carey testified at trial. I found him to be a credible witness. Carey is an attorney practicing in Montana. He was admitted to the Montana State Bar in 1984. For the past 27 years, Carey has practiced in the workers' compensation field. Carey testified that he spent approximately 15 years as an insurance defense attorney before he began representing claimants. Carey testified that his practice was split evenly between defense and claimant representation for several years, but in recent years, his practice has become more claimant-oriented.[41]

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[36] Malcomson Dep. 31:16-20.

[37] Malcomson Dep. 32:12 – 33:8.

[38] Malcomson Dep. 21:11 – 22:6.

[39] Trial Test.

[40] Trial Test.

[41] Trial Test.

¶ 36 Carey opined that *ex parte* communications are a "wonderful advantage" for insurers because it allows them to: present information to a healthcare provider in a manner which is advantageous to them; present only the information they wish to present; and frame questions in any manner they wish without any counterpoint from the injured worker. Carey testified that if a medical provider makes a decision based upon information and questions presented in an *ex parte* meeting with an insurer, it is very difficult for an injured worker to get that decision reconsidered. Carey further testified that it is inefficient for an injured worker to have to correspond or meet with the medical provider later in order to seek clarification for decisions which arose from *ex parte* communication.[42] Carey further testified that no procedural safeguards under § 39-71-604(3), MCA, protect an injured worker from a denial or termination of benefits which occurs from an *ex parte* communication between an insurer and a medical provider, and the statute contains no procedural safeguards to protect an injured worker from the disclosure of irrelevant healthcare information.[43]

¶ 37 Carey testified that in his opinion, Young's e-mail correspondence indicated that she sought to direct Malcomson's treatment. Carey noted that for example, in one e-mail Young stated that she wanted the provider to instruct Malcomson to keep a journal; in another, Young stated that she intended to attend one of Malcomson's medical appointments and "make sure she stays on track." Carey further opined that Young's correspondence indicates that she intended to dictate to Dr. Woods what Young believed Malcomson's restrictions should be, and that she intended to ask Dr. Woods to release Malcomson to return to work without restrictions on a certain date.[44]

¶ 38 Carey further testified that from the medical records, Malcomson apparently saw Dr. Woods on March 11, 2008, at which time Dr. Woods placed her at maximum medical improvement (MMI) and gave her a permanent restriction of 20 pounds maximum lifting, with occasional bending and twisting. Dr. Woods reviewed six job analyses and made recommendations. After March 11, 2008, Young's invoices indicate that she made five telephone calls to Dr. Woods' office, totaling 1.4 hours. Carey opined that five telephone calls totaling 1.4 hours is an "extraordinary" amount of time for a nurse case manager to spend calling a physician's office after a worker reached MMI. Carey testified that he could think of only two reasons why a nurse case manager would call a physician after a worker had been placed at MMI: either to clarify restrictions or to ask a physician to reconsider the restrictions. Carey further noted that on March 20, 2008, following those telephone calls, someone in Dr. Woods' office made a handwritten note in Malcomson's chart indicating that she had been released to work

[42] Trial Test.

[43] Trial Test.

[44] Trial Test.

without restriction. Carey further noted that Dr. Woods had not seen Malcomson between March 11 and March 20, 2008, and the only activity in the case during that time appears to be Young's five calls to Dr. Woods' office.[45]

¶ 39 Michael Woods, M.D., is board-certified in orthopedics.[46] Dr. Woods testified that he usually does not communicate directly with a nurse case manager without the patient present because he finds "it's a lot more efficient and easy on everybody if we're all in the same room at the same time."[47] Dr. Woods further testified that although he would be uncomfortable if an insurer wanted to have a representative talk to him about an injured worker's case without the injured worker present, he would agree to do so if the law permitted it. However, he stated that he would prefer to have "everyone involved" than to have a "one-sided conversation" with the insurer.[48]

¶ 40 Waller testified that although Dr. Woods was very responsive to her inquiries regarding Malcomson's case, not all physicians are equally responsive, and she regularly receives non-responsive or incomplete responses to her questions and some physicians routinely fail to respond. In those cases, she either submits additional questions to try to obtain clarification from the physician, or if she believes she is not going to receive an adequate response from the physician, she schedules an IME.[49]

¶ 41 Waller testified that after this Court issued *Thompson*, Liberty's policy was that if Liberty did not have a medical release from a claimant which authorized *ex parte* communication, the claims adjusters would not accept telephone calls from any medical providers. Instead, the adjusters would require that medical providers communicate via written letter, which slowed treatment for injured workers. Waller further testified that Liberty's claims adjusters would accept faxes from medical providers.[50]

¶ 42 Waller further testified that after this Court issued its summary judgment order in Malcomson's case, Liberty's claims adjusters began using a new two-part release in which one part indicates that Liberty can obtain medical information related to the claim and the second part allows *ex parte* communication. Each part requires a separate

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[45] Trial Test.

[46] Woods Dep. 4:22-25.

[47] Woods Dep. 31:8-17.

[48] Woods Dep. 38:25 – 39:12.

[49] Trial Test.

[50] Trial Test.

signature and Waller explained that the new release allows claimants to determine whether they wish to permit *ex parte* communication.[51]

¶ 43 Kern testified that when she read this Court's now vacated decision in this case, she understood that there were no exceptions to the ban on *ex parte* communications between Liberty and medical providers. She explained that if a claims adjuster received a call from a provider, the adjuster would instruct the provider to submit any requests in writing. Kern explained that the earlier decision in this case, like this Court's earlier *Thompson* decision, did not set any parameters for determining whether any *ex parte* communication was permissible and there appeared to be no exceptions to the ban on *ex parte* communications. Kern acknowledged that nothing in the previous decision in this case nor during the time that *Thompson* was in effect precluded claims adjusters from communicating via letter, fax, or e-mail.[52]

¶ 44 Kern testified that in her experience, allowing an insurer to participate in *ex parte* communication with medical providers often benefits an injured worker. She testified that most claims are not questioned and that allowing the insurer to communicate in the fastest possible manner with medical providers helps speed benefits and treatment, and ultimately an injured worker's return to work.[53]

¶ 45 Kern testified that if the Court finds the statutes at issue in this case to be unconstitutional, that claims adjusters need guidance to understand what type of communication with medical providers is permissible. Kern noted that on occasion, medical providers will call Liberty with a question and the claims adjuster will be unable to reach the worker to conference them in on the conversation. Kern testified that the inability to efficiently authorize treatment makes it difficult to keep a claim moving along and may delay medical treatment. Kern also noted that in obtaining a release to allow an injured worker to return to work on modified duty, it can be difficult to handle the complexity of matching job duties with restrictions without a reliable channel communication between the parties.[54]

CONCLUSIONS OF LAW

¶ 46 This case is governed by the 2007 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Malcomson's

[51] Trial Test.

[52] Trial Test.

[53] Trial Test.

[54] Trial Test.

industrial accident.[55] Malcomson bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[56]

¶ 47 Both Malcomson and Liberty asked the Court to incorporate the briefing they submitted prior to the now-vacated summary judgment order into their briefing for the present matter before the Court.[57] Therefore, their previously-raised arguments are cited below when pertinent.

> **I. Whether Petitioner is entitled to reinstatement of her medical benefits, which Respondent terminated after she refused to allow Respondent to communicate *ex parte* with her healthcare providers.**
>
> **II. Whether § 39-71-604(3), MCA, and § 50-16-527(5), MCA (2007), unconstitutionally violate Petitioner's right of privacy under Article II, Section 10 of the Montana Constitution.**
>
> **III. Whether § 39-71-604(3), MCA, and § 50-16-527(5), MCA (2007), unconstitutionally violate Petitioner's right to due process under Article II, Section 17, of the Montana Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution.**

Standard of Review

¶ 48 Malcomson and Liberty disagree on the appropriate level of scrutiny to use in evaluating the constitutionality of the statutes at issue. Regarding her right of privacy challenge, Malcomson argues that because the right of privacy is explicit in the Declaration of Rights of Montana's Constitution, it is a fundamental right. Since it is a fundamental right, any legislation which infringes upon its exercise must be reviewed under strict scrutiny.[58] Liberty argues that rational basis review is the level of scrutiny which applies in constitutional challenges to workers' compensation statutes, regardless

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

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

[57] Liberty's Trial Brief, Docket Item No. 67, at 1; Petitioner's Notice to Incorporate her Motion for Summary Judgment and Reply Brief as Findings of Facts and Conclusions of Law and Trial Brief, Docket Item No. 68.

[58] Petitioner's Reply in Support of her Motion for Summary Judgment (Reply Brief) at 5, Docket Item No. 47, *citing Gryczan v. State*, 283 Mont. 433, 448-49, 942 P.2d 112, 121-22 (1997); *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364.

of which constitutional provisions may be infringed, because workers' compensation statutes do not involve fundamental rights.[59]

¶ 49 Liberty relies on *Henry v. State Comp. Ins. Fund* in support of its position. In *Henry*, and relying on previous cases challenging the constitutionality of statutes in the Workers' Compensation Act (WCA), the Montana Supreme Court noted that equal protection challenges which do not involve a suspect classification or implicate a fundamental right do not trigger a strict scrutiny analysis. The court further noted:

> This Court has previously held that the workers' compensation statutes neither infringe upon the rights of a suspect class nor involve fundamental rights which would trigger a strict scrutiny analysis. This Court has held that the test to be applied when analyzing workers' compensation statutes is the rational basis test.[60]

¶ 50 As it pertains to the review of a constitutional challenge based on the privacy clause, Liberty's reliance on *Henry* is misplaced. *Henry* relies upon four older cases: *Heisler v. Hines Motor Co.*,[61] *Stratemeyer v. Lincoln County*,[62] *Cottrill v. Cottrill*,[63] and *Zempel v. Uninsured Employers' Fund*.[64] The oldest of these is *Cottrill*, decided in 1987. *Cottrill* raised an equal protection challenge to § 39-71-401(2)(c), MCA (1985). The court noted:

> Both parties agree that the right to receive Workers' Compensation benefits is not a fundamental right which would trigger a strict scrutiny analysis of equal protection. . . . Examples of fundamental rights are the right of privacy, freedom of speech, freedom of religion, right to vote and the right to interstate travel.[65]

¶ 51 *Cottrill* states that the right to receive workers' compensation benefits, in and of itself, is not a fundamental right. *Cottrill* does not state that any constitutional claim involving a fundamental right which sounds in workers' compensation law is somehow stripped of its status as a fundamental right simply because it is found within the WCA.

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[59] Liberty's Brief in Opposition to Motion for Summary Judgment and Request for Hearing (Response Brief), Docket Item No. 39, at 8, *citing Henry*.

[60] *Henry*, ¶ 29. (Citations omitted.)

[61] *Heisler*, 282 Mont. 270, 279, 937 P.2d 45, 50 (1997).

[62] *Stratemeyer*, 259 Mont. 147, 151, 855 P.2d 506, 509 (1993).

[63] *Cottrill*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987).

[64] *Zempel*, 282 Mont. 424, 430, 938 P.2d 658, 662 (1997).

[65] *Cottrill*, 229 Mont. at 42-43, 744 P.2d at 897.

¶ 52 The Montana Supreme Court later relied upon *Cottrill* in determining the correct level of scrutiny to apply to an equal protection challenge made in *Stratemeyer*. After quoting *Cottrill*, the court noted, "The statute at issue here, because it affects no fundamental right or suspect class, must be analyzed under the rational basis test."[66] The court looked to the specific challenge made and determined whether it implicated a fundamental right or suspect class; it did not end the analysis after merely ascertaining that the statute was part of the WCA.

¶ 53 In *Heisler*, which also presented an equal protection challenge to a statute within the WCA, the Montana Supreme Court quoted *Stratemeyer*, again noting that an equal protection challenge which neither implicates a fundamental right nor a suspect class is scrutinized under a rational basis test.[67]

¶ 54 Finally, in *Zempel*, the Montana Supreme Court noted that legislation subject to an equal protection challenge is reviewed under strict scrutiny if a fundamental right is infringed or a suspect class affected.[68] The court further noted that it applies middle-tier scrutiny in limited situations where constitutionally significant interests are implicated by government classification.[69] Zempel argued that this middle-tier scrutiny should apply to his constitutional challenge, but the court disagreed, noting that the Workers' Compensation Court had applied the rational basis test, and rejecting Zempel's argument that middle-tier scrutiny should apply because, like welfare benefits, workers' compensation benefits are "lodged in" Article XII, Section 3(3), of the Montana Constitution.[70] The court further noted, "Moreover, we consistently have applied the rational basis test to equal protection challenges in workers' compensation cases."[71]

¶ 55 In addition to *Stratemeyer* and *Cottrill*, the Montana Supreme Court cited *Burris v. Employment Relations Div./Dep't of Labor and Indus.*[72] in support of its assertion that the rational basis test is "applied . . . to equal protection challenges in workers' compensation cases." In *Burris*, as in *Cottrill*, *Stratemeyer*, *Heisler*, and *Zempel*, the Montana Supreme Court, faced with an equal protection challenge, first considered whether the challenge involved a fundamental right or suspect class.[73] Concluding that it did not involve either a fundamental right or suspect class, the *Burris* court then

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[66] *Stratemeyer*, 259 Mont. at 151, 855 P.2d at 509.

[67] *Heisler*, 282 Mont. at 279, 937 P.2d at 50.

[68] *Zempel*, 282 Mont. at 428-29, 938 P.2d at 661.

[69] *Zempel*, 282 Mont. at 429, 938 P.2d at 661. (Citation omitted.)

[70] *Id*.

[71] *Zempel,* 282 Mont. at 430, 938 P.2d at 662.

[72] *Burris*, 252 Mont. 376, 380, 829 P.2d 639, 641 (1992).

[73] *Burris*, 252 Mont. at 379, 829 P.2d at 641.

considered whether the challenge presented by Burris would appropriately be scrutinized under a middle-tier analysis, as used in cases involving the constitutionally-protected interests of education and welfare, and determined that the challenge was not the kind which would be subject to middle-tier scrutiny.[74] The court therefore analyzed Burris' challenge using the rational basis test.[75]

¶ 56 More to the point, Article II, Section 10, of the Montana Constitution, states: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a ***compelling state interest***." (Emphasis added.) By requiring the showing of a compelling state interest, the language of the privacy clause itself invokes a strict scrutiny review.[76] To review Malcomson's constitutional challenge under a rational basis review, as Liberty suggests, would require this Court to amend the privacy clause so that it reads: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a ***rational basis***." Under the heading of things that are beyond the Montana Workers' Compensation Court's jurisdiction, I am confident that amending the Montana Constitution is at the top of the list. I therefore will evaluate Malcolmson's privacy clause challenge under a strict scrutiny level of review.

Analysis and Decision

¶ 57 I note at the outset that Liberty has argued that this Court lacks jurisdiction to consider Malcomson's constitutional challenge to § 50-16-527(5), MCA. In its brief, Liberty states:

> Under MCA § 39-71-2905 (2007) this Court "has exclusive jurisdiction to make determinations concerning disputes under chapter 71, except as provided in 39-71-317 and 39-71-516." The constitutionality of MCA § 50-16-527(5) is not a dispute under chapter 71. Liberty respectfully submits the Court does not have jurisdiction to hear and decide a constitutional challenge to a statute in title 50.[77]

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[74] *Burris*, 252 Mont. at 380, 829 P.2d at 641.

[75] *Id.*

[76] *See, e.g., Oberson v. U.S. Dep't of Agric.*, 2007 MT 293, ¶ 36, 339 Mont. 519, 171 P.3d 715; *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996) ("Strict scrutiny of a legislative act requires the government to show a compelling state interest for its action.")

[77] Liberty's Trial Brief at 7-8.

¶ 58 Jurisdiction involves the fundamental power and authority of a court to hear and decide an issue.[78] Malcomson does not dispute Liberty's assertion regarding the Court's apparent lack of jurisdiction to consider her constitutional challenge to § 50-16-527(5), MCA. Although the wording of these two statutes is substantively identical, Liberty is correct that this Court's jurisdiction, as set forth in § 39-71-2905, MCA, does not provide the authority to rule on the constitutionality of § 50-16-527(5), MCA. I therefore conclude that this Court lacks such jurisdiction and limit this decision only to the constitutionality of statutes found within Title 39, Chapter 71, of the Montana Code Annotated.

¶ 59 Section 39-71-604(3), MCA, was enacted under Senate Bill 450 and passed by the 2003 Legislature. In its entirety, § 39-71-604(3), MCA, states:

> A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (2), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (2) without prior notice to the injured employee, to the employee's authorized representative or agent, or in the case of death, to the employee's personal representative or any person with a right or claim to compensation for the injury or death.

¶ 60 "Relevant healthcare information," is defined at § 39-71-604(2), MCA:

> Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery.

¶ 61 Malcomson alleges that *ex parte* communications with her medical providers violate her right of privacy under Article II, Section 10, of the Montana Constitution. Malcomson contends that the statute is unconstitutional as applied to the facts of her case because she is willing to allow Liberty to communicate with her healthcare

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[78] *Pinnow v. Montana State Fund*, 2007 MT 332, 340 Mont. 217, 172 P.3d 1273, ¶ 16 (*citing Stanley v. Lemire*, 2006 MT 304, ¶ 30, 334 Mont. 489, 148 P.3d 643).

providers regarding relevant healthcare information so long as her counsel is informed of any communications and given the opportunity for inclusion.[79]

¶ 62 To withstand a strict-scrutiny analysis, legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest.[80] Article II, Section 10, of the Montana Constitution protects an individual's right of privacy to matters which can reasonably be considered private.[81] Although Montana's constitutional right of privacy cannot protect something that is not a private matter,[82] the Montana Supreme Court has long recognized that the privacy interests concerning a person's medical information implicate Article II, Section 10, of the Montana Constitution.[83]

¶ 63 Montanans' fundamental right of individual privacy is not absolute. When an injured worker files a workers' compensation claim, he or she relinquishes privacy rights to all medical records and information which are relevant to the claim.[84] Malcomson acknowledges that the State has a compelling interest in the orderly administration of its workers' compensation laws and that as part of such administration, insurers have the right of access to a claimant's relevant medical information.[85] However, Malcomson argues that the State does not have a compelling interest in allowing private insurers or their agents to engage in private communications with a claimant's healthcare providers without prior notice to the injured worker or her representative.[86] She contends:

> The fact that private insurers would like such access in the interest of efficiency and administrative convenience does not establish a compelling state interest. Unfettered private communications with a claimant's healthcare providers invade an individual's privacy solely in the interest of the private insurer and without any of the safeguards associated with traditional methods for discovery of private information such as notice and opportunity to object, *in camera* review, protective orders, etc. As such, [§§ 39-71-604(3) and 50-16-527(5), MCA,] are not narrowly tailored to accommodate the state's interest in permitting

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[79] Petitioner's Motion for Summary Judgment and Brief in Support (Opening Brief), Docket Item No. 29, at 2, 7.

[80] *Gryczan*, 283 Mont. at 449, 942 P.2d at 122. (Citations omitted.)

[81] *Hastetter v. Behan*, 196 Mont. 280, 283, 639 P.2d 510, 513 (1982).

[82] *Hastetter*, 196 Mont. at 282, 639 P.2d at 512.

[83] *See, e.g., State v. Nelson*, 283 Mont. 231, 241-42, 941 P.2d 441, 447-48 (1997).

[84] *Thompson*, 2005 MTWCC 53, ¶ 9.

[85] Opening Brief at 6.

[86] *Id.*

> insurers' access to relevant medical information and exceed the right of privacy guaranteed to Montana citizens under Article II, § 10 of the Montana Constitution.[87]

¶ 64 As I previously noted in *Thompson v. State*, the legislative history of SB 450 does not offer much insight regarding the bill's purpose pertaining to § 39-71-604(3), MCA.[88] In *Thompson*, the petitioners submitted a Fiscal Note which Malcomson also submits in support of her present motion. Malcomson points out that the Fiscal Note contains a "passing reference" to the bill allowing for private communication of medical information between the insurer and the healthcare provider and justifies the method of access by asserting, "The proposal will make the process more efficient, and thereby reduce costs. The more quickly the insurer can receive information on the status of the claimant, the more quickly they can authorize certain procedures to hasten the process."[89] Malcomson argues that no evidence supports the notion that *ex parte* communications are more efficient, but in any event, the standard is whether the statute is narrowly tailored to provide the least restrictive means of access[90] – not whether it is the fastest means of access.[91]

¶ 65 Prior to the 2003 amendments, private communications between insurers and healthcare providers were prohibited. The Montana Supreme Court has previously held that even if the physician-patient privilege has been waived, the rules of discovery do not permit private interviews between counsel for one party and possible adversarial witnesses.[92] In *Jaap v. District Court*, the court noted that, if a party were allowed to privately interview an adverse witness, "the sanctions and protections which are available under the Montana Rules of Civil Procedure for ordinary methods of discovery become unavailable . . . ."[93]

¶ 66 Later, citing *Jaap*, the Montana Supreme Court held in *Linton v. City of Great Falls* that in a workers' compensation claim, no physician-patient privilege exists and an insurer is entitled to relevant healthcare information. However, the Court held that the WCA did not contemplate private interviews without the knowledge or opportunity of the claimant to be present. The Court held that a personal interview between an insurer

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[87] Opening Brief at 12-13.

[88] *Thompson,* 2005 MTWCC 53, ¶ 5.

[89] Ex. 28, ¶ 5 to Opening Brief; Opening Brief at 12.

[90] Opening Brief at 12.

[91] Reply Brief at 6.

[92] *Jaap v. District Court*, 191 Mont. 319, 322, 623 P.2d 1389, 1391 (1981).

[93] *Jaap*, 191 Mont. at 323, 623 P.2d at 1392.

and the claimant's treating physician must be done openly to allay any suspicion that something is available to one party and not to the other.[94]

¶ 67 Malcomson argues that in considering her constitutional challenge, this Court must distinguish an insurer's ***right*** of access to relevant medical information from the ***method*** of access. Malcomson alleges that the statute at issue does not set forth a method of access for which a compelling state interest exists.[95] Malcomson argues:

> [N]othing in the legislative history explains why approximately 90 years after enactment of the WCA, during which workers' compensation insurers have had reasonable access to relevant healthcare information, it suddenly became necessary to expressly authorize private communications between the insurers and the claimant's physicians without notice to the claimant. Nor does legislative history reflect any finding by the legislature that in the absence of permitting such private communications, the insurers would somehow be denied reasonable access to relevant healthcare information.[96]

¶ 68 Malcomson contends that, as the Montana Supreme Court recognized in *Linton*, she cannot protect her right of privacy if she is excluded from communications between Liberty and her healthcare providers. She argues that no safeguards ensure protection of her right of privacy to information other than relevant healthcare information without an opportunity for her or her agent to be present during communications between the insurer and her healthcare provider. Malcomson argues that if she is excluded, it becomes solely up to Liberty to decide what constitutes relevant healthcare information. Malcomson would not know what information was shared and would be unable to object if the parties exchanged information beyond the relevant healthcare information allowed by statute.[97]

¶ 69 Malcomson further argues that "relevant healthcare information" is defined in a way which does not provide any objective standard or guidelines by which legal relevance can be determined, leaving relevancy to the subjective determination of the claims adjuster and the claimant's medical provider.[98] Malcomson notes that "relevance" is not a medical term, but rather is a legal concept. She argues that

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[94] *Linton v. City of Great Falls*, 230 Mont. 122, 132-34, 749 P.2d 55, 62-63 (1988).

[95] Opening Brief at 6.

[96] Opening Brief at 16.

[97] Reply Brief at 7. In *Thompson*, ¶ 23, I noted that these statutes contain no procedural safeguards regarding how much, if any, of these *ex parte* communications are documented.

[98] Reply Brief at 7.

healthcare providers cannot be expected to make a legal determination as to what medical information falls within the legal definition of relevancy.[99] Malcomson argues that private insurers' desire for *ex parte* access to a claimant's healthcare providers "in the stated interest of efficiency and administrative convenience" does not establish a compelling state interest. Malcomson contends that these private communications invade a claimant's privacy solely in the insurer's interest and without any discovery safeguards.[100]

¶ 70 Malcomson notes that in her case, Liberty contracted with Young to serve as Malcomson's medical case manager, and Young then made 32 telephone calls totaling 8.9 hours and made additional personal visits to Malcomson's medical providers without Malcomson's knowledge or opportunity to participate. Malcomson asserts that, since she was not present for these conversations, she has no way of knowing what was discussed, and no way to know whether the information shared was healthcare information relevant to her claim or not. Malcomson contends that while she does not know what Young may have orally communicated to Malcomson's healthcare providers, she knows that in e-mail communications with Malcomson's physical therapist, Young characterized Malcomson as taking up Young's and the physical therapist's time with repetitive information and "rambl[ings]."[101] Malcomson argues that Young's attempts to cast her in a negative light with one of her medical providers can only be viewed as an attempt to negatively influence the treating provider – a situation which would not occur if Malcomson or her agent were included in communications between the insurer and the provider. Malcomson further alleges that it is inaccurate to characterize Young's activities regarding her claim as simply "expedited record gathering" since Young's notes indicate that she advocated for Liberty's position and directed Malcomson's treating physician regarding Malcomson's work restrictions.[102]

¶ 71 Liberty contends that it is more efficient for an insurer to communicate *ex parte* with a claimant's healthcare providers. Liberty admits, however, that Malcomson's treating physician opined, "it's a lot more efficient and easy on everybody if we're all in the same room at the same time."[103] Malcomson replies that Liberty does not contend that allowing it to engage in *ex parte* communications with her healthcare providers is the least restrictive means to provide relevant healthcare to the insurer; it only argues that it is the fastest means.[104] Malcomson argues that her treating physician's testimony

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[99] *Id.*

[100] Reply Brief at 9.

[101] Opening Brief at 9-10.

[102] Opening Brief at 10.

[103] Response Brief at 15, quoting deposition of Michael Woods, M.D., at 31:16-17.

[104] Reply Brief at 6.

demonstrates that, "allowing everyone to participate in the discussions is actually the most efficient and least problematic way to discuss relevant healthcare information."[105]

¶ 72 Liberty further responds that relevant healthcare information is "a very broad concept that is best left to the expert medical judgment of the health care provider who is providing the information."[106] Liberty argues that § 39-71-604(3), MCA, passes constitutional muster because the statute allows the insurer or its representative to discuss only relevant healthcare information *ex parte* with a healthcare provider. Liberty contends, "The statutes only apply to relevant health care information. What can be narrower than that?"[107] The difficulty with Liberty's position is that – as Liberty itself admits – the statutory definition of what constitutes relevant healthcare information is very broad; and within the breadth of that definition, what is or is not relevant can be highly subjective.

¶ 73 In *Thompson*, I hypothesized that under this broad definition of relevancy, an insurer could inquire into a claimant's history of mental illness, no matter how remote, since a claimant's mental health might affect his or her recovery. It may also allow an insurer to inquire into a claimant's medical history of unrelated conditions simply because those conditions involve the same body part.[108] I further speculated that the definition of relevant healthcare information leaves it to the insurer's sole discretion to determine what healthcare information is "similar" enough to be discoverable.[109] Since issuing my ruling in *Thompson*, it has become apparent that these concerns are more than hypothetical.

¶ 74 In *Dewey v. Montana Contractor Compensation Fund*, the claimant (Dewey) sought treatment for wrist pain following two industrial accidents in 2007. The claims adjuster obtained and reviewed virtually Dewey's entire medical history because she considered it to be relevant to his wrist claim.[110] The claims adjuster denied Dewey's request for authorization for carpal tunnel surgery and arranged for Dewey to undergo an independent medical examination (IME) for his wrist complaints. The adjuster provided the IME physician with Dewey's medical records dating back to the 1970s.[111] Among other items, these medical records included a treatment note for a bout of

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[105] Reply Brief at 8.

[106] Response Brief at 12.

[107] Response Brief at 11.

[108] *Thompson*, 2005 MTWCC 53, ¶ 11.

[109] *Id*.

[110] *Dewey v. Montana Contractor Comp. Fund*, 2009 MTWCC 17.

[111] *Dewey*, ¶¶ 24-25.

pneumonia Dewey suffered in 1970 and a sore throat in 1974.[112] The IME physician testified that it was his opinion that carpal tunnel syndrome is never caused by work-related activities except in cases of extreme repetitive motion with vibration, which Dewey's job activities did not entail. Nevertheless, the IME physician found it appropriate and important to include in his report such details as: Dewey was "born illegitimately"; Dewey felt suicidal after his grandfather's death several years before the onset of his wrist problems; and Dewey's father was a drug user.[113] The IME physician testified that he believed these details were relevant to Dewey's carpal tunnel syndrome claim because they spoke to a certain "social chaos" in Dewey's life. When asked whether the social chaos related to Dewey's veracity, the IME physician testified, "Yeah, ***I guess so***."[114]

¶ 75 Certainly, *Dewey* illustrates one of the more egregious examples of the use of irrelevant healthcare information; and it bears reiterating my statement in *Thompson*, that I do not impute ill intent to every claims adjustor or IME physician who is simply trying to obtain ***relevant*** healthcare information in order to adjust the claim. However, *Dewey* illustrates the peril to an injured worker's constitutional right to privacy in allowing unfettered access to a claimant's healthcare providers with no check to ensure that the information communicated is relevant. Under the challenged statute, not only is a claimant unable to object to the sharing of arguably irrelevant information, he or she may never learn what information has been shared.

¶ 76 Furthermore, there are myriad methods of communicating in the current era which allow everyone to be part of the conversation in a time-efficient manner. While Liberty paints a picture in which the entire system grinds to a halt because of the theoretical need to coordinate everyone's calendars to schedule real-time conference calls if *ex parte* communication is prohibited, it appears to me that the use of e-mail – which does not require the coordination of any schedules, allows all parties to be privy to the communications *via* the use of "cc" and "reply-all," and which has the additional advantage of creating a written record – provides an easier and more efficient means of communication.

¶ 77 Although Liberty argues that an injured worker has a remedy available in the form of attorney fees and/or a penalty if an insurer gives incorrect information to a doctor which results in the unreasonable delay or denial of benefits, the problem with Liberty's position is two-fold: first, it assumes that imparting incorrect information which

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[112] *Dewey*, ¶ 27.

[113] *Dewey*, ¶ 28.

[114] *Dewey*, ¶ 29 (emphasis in original).

does not result in unreasonable delay or denial is somehow acceptable,[115] and second, an injured worker may never learn that such an *ex parte* communication caused an unreasonable delay or denial. Certainly the latter principle is at play in the present case, where Malcomson argues that the most logical explanation for Young's telephone calls to Dr. Woods from March 11 until March 20, 2008, is that Young directed Dr. Woods to release Malcomson to return to work without restriction. In her closing argument, Malcomson's counsel suggested that Young's conversations convinced either Dr. Woods or one of his employees to release Malcomson to full duty. Malcomson points out that Kleinkopf testified that Young had informed her that Malcomson would be released to return to work without restrictions, and argues that the evidence indicates that Young accomplished this goal via the use of *ex parte* contact with Dr. Woods.

¶ 78 However, the evidence Malcomson has regarding Young's actions is circumstantial because she was not allowed to participate in these communications and thereby protect her rights. In the case before me that is all Malcomson sought – an opportunity to be apprised of the communications with her treating physician and to object, if necessary, to the sharing of irrelevant information. Although the State has a compelling interest in the orderly administration of the workers' compensation process, the statute at issue is not narrowly tailored to effectuate that interest. Rather, the statute abrogates a claimant's ability to safeguard his or her constitutional right of privacy in exchange for an arguably – and debatable – more efficient exchange of information between the insurer and the claimant's healthcare providers. I therefore conclude that, as applied to Malcomson's case, § 39-71-604(3), MCA, unconstitutionally violates her right of privacy under Article II, Section 10, of the Montana Constitution.

Due Process

¶ 79 Malcomson further argues that § 39-71-604(3), MCA, unconstitutionally violates her right to due process under Article II, Section 17, of the Montana Constitution, and under the Fifth and Fourteenth Amendments to the United States Constitution. Since I have concluded that the statute violates her right of privacy under Article II, Section 10, of the Montana Constitution, I need not reach these additional constitutional arguments.

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[115] *See, e.g.*, the case of *Kramer v. Montana Contractor Comp. Fund*, 2008 MTWCC 48, ¶ 61, in which I concluded that a claims adjuster repeatedly reminded a treating physician that the injured worker's industrial accident was unwitnessed in an attempt to call the worker's credibility into question. However, I further concluded that since the claims adjuster's actions, albeit inappropriate, did not cause a delay or denial of benefits, a remedy in the form of a penalty was not available to the injured worker.

Clarification of Extent of Prohibition on *ex parte* Communication

¶ 80 In asking for reconsideration, Liberty further asked the Court to clarify "if the ex parte communication prohibition extends to accepting calls from providers requesting authorization for treatment and calls by adjustors to providers' offices requesting when the next appointment is and/or whether a claimant kept an appointment."[116] Liberty argues that strictly administrative actions, such as the gathering of information of when an appointment is scheduled, whether an appointment occurred, and requests for medical records, are not a violation of the right to privacy because they are not discussing the claimant or their medical procedures or making medical decisions.

¶ 81 Malcomson counters that this is a hypothetical question and not a true case or controversy, and therefore the Court has no jurisdiction to provide such clarification. Malcomson offers:

> In *Gryczan v. State*, 283 Mont. 433, 442, 942 P.2d 112, 117 (1997), the [Montana] Supreme Court laid out the following test to distinguish hypothetical questions from true cases and controversies:
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> > The test of whether a justiciable controversy exists is: (1) that the parties have existing and genuine, as distinguished from theoretical, rights or interests; (2) the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion; and (3) the controversy must be one the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities, be of such overriding public moment as to constitute the legal equivalent of all of them.[117]

¶ 82 Malcomson argues that Liberty has not met these requirements and therefore the Court cannot respond to Liberty's request.[118] I disagree. Liberty absolutely has an existing, genuine right or interest in knowing the parameters and the extent of any

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[116] Combined Motion for Hearing, Reconsideration, Clarification and Supporting Brief, Docket Item No. 50, at 7-8.

[117] Petitioner's Response in Opposition to Respondent's Combined Motion for Hearing, Reconsideration, Clarification and Supporting Brief, Docket Item No. 51, at 5.

[118] *Id*.

prohibition on *ex parte* communication. What Liberty requests is not a purely political, administrative, philosophical or academic debate, but rather is a matter with clear real-world application. Furthermore, this clarification affects both the parties in interest as it allows both parties to better understand what *ex parte* communications between an insurer and a medical provider may or may not be permissible under this decision.

¶ 83 As the evidence in this case demonstrates, insurers have a legitimate reason for wanting *ex parte* contact with medical providers and while I have concluded that insurers may not violate an injured worker's right to privacy by seeking *ex parte* contact to discuss medical issues, it is clear that claims could be handled more expeditiously if ***administrative*** contact is permissible. As Liberty points out, strictly administrative actions, such as gathering information regarding appointment scheduling, determining if a claimant attended a medical appointment, and requesting medical records, are not a violation of a claimant's right to privacy because these communications do not discuss the claimant's healthcare information. I agree. An insurer should be permitted to craft a release which would allow a claimant to grant such limited *ex parte* contact to facilitate and expedite the administrative aspect of the claims handling procedure.

JUDGMENT

¶ 84 Petitioner is entitled to reinstatement of her medical benefits, which Respondent terminated after she refused to allow Respondent to communicate *ex parte* with her healthcare providers.

¶ 85 As applied to the facts of this case, § 39-71-604(3), MCA (2007), unconstitutionally violates Petitioner's right of privacy under Article II, Section 10 of the Montana Constitution.

¶ 86 This Court lacks the jurisdiction to hold whether § 50-16-527(5), MCA (2007) is unconstitutional.

¶ 87 The Court does not reach the issue of whether § 39-71-604(3), MCA, (2007), unconstitutionally violates Petitioner's right to due process under Article II, Section 17, of the Montana Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution.

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

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DATED in Helena, Montana, this 16th day of August, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Stacy Tempel-St. John
Larry W. Jones
Submitted: December 9, 2011