

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 7

WCC No. 2018-4297

MARYSHAUN MIZE

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner seeks death benefits, asserting that her husband's industrial accident six days before his death was the primary cause of his pulmonary embolism. Respondent denied liability, asserting that Petitioner did not meet her burden of proving that her husband suffered an injury by objective medical findings. In the alternative, Respondent argues that decedent's accident was not the primary cause of his pulmonary embolism.

Held: Petitioner is entitled to death benefits. Petitioner proved with objective medical findings and medical causation opinions that her husband's accident was the primary cause of his pulmonary embolism and resulting death, which is, by itself, an injury under the Workers' Compensation Act. However, because Respondent's denial of liability was reasonable, Petitioner is not entitled to attorney fees or a penalty.

¶ 1 The trial in this matter was held on November 7-8, 2018, in Helena. The parties gave closing arguments on December 6, 2018. Petitioner MaryShaun Mize (MaryShaun) was present and represented by Anthony F. Jackson, Monte D. Beck, and Michael G. Black. Respondent Montana State Fund (State Fund) was represented by Thomas E. Martello and Nick Mazanec.

¶ 2 **Exhibits:** This Court admitted Exhibits 1 through 12, 15, 18, 19, 21 through 24, 30, 31, 34 through 51, and 53 through 55. Nothing was offered as Exhibits 13, 14, 16, 17, 20, and 52. MaryShaun withdrew Exhibits 25, 26, 32, and 33. This Court sustained State Fund's hearsay objections to Exhibits 27, 28, and 29 and did not admit those exhibits.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of R. James Majxner, MD, John S. Patterson, MD, and MaryShaun Mize. Alan F. Barker, MD, Tracy M. Herman, Robert Ryan Clancy, MD, MaryShaun Mize, KM, AM, Dan Noyes, Kevin Emmelkamp, Laurie Emmelkamp, Kyle Demars, Scott B. Anderson, PhD, and Gina Keltz were sworn and testified at trial.

¶ 4 Issues Presented: This Court restates the issues from the Pretrial Order as follows:

Issue One: Did Donald “Rick” Mize suffer an injury, arising out of and in the course of his employment on February 8, 2016?

Issue Two: Did Donald “Rick” Mize suffer an occupational disease, arising out of and in the course of his employment, which began on February 8, 2016, and resulted in his death on February 14, 2016?

Issue Three: Is MaryShaun entitled to her attorney fees, a penalty, and/or her costs?

FINDINGS OF FACT

¶ 5 The following facts are established by a preponderance of the evidence.

¶ 6 In the winter of 2016, Donald “Rick” Mize (Rick) was in his mid-fifties. He was moderately healthy. He was overweight at over 240 pounds at 5 feet, 9 inches tall. He had high blood pressure, asthma, and occasional migraine headaches. Rick intermittently saw Randall S.C. Lundgren, DC, to treat low-back pain.

¶ 7 Rick was close to his wife, MaryShaun, and their teenage daughters, AM and KM. Due to Rick’s and MaryShaun’s busy schedules, and incongruent work schedules, they did not have much time to speak during the work week.

¶ 8 Rick worked for the Montana Department of Transportation (MDT). He was based out of MDT’s Big Sky shop. He did the work necessary to maintain highways, including snowplowing. His route was on Highways 64 and 191, south of Belgrade. In the winter, his scheduled shift was from 4:00 a.m. to noon, though he often worked overtime due to the weather. Rick started his winter shifts with a two-hour trip in his snowplow to check and plow the highways. He typically sat uninterrupted in his snowplow for an hour to an hour and a half when plowing.

¶ 9 Rick had two appointments at Lundgren Chiropractic during the first week of February 2016 to address “low[-]back pain after sitting too much in the work trucks.” He rated his pain as a 5 on a scale from 0-10 at his first appointment but, by the end of his second appointment, on Friday, February 5, 2016, he was “doing much better.” He did

not schedule another appointment because he did not make advance appointments; he called the day he needed treatment.

¶ 10 Around 6:00 a.m. on Monday, February 8, 2016, Rick was in an accident on Highway 191 while driving his snowplow. Unbeknownst to him, the hydraulics that controlled the right-wing plow failed, causing the wing to descend. Consequently, while he was driving around 45 miles per hour, the wing collided with the endplate of a guardrail. The collision deformed the guardrail, tore the wing, and bent and broke several supporting rods and brackets on the truck, all of which were made of steel, and built to withstand the forces of highway snowplowing. The collision caused the snowplow to abruptly decelerate and rotate in a clockwise direction. Rick was thrown, and his body slammed into the interior of the cab.¹

¶ 11 Rick regained control of his snowplow, stopped, and looked at the damage to the guardrail. He then drove back to MDT's Big Sky shop, which took approximately an hour. He reported the accident to his supervisor, Dan Noyes. After seeing the damage to the snowplow, Noyes "wasn't too happy with him." Thus, when Rick told Noyes the impact "sure woke [me] up," Noyes snapped back, "Well, you should have been awake before that." Rick did not report any injury to Noyes.

¶ 12 Noyes, Rick, and the MDT's office staff filled out a Risk Management and Tort Defense Report of Incident (Report of Incident), a form required by the State of Montana. It describes the accident as follows:

Rick was down plowing off a drift at the 32.5 mile marker on the south side of the road. Used head plow and wing pushing snow. When Rick was done he lifted up headplow and wing and went down to the pullout at 32.4 and turned around and started heading north back towards Big Sky. Didn't use the headplow or wing any more and was in traveling mode. Did noticed [sic] the wing strobe had quit working again Traveling around 45 mph and

¹ At trial, State Fund called Scott B. Anderson, PhD, an accident reconstructionist, who testified that, based on calculations from the EDCRASH program, the snowplow decelerated less than 1 mile per hour and that it rotated "much less" than 1 degree. State Fund intended for Dr. Anderson's calculations to support its position that the collision did not cause the snowplow to "spin" nor cause Rick's body to impact anything in the cab. However, this Court gives Dr. Anderson's testimony no weight for four reasons. First, Dr. Anderson's opinion was contradicted by other snowplow drivers who had hit objects with the right wing. They testified that the force causes the snowplow to rotate. Kyle Demars had clipped signs and approaches with the right wing. When asked what the snowplow did, he demonstrated the movement by holding his arms straight out from his side and quickly rotating his shoulders clockwise approximately 60 degrees. Likewise, Dan Noyes testified that at 45 mph, the snowplow would have "listed a little bit" and "shifted" and that Rick would have "felt" the impact. Second, State Fund did not object to the testimony from AM, who credibly testified that Rick told her on the day of his accident that the snowplow "spun," nor to the testimony of AM and KM, who credibly testified that Rick told them on the day of the accident that he "slammed into the side of the plow." Third, this Court finds that Rick told Noyes that the snowplow "spun around" on the day of the accident. While this finding is partly based on MaryShaun's testimony of what Noyes told her Rick had said, which is double hearsay, State Fund elicited this testimony from MaryShaun, who was a credible witness. Finally, Dr. Anderson was an unreliable witness, as he hindered MaryShaun's efforts to discover the bases for his opinions and was evasive on cross examination. For all these reasons, this Court is convinced that Dr. Anderson's calculations were flawed.

never had any knowledge that the wing was bleeding down. Hit a ET head at the 38 mile marker going north bound causing damage to the wing and guardrail.

¶ 13 Based on the amount of damage to the snowplow, Noyes was surprised that the damage to the guardrail was not more extensive. Nevertheless, Noyes completed the Supervisor's Investigation Report, stating that the damage to the wing and to the guardrail was "severe."

¶ 14 Noyes and Rick took the snowplow to MDT's Bozeman shop for repair. While at the shop, Rick spoke with Kevin Emmelkamp, an MDT mechanic, and other MDT employees, about the accident.

¶ 15 After his shift, Rick picked up his daughter AM from Sacajawea Middle School. He told her he had a bad day because he had been in an accident at work, which he described as "kind of a rodeo." Rick told AM that the wing hit the guardrail, that his truck spun, that he hit the side of the truck's cab, that his back and leg were really hurting, and that he needed to see his chiropractor.

¶ 16 Rick then picked up his daughter KM from Bozeman High School. Rick also told KM about the crash into the guardrail. Rick told her that he "slammed into the side of the plow" and "messed up his back pretty bad." Rick also complained of leg pain. It was not unusual for Rick to complain of back pain, but KM had never heard him complain about leg pain before, which stood out to her. Rick told KM that he "needed" to see his chiropractor.²

¶ 17 MaryShaun got home around 5:30 p.m., and had a chance to talk to Rick before he went to bed, which was around 7:00 p.m., as he had to wake up at 3:15 a.m. Rick told MaryShaun that he had damaged the wing. He was frustrated because he had previously sent the snowplow to the shop to repair the wing hydraulic, but the mechanics did not fix it. Rick did not tell MaryShaun that the wing had crashed into the guardrail and MaryShaun thought that the wing had just fallen to the pavement.

² State Fund asserts that MaryShaun did not prove her case because, according to State Fund, it is largely based on hearsay. However, in many instances, such as with AM's and KM's testimony as to what Rick told them on the day of his accident, State Fund did not object; thus, the testimony came into evidence under M.R.Evid. 103(a)(1), which provides that a party must make a "timely objection or motion to strike . . . stating the specific ground of objection." In many other instances, State Fund elicited the hearsay. Other testimony was admitted either because it was not offered to prove the truth of the matter asserted or because it fell under an exception to the hearsay rule. This Court weighed this testimony with the other admitted evidence and determined whether it was reliable. As a final point, under M.R.Evid. 703, expert witnesses may rely upon inadmissible evidence if it is "of a type reasonably relied upon by experts" in that field. When evaluating the physicians' opinions, this Court was mindful that the hearsay on which they relied was not admitted to prove the truth of the matter asserted; rather, it was admitted for the limited purpose of allowing this Court to "scrutinize the expert's reasoning," which is permitted by M.R.Evid. 705. *Reese v. Stanton*, 2015 MT 293, ¶ 22, 381 Mont. 241, 358 P.3d 208.

¶ 18 That night, Rick was suffering from low-back pain. Before he went to bed, he used a TENS unit for the first time in many years.

¶ 19 On Tuesday, February 9, 2016, Rick worked an eight-hour shift and several hours of overtime.

¶ 20 On Wednesday, February 10, 2016, Rick worked an eight-hour shift. That evening, Rick met MaryShaun at church, and told her that he had not had a good day, or a good week, because his back was “killing him.” He went home before MaryShaun and was sleeping by the time she got home.

¶ 21 Rick’s pain had steadily worsened since his accident. Thus, at 3:15 a.m. on Thursday, February 11, 2016, Rick called in sick to work. MaryShaun woke up and asked him what was wrong. Rick told her that he was “not up to it.”

¶ 22 Later that morning, Rick called Lundgren Chiropractic in hopes of getting an appointment that day. He spoke with Tracy Herman, who knew Rick from his prior visits. Herman could tell by Rick’s demeanor that something was wrong. Rick told her that he had been in an accident at work, that he was suffering from severe pain, and that he needed to see Dr. Lundgren for an adjustment. Nevertheless, because Dr. Lundgren was completely booked, Herman was not able to get Rick an appointment that day.

¶ 23 That afternoon, Rick picked up AM from school and then picked up MaryShaun from work. On their way to pick up KM, MaryShaun proposed that the family go out to dinner. However, Rick said he felt “like crap” and just wanted to go home and go to bed.

¶ 24 On Friday, February 12, 2016, Rick worked an eight-hour shift. He plowed for his entire shift.

¶ 25 On the morning of Saturday, February 13, 2016, Rick and MaryShaun volunteered at KM’s speech and debate tournament. On their way to the school, they stopped to pick up doughnuts, bagels, and coffee for the coaches’ room. Rick’s back was hurting so much that he could not comfortably lift the coffee containers. Thus, to MaryShaun’s and KM’s surprise, he asked the coffee shop employee to carry the coffee containers to their car, and for MaryShaun’s help bringing them into the school.

¶ 26 After setting up the coaches’ room, Rick and MaryShaun went out for breakfast. At the restaurant, Rick took ibuprofen, which was unusual because he did not like taking medication. During their conversation, he told MaryShaun, “my back is killing me,” “I am miserable,” and, “I can’t get past this.”

¶ 27 After they returned to the school, MDT called Rick into work. Rick arrived at 10:00 a.m. and plowed until 3:30 p.m.

¶ 28 Rick returned home, suffering from low-back pain. After Rick and MaryShaun made snacks for AM and her friends, who were having a slumber party, Rick bent over their kitchen island to alleviate his back pain. He was also having trouble breathing and started breathing exercises. He ate dinner while fully reclined in a chair, which was unusual.

¶ 29 On the morning of Sunday, February 14, 2016, Rick woke up and had a normal conversation with MaryShaun. Rick got out of bed, intending to make breakfast for AM and her friends. While walking to the kitchen, he collapsed.

¶ 30 Rick was conscious but confused when the ambulance arrived. Upon arrival at the ambulance garage at Bozeman Deaconess Hospital, he became unresponsive and his condition rapidly deteriorated.

¶ 31 R. James Majxner, MD, was Rick's treating physician in the Emergency Room. Dr. Majxner asked Tiffany A. Kuehl, MD, for a cardiac ultrasound, which showed no independent cardiac activity and an enlarged right ventricle, which is a sign of a pulmonary embolism.

¶ 32 A pulmonary embolism is a blood clot in the pulmonary artery or its branches that blocks the flow of blood from the heart into the lungs. Such clots most often form in other parts of the body — such as the legs, arms, or abdomen — break free, and travel within the veins to the right side of the heart and then into the pulmonary artery. When the clot blocks the flow of blood from the heart to the lungs, the lack of oxygenated blood circulating through the body causes cardiac arrest.

¶ 33 Dr. Kuehl performed repeat cardiac ultrasounds, which showed blood clots in Rick's right ventricle, which remained enlarged. Dr. Majxner administered a "clot busting" drug, but it did not work. Rick died as a direct result of his pulmonary embolism.

¶ 34 Dr. Majxner came to the waiting room to inform MaryShaun, KM, and AM that Rick had died. Because physical trauma is a recognized cause of a pulmonary embolism, Dr. Majxner suspected that Rick had recently been in an accident and questioned MaryShaun. Because MaryShaun was unaware of Rick's accident at that time, she told Dr. Majxner that he had not recently been in an accident. In his record, Dr. Majxner noted, "patient wife was in the department prior to the patient arriving she states he has not been ill recently [and] was not complaining of anything earlier today."

¶ 35 A few days later, MaryShaun called Robert Ryan Clancy, MD, a family friend, for help understanding what caused Rick's death. Dr. Clancy, who is a professor at the University of Pennsylvania School of Medicine and a practicing pediatric neurologist, agreed to review Rick's medical records and help MaryShaun understand what had occurred.

¶ 36 In late February 2016, Laurie Emmelkamp, Kevin’s wife, called MaryShaun to express her condolences. Laurie had read Rick’s obituary, which stated that he died of a pulmonary embolism. Laurie knew from her Emergency Medical Technician training that trauma is a recognized cause of a pulmonary embolism and that it takes several days after an accident for the clot to enlarge, break free, and travel to the heart. Thus, Laurie asked MaryShaun if she knew that Rick had been in an accident with his snowplow, which Laurie knew about from speaking to Kevin. This was the first time MaryShaun had heard that Rick had been in an accident. After MaryShaun said she was not aware of an accident, Laurie informed her that in the week before Rick’s death, he was in a “severe accident” when the wing of his snowplow crashed into a guardrail, causing substantial damage to the snowplow.

¶ 37 MaryShaun called Noyes to inquire. Noyes confirmed that Rick had been in an accident when the wing on the snowplow crashed into the guardrail and said Rick had told him that the crash “spun the plow around in the lane” and “stopped the plow in its tracks.” Noyes provided MaryShaun with his Supervisor’s Investigation Report, and put her in touch with Kyle Demars, MDT’s Bozeman Operations Chief, to get the Report of Incident.

¶ 38 MaryShaun also asked KM and AM if they knew about Rick’s accident. They conveyed that Rick told them about the accident on the day it occurred and recounted their conversations with him.

¶ 39 On March 22, 2016, Dr. Clancy drafted a letter to MaryShaun. Dr. Clancy explained his understanding of what happened in Rick’s “serious accident,” which was that the “wing of his plow struck a guard rail causing significant impact to him and extensive damage to the plow.” Dr. Clancy also explained his understanding that Rick “experienced soft tissue injuries in the lower body from the impact of that collision.” Dr. Clancy also explained his understanding that Rick “spent extremely long periods of time just sitting behind the wheel of his [snowplow].” Dr. Clancy explained that Rick’s accident started the process which led to his pulmonary embolism:

Traumatic injury to soft body tissues releases blood clotting factors in the circulation intended to stem the risk of internal hemorrhaging. While this is protective from one perspective, it also causes the victim’s blood to be “stickier” and more prone to form blood clots. One of the major sources of venous blood clot formation that leads to pulmonary emboli is *inactivity*, such as prolonged sitting. . . . In my opinion, the activation of his blood clotting factors from the soft tissue trauma from the accident on 02/08/16 coupled with the prolonged, unsafe duration of sitting required by his “overtime” snow plowing duties were significant contributors to his venous blood clots, pulmonary emboli, and ultimately his death. I hold these opinions with a reasonable degree of medical certainty.

¶ 40 On April 19, 2016, based on MaryShaun’s conversation with Noyes and the two MDT reports, her attorneys completed a First Report of Injury or Occupational Disease, describing Rick’s accident as follows:

Mize was checking roads in plow truck and doing some plowing and sanding. Had stowed the wing on the truck and was headed in to Big Sky traveling about 45 mph. Did not realize wing had bled down. Wing contacted the et end of the guardrail doing severe damage to both the wing and the guardrail. Impact stopped the plow in its tracks and spun the snowplow in the road.³

¶ 41 On May 16, 2016, State Fund denied liability on the grounds that it had not received necessary information from MaryShaun to investigate her claim.

¶ 42 On July 28, 2016, State Fund reiterated its denial of liability, asserting that there were no objective medical findings supporting MaryShaun’s claim that Rick suffered an “injury,” as defined in the Workers’ Compensation Act (WCA).

¶ 43 In early January 2017, Dr. Clancy signed an affidavit setting forth his opinion that Rick’s accident primarily caused his pulmonary embolism and death. At this time, Dr. Clancy understood the accident as a head-on collision:

Rick was involved in a serious accident while driving a MT DOT snowplow on February 8, six days before he died from a pulmonary embolism. The front of his snowplow struck head-on with a guardrail on the roadside. The force of the collision was such that the vehicle was spun around in the middle of the highway before coming to a stop.

Dr. Clancy determined that “the February 8 accident resulted in a substantial impact to Rick’s body.” Dr. Clancy also determined that Rick was sedentary following the accident. From these determinations, Dr. Clancy concluded that Rick’s accident caused his pulmonary embolism and death. He explained:

37. It is my professional medical opinion, on a more likely than not basis, that the trauma Rick suffered in the February 8 accident caused the thrombus and resulting thrombotic pulmonary embolism that led to his death. In other words, if not for the February 8 accident, Rick would not have died.

38. To a reasonable degree of medical certainty, the trauma caused Rick’s blood to become hypercoagulative. This means that it was highly susceptible to clotting, even from things that would not normally cause it to clot. Following the February 8 accident, Rick was reportedly sore

³ All caps removed.

and in pain. His injuries and pain led to increased sedentariness. Also when he was working his regular shifts plus abundant overtime, he was sitting for long periods in his vehicle. His prolonged sitting and hypercoagulable state led blood clots to form in his legs and lower body that would not have formed if he were not in a hypercoagulative state. When he got up and walked a few steps to his kitchen on the morning of his death, the clot, more likely than not, dislodged and traveled via his bloodstream to his pulmonary artery causing the blockage that led to his death. Without the February 8 accident and resulting hypercoagulative state, Rick would not have died on February 14 from the pulmonary embolism. There is no more likely medically-supported explanation for his death.

Dr. Clancy also opined: “To a reasonable degree of medical certainty, the February 8 trauma accounted for more than 50% of the physical condition that led to Rick’s pulmonary embolism and death. In other words, without the February 8 trauma, the pulmonary embolism that caused Rick’s death would not have occurred.”

¶ 44 MaryShaun’s attorney sent Dr. Clancy’s affidavit to State Fund. Upon reviewing Dr. Clancy’s affidavit, Gina Keltz, the claims examiner who adjusted MaryShaun’s claim, determined that Dr. Clancy’s opinion was not entitled to any weight because he did not have accurate information about Rick’s accident. Keltz also determined that Dr. Clancy “did not provide objective medical findings that the accident resulted in an injury”; i.e., no objective medical findings of trauma. Thus, State Fund maintained its denial of liability.

¶ 45 In response to Dr. Clancy’s affidavit, State Fund retained Alan F. Barker, MD, an internist and pulmonologist at the Oregon Health and Science University, to review Rick’s medical records and other documents and render an opinion as to whether Rick’s accident was the primary cause of his pulmonary embolism and death.

¶ 46 Keltz sent Dr. Barker a lengthy cover letter with a summary of the “facts” and the “specific things” to which she wanted him “to pay attention.” *Inter alia*, Keltz asked Dr. Barker to “note that the incident as described on the First Report of Injury is according to the deceased’s wife.” Keltz directed Dr. Barker to the Report of Incident, stating: “The Incident Form that was completed, signed, and dated by the deceased on February 8, 2016, does not provide that description of the accident.” Keltz also pointed to the Report of Incident and, even though it was only to report injuries to non-State parties, told Dr. Barker that Rick “reported no personal injury on the date of the accident.” Keltz also told Dr. Barker that “Mr. Mize did not complain of any injury or injuries from February 8, 2016, forward” and that MaryShaun “indicated to the emergency room physician that he was fine with no complaints.” Keltz also emphasized that Rick saw Dr. Lundgren many times before his accident but did not see Dr. Lundgren or any other medical provider after his accident.

¶ 47 Dr. Barker issued his report on January 30, 2017. He concluded that Rick suffered cardiac arrest but dismissed the Emergency Room reports and asserted that there was

“no objective information to firmly establish the cause of death.” Dr. Barker speculated that Rick could have died because of a myocardial infarction. Dr. Barker opined that if Rick suffered a pulmonary embolism, it was “unprovoked” and that there was “absolutely no relationship between the February 8, 2016 vehicle damage to the guardrail and his death.” Dr. Barker reached his opinion for two reasons.

¶ 48 First, Dr. Barker opined that Rick did not suffer sufficient trauma in his accident to cause a pulmonary embolism. Dr. Barker understood the accident as occurring when, “The loader or plow that was attached to his truck banged into a guardrail and did damage.” Dr. Barker based his conclusion that Rick did not “suffer[] any lower extremity insult or other injury during his work on February 8, 2016, from which the coagulation cascade may have been promoted,” on his determinations that: (1) Rick did not report an injury on the Report of Incident; (2) Rick did not see any medical providers in the days following his accident; and (3) Rick worked all but one of his scheduled shifts following his accident.

¶ 49 Second, Dr. Barker opined that Rick was too active to cause the risk of “increased coagulation and deep venous thrombosis and/or pulmonary embolism.” Dr. Barker determined that Rick “was in an[d] out of his truck and active.”

¶ 50 On January 31, 2017, Dr. Majxner signed an affidavit in which he set forth that Rick died of a pulmonary embolism and opined that Rick’s pulmonary embolism was caused by his accident. Dr. Majxner averred that the objective medical findings, including Rick’s enlarged right ventricle and the clots that were seen on cardiac ultrasound, showed that Rick died of a pulmonary embolism, and not a myocardial infarction. Dr. Majxner noted that, “[t]rauma such as the collision that Rick was reported to have underwent in the February 8 collision is one of the recognized [causes] of a pulmonary embolism” and explained his causation opinion as follows:

12. It is not typical for someone with Mr. Mize’s medical history and physical condition to die from a pulmonary embolism. Subsequent to his death, I learned that Mr. Mize was involved in a motor vehicle accident six days before his death when the snowplow he was operating hit a guardrail at a speed of approximately 45 miles per hour. Such an accident would have a significant impact on the body. I was informed that Mr. Mize had also been sore and in pain since his collision, even to the extent that he had to call in sick to work three days before his death. Mr. Mize’s occupation was a snowplow driver – meaning he was driving and sitting sedentary for long periods of time following the motor vehicle accident and in the immediate days before his death.

. . . .

14. The February 8 trauma combined with Mr. Mize’s sedentariness at work and as a result of the collision are the most likely

cause of the pulmonary embolism, based on all available objective medical information.

¶ 51 MaryShaun’s attorneys sent Dr. Majxner’s affidavit to State Fund. However, Keltz determined that Dr. Majxner’s opinion was insufficient because he did not set forth objective medical findings supporting his determination that Rick suffered trauma in his accident.

¶ 52 On February 17, 2017, Bradley Fancher, MD, issued a cause-of-death report for an insurance company as part of another insurance claim. Dr. Fancher opined that Rick’s prolonged sitting in the snowplow was the primary cause of his pulmonary embolism, explaining: “Prolonged sitting on its own . . . without any other risk factor being present, could have easily, and singularly, led to a venous thrombosis and a pulmonary emboli.” Dr. Fancher explained: “Prolonged sitting is a substantial risk factor for the development of lower venous thrombosis, and the subsequent complication of pulmonary emboli.” Dr. Fancher asserted that this scenario “would be well known and familiar to all practicing physicians.”

¶ 53 Dr. Fancher also noted that Rick had been in an accident, though stated, “[t]he extent and nature of his injuries cannot be objectively assessed, due to the absence of any clinical record concerning these injuries.” Dr. Fancher thought that Rick could have had a “transient hypercoagulable state as the result of minor trauma,” but he still considered the prolonged sitting to be the primary cause. He explained:

It is true that the risk of deep venous thrombosis increases following trauma. Trauma under some circumstances is known to cause a transient hypercoagulable state. Whether the claimant’s injuries were sufficient to cause a hypercoagulable state, or whether a transient hypercoagulable state was in any way responsible for the initiation of a deep venous thrombosis in this gentleman is unknowable and requires speculation. I cannot exclude this possibility.

Medical Testimony

John S. Patterson, MD

¶ 54 Dr. Patterson was Rick’s primary care physician for more than 15 years. However, Dr. Patterson last saw Rick more than three years before his death.

¶ 55 Based on his knowledge of Rick’s health, his review of Rick’s medical records, and a conversation with Dr. Majxner, Dr. Patterson opined that Rick died of a pulmonary embolism, explaining that Rick’s dilated right ventricle, which was seen on ultrasound, was an objective medical finding consistent with a “massive pulmonary embolus.” Dr. Patterson explained that when the pulmonary artery is obstructed by a clot, it puts “back pressure on the right side of the heart which is trying to pump against that,” which

causes the right ventricle to dilate. Dr. Patterson opined that there were three causes of Rick's pulmonary embolism.

¶ 56 First, Dr. Patterson opined that the trauma from Rick's accident was a cause. He explained: "any trauma to the body . . . will increase our coagulability, the risk of having blood clots, especially if it's to the abdomen, [or] lower extremities, which is where most of these pulmonary emboli arise." Based on the information about Rick's accident, including documents stating that Rick's snowplow "spun around," Rick's reports that his body hit the interior of the cab, and Rick's subsequent reports of severe pain, Dr. Patterson testified that it "certainly suggested to me there was an accident, fairly significant accident, enough that he had trauma and reported it to different people and was having complaints because of that, that being just a few days prior to his death of a massive pulmonary embolus."

¶ 57 Second, Dr. Patterson opined that the sedentary nature of Rick's job was a cause. Dr. Patterson explained that the risk of a blood clot increases as the length of the sedentariness increases, and that he has had patients develop a leg thrombosis driving for "an hour or two." Dr. Patterson testified that moving one's feet on a long trip decreases the risk but does not eliminate it. He explained: "He may have gotten in and out of his truck to do things, but he still is sitting for hours. And that sedentary positioning, just as someone on a longer airline flight, sets you up for a higher risk for pulmonary emboli."

¶ 58 Third, Dr. Patterson opined that Rick's weight was a cause because obesity increases the risk of a pulmonary embolism.

¶ 59 Out of these three causes, Dr. Patterson opined that Rick's accident was the primary cause of his pulmonary embolism; i.e., he opined that Rick's accident was more than 50% of the cause, and that Rick would not have developed a pulmonary embolism without the accident. He explained, "two and two says that the trauma set him up for this"

R. James Majxner, MD

¶ 60 Dr. Majxner testified that there is "no question" that Rick died of a pulmonary embolism, explaining that all the objective medical evidence pointed to a pulmonary embolism. Dr. Majxner explained that the cardiac ultrasounds, which showed clots inside an enlarged right ventricle, were objective medical findings of a pulmonary embolism.

¶ 61 Dr. Majxner thought there were two causes of Rick's pulmonary embolism.

¶ 62 First, Dr. Majxner opined that the trauma from Rick's accident was the primary cause of his pulmonary embolism, explaining that trauma is a known and recognized cause of pulmonary embolism. Dr. Majxner determined that Rick experienced blunt trauma in his accident when his body hit the truck's interior. Initially, Dr. Majxner testified that he understood Rick's accident as involving a "pretty sudden stop" and Rick's truck

“going from 45 miles an hour to zero very abruptly.” However, Dr. Majxner thereafter testified that he understood that Rick’s wing hit the guardrail, turning the snowplow “to some degree” and causing it to stop “over a somewhat short distance.” Dr. Majxner explained that the trauma necessary to cause a pulmonary embolism “does not need to be significant trauma” and that he considered Rick’s trauma sufficient to cause a pulmonary embolism.

¶ 63 Second, Dr. Majxner explained that Rick’s sedentariness after his accident, including sitting in his snowplow for long periods, was the secondary cause, and contributed to the enlargement of his blood clots. Dr. Majxner explained that Rick’s getting out to walk around the truck or do some mild activity would not rule out his work as being a risk factor.

¶ 64 Dr. Majxner noted other factors that supported his opinion that Rick’s accident was the primary cause of his pulmonary embolism. Dr. Majxner explained that Rick’s subjective complaints after the accident were consistent with those of a person with developing blood clots. Dr. Majxner explained that Rick’s complaints of leg pain after the accident was an indication that he had “developed a small clot, a deep vein thrombosis causing the leg pain.” Dr. Majxner also noted that Rick complained of shortness of breath the day before his death, which “certainly would be consistent with him having a small blood clot in his lung at that time.”

¶ 65 Dr. Majxner also testified that “[t]he timing of the accident related to the timing of [Rick’s] presentation is very consistent with him developing a pulmonary embolus that caused his arrest and death.” Dr. Majxner explained:

A clot like this would progress with continued inactivity and no treatment. So the clot load, if you will, the amount of blood clot present, is going to gradually increase, which would be consistent with him having mild symptoms and then presenting later with this type of event. So it’s all consistent with developing a thrombotic event.

¶ 66 In sum, Dr. Majxner explained his causation opinion as follows:

There is no other explanation that makes sense to me. You know, he had an event that increased his risk. He had some underlying risk factors. And his presentation was clearly due to his pulmonary embolus. He had a massive pulmonary embolus which caused his cardiac arrest.

...

You know, he had some underlying risk factors, his lifestyle, body habitus, he had an occupational risk factor, and then this added recent trauma is what brought this all together in a rather unfortunate way.

Robert Ryan Clancy, MD

¶ 67 Dr. Clancy testified that Rick died because of a pulmonary embolism. When asked for the objective medical evidence supporting his testimony, he pointed to “[t]he pulmonary embolism itself,” noting that clots were visible inside Rick’s right ventricle on cardiac ultrasound. Dr. Clancy also pointed to Rick’s enlarged right ventricle, which was also seen on Rick’s cardiac ultrasound. Dr. Clancy explained that Rick’s right ventricle was enlarged because the blockage in Rick’s pulmonary artery caused a backup.

¶ 68 Dr. Clancy opined that there were two causes of Rick’s pulmonary embolism.

¶ 69 First, Dr. Clancy testified that Rick’s accident was a cause. Dr. Clancy explained that minor trauma can lead to a pulmonary embolism. Dr. Clancy likened the coagulability of blood to a thermostat that the body turns up or down. When a person’s body is cut, he explained, it senses that it is bleeding and turns up the “thermostat” to increase the blood’s tendency to clot. Dr. Clancy explained that blunt trauma can also “turn on that thermostat to increase the level of coagulation.” Dr. Clancy acknowledged that the risk of a pulmonary embolism increases as the severity of trauma increases. Dr. Clancy also acknowledged that the statement in his affidavit that Rick’s snowplow hit the guardrail “head-on” was not true; he testified that his description of the accident was “slightly off.” However, he testified that even minor blunt trauma can cause a clotting response and thereby increase the risk of a pulmonary embolism.

¶ 70 Dr. Clancy relied on several pieces of evidence to determine that Rick suffered trauma in the accident. Dr. Clancy noted that the accident reports stated that the snowplow and guardrail were severely damaged, which led Dr. Clancy to find that the impact was sufficient to cause trauma. Dr. Clancy relied on the deposition of Kevin Emmelkamp in a separate district court case, in which he testified that Rick stated that he struck his chest and abdomen in the snowplow’s cab during the accident. Dr. Clancy also relied on an affidavit from Herman, in which she stated that Rick said he needed the appointment for a “work-related injury.” Dr. Clancy also relied on the reports from KM and AM that Rick told them he had low-back and leg pain after the accident. Dr. Clancy also relied on MaryShaun’s report that Rick was in pain and took ibuprofen.

¶ 71 Second, Dr. Clancy testified that Rick’s sedentariness following the accident was a cause. Dr. Clancy explained that the sedentary nature of Rick’s work contributed to the development of his pulmonary embolism because his blood was clotting when he was sitting in the snowplow. Dr. Clancy determined that Rick spent a significant amount of time driving a snowplow in the days after his accident. Dr. Clancy explained that neither operating the clutch nor getting out of the snowplow every hour to hour and a half would make a difference. He explained: “walking around the truck a couple of times doesn’t really stop the process of blood clotting. Because remember, his body has been injured. So that thermostat that’s going to increase the stickiness of his blood has been turned up.”

¶ 72 Dr. Clancy concluded that Rick would not have had a pulmonary embolism had the February 8, 2016, trauma not occurred, and that Rick would not have died but for the accident. Dr. Clancy explained that there was no other reasonable explanation for Rick's pulmonary embolism. Dr. Clancy explained that there is a temporal relationship between Rick's accident and his pulmonary embolism. He testified that "the typical time for a pulmonary embolism to show up after trauma is five to seven days." Dr. Clancy explained that the only other risk factor that Rick had was his weight, which Dr. Clancy described as creating only "a slight increase" in risk.

¶ 73 Dr. Clancy concluded that this is not a "complicated case." He explained:

[Rick is] in an accident. He hurts himself. How do we know he hurt himself? He tells people he hurt himself. He calls the chiropractor. He's taking extra medicine. He tells his daughters. You and I haven't talked about that. They're going to be here this afternoon, but I talked to them about it. And they said, yeah, he was hurting, all right.

He took a day off, which is not — you know, this is a good time to make money for the family. He took a day off because he didn't feel well. The people in the shop said, yes, you know, severe damage to the truck and to the guardrail. One of his coworkers said Rick told me his body struck the steering wheel. The truck's going 45 miles an hour and he hurt himself.

He calls the chiropractor because he's in pain. He's taking extra medicine. I haven't even mentioned something that [KM] told me; that he had fished out an old TENS unit and was trying to make it work.

And then six days after the injury and, again, pulmonary embolisms are typically five to seven — he gets up after sleeping Sunday morning, walks into the kitchen and collapses, goes to the hospital, pulmonary embolism, can't be resuscitated and dies. Now, that's not a complicated story to me.

Alan F. Barker, MD

¶ 74 At trial, Dr. Barker "modified" his cause-of-death opinion and acknowledged that Rick died because of a pulmonary embolism. Although Dr. Barker stated in his report that there was "no objective information to firmly establish the cause of death," he also conceded that the cardiac ultrasounds showed objective medical evidence of a pulmonary embolism.

¶ 75 However, Dr. Barker reiterated his opinion that Rick's accident "played no role in the causality or contribution to his pulmonary embolism and death." Dr. Barker reached his opinion for two reasons.

¶ 76 First, Dr. Barker determined that Rick did not suffer sufficient trauma in the accident to lead to a pulmonary embolism. Dr. Barker testified that trauma to the low back and legs creates the highest risk of developing a pulmonary embolism, but that it must be “major” trauma. He testified:

It’s usually extensive trauma in which somebody is bedridden, or multiple fractures of their lower extremity. Minor trauma is rarely considered a cause. I think that’s an important consideration here.

Dr. Barker testified that the amount of trauma necessary to result in a pulmonary embolism would “virtually always” result in physical evidence on the body, such as lacerations and bruises. When asked about Kevin Emmelkamp’s testimony that Rick said he hit his chest on the steering wheel, Dr. Barker testified that chest trauma rarely leads to blood clots and when it does, it is “major” chest trauma, the severity of which is evidenced by objective findings such as rib fractures, bruises, and a collapsed lung.

¶ 77 Dr. Barker testified that there was “no evidence of medical trauma . . . to Mr. Mize” and no objective medical findings that he suffered an injury on February 8, 2016. Dr. Barker reasoned that if Rick had suffered trauma, he would have sought “medical attention.” Given Rick’s longstanding relationship with Dr. Lundgren, Dr. Barker explained: “I would have anticipated, since it’s his closest relationship, he might have said, I’ve got to get in to see you, or sought some kind of medical or other kind of encounter if there was some kind of medical injury or trauma.” Dr. Barker also based his opinion that Rick did not suffer sufficient trauma on the fact that he was able to work every scheduled shift but one following his accident. Dr. Barker thought Rick did not work on Thursday, February 11, 2016, because he was “ill.”

¶ 78 Second, Dr. Barker determined that Rick was not sufficiently sedentary to increase the risk of a pulmonary embolism. Dr. Barker testified that it would take five to seven hours of continuous sitting without leg movement to increase the risk of developing a deep vein thrombosis and that, for a moderately healthy person, driving for an hour and a half does not increase the risk. Dr. Barker also determined that Rick engaged in a number of activities that would eliminate the risk, including getting in and out of the snowplow. He thought that Rick got out of his snowplow every 40 to 60 minutes.

¶ 79 In sum, Dr. Barker testified that, among 55-year-old males who are relatively healthy, approximately 40% of pulmonary emboli are idiopathic. He concluded that Rick’s case fell into this category.

Resolution of Main Factual Disputes

Medical Causation

¶ 80 When weighing conflicting medical opinions, this Court considers many factors, including the quality of evidence upon which the physicians based their respective opinions and whether any physician is biased.⁴

¶ 81 This Court gives the greatest weight to Dr. Majxner's, Dr. Patterson's, and Dr. Clancy's causation opinions. This Court gives less weight to Dr. Fancher's causation opinion because it is unknown what information he had in reaching it. This Court gives no weight to Dr. Barker's opinions. This Court apportions weight in this way for three reasons.

¶ 82 First, this Court is convinced from Dr. Patterson's, Dr. Majxner's, and Dr. Clancy's testimony, and from Dr. Fancher's report, that minor trauma such as that suffered by Rick can cause hypercoagulability and that sitting uninterrupted for an hour to two hours further increases the risk of developing blood clots, thereby increasing the risk of a pulmonary embolism. Indeed, even though Dr. Majxner did not see lacerations or bruising on Rick's body in the ER, he suspected at that time that Rick had recently been in an accident, thereby showing that in a treatment setting, Dr. Majxner did not think that trauma needed to be major to result in a pulmonary embolism. This Court does not make its findings simply by siding with the position taken by the majority of physicians.⁵ However, Dr. Barker did not provide any explanation or support as to why his thoughts on the causes of pulmonary embolisms differed so greatly from Dr. Clancy's, Dr. Patterson's, Dr. Majxner's, and Dr. Fancher's. This Court is convinced that Dr. Barker's thoughts that trauma must be "major" and that a person must sit uninterrupted for at least 5 hours to increase the risk of a pulmonary embolism are out of the mainstream.

¶ 83 Second, this Court gives weight to Dr. Patterson's, Dr. Majxner's, and Dr. Clancy's testimony and causation opinions because their testimony and opinions are based on the

⁴ See *Bain v. Liberty Mut. Fire Ins. Co.*, 2004 MTWCC 45, ¶ 135 ("In assessing the medical opinions I take into consideration, among other things, (1) whether the opining physician reviewed the claimant's medical records before reaching his or her conclusions; (2) in cases where actual examination of a claimant is important, whether the physician physically examined the claimant; (3) the professed or obvious biases of the physician; (4) the specific areas of expertise of the physician; (5) peer reviewed articles authored by the physician, particularly in the subject area in which opinions are rendered; (6) the physician's standing among peers in the specialized medical area involved in the opinions; (7) the physician's specific analysis in the case; (8) the physician's consideration and evaluation of other explanations for the claimant's condition; (9) the accuracy of the facts upon which the physician's opinions are based; and (10) medical and scientific literature brought to the Court's attention which tends to support or contradict the physician's conclusions."). See also *Floyd v. Zurich Am. Ins. Co. of Ill.*, 2017 MTWCC 4, ¶ 47 (citation omitted) (explaining that when weighing medical opinions, this Court considers "such factors as the relative credentials of the physicians and the quality of evidence upon which the physicians based their respective opinions").

⁵ See, e.g., *Neisinger v. New Hampshire Ins. Co.*, 2020 MTWCC 4, ¶ 40 (ruling that the opinion of a physician was entitled to greater weight than that of two other physicians and two chiropractors because it was based upon better evidence).

evidence. They understood that Rick suffered physical insult to his body in the accident, as evidenced by his report that his body slammed into the cab and his increased low-back pain, which caused his blood to become hypercoagulable and clots to form in his veins. Although, at one time, Dr. Clancy and Dr. Majxner thought Rick's accident was a head-on collision, both confirmed that the actual collision, between the wing and the guardrail, would still cause sufficient trauma to put Rick in a hypercoagulable state. Moreover, Dr. Patterson, Dr. Majxner, and Dr. Clancy also understood that Rick sat in his snowplow for up to two hours at a time and that in the days following his accident, he spent a considerable amount of time plowing, which caused his clots to enlarge.

¶ 84 In contrast, Dr. Barker's opinions are not supported by the evidence. Dr. Barker's statement that there is "no evidence" that Rick suffered an "injury" or "insult" in his accident is baseless. Although Rick did not report an injury to MDT, he reported that he slammed into the side of the cab to AM and KM and the onset of significant pain to AM, KM, MaryShaun, and Herman. Moreover, Rick called Dr. Lundgren's office for an appointment because of the increase in his low-back pain caused by the accident, the very action Dr. Barker said he would have expected Rick to take if he had suffered trauma in the accident. Dr. Barker's conjecture that Rick called Lundgren Chiropractic for a regular appointment to treat his longstanding back pain was completely undercut by AM's, KM's, and Herman's credible testimony; it is evident that Rick called for an appointment because his accident caused a significant increase in his low-back pain. Although Rick worked all but one of his shifts after his accident, the evidence shows that Rick simply worked through his pain, except for Thursday, February 11, 2016. There is no evidence supporting Dr. Barker's speculation that Rick did not work that day because he was "ill" — i.e., because he had a cold or the flu. It is evident that Rick did not work that day because of his low-back pain. Moreover, Dr. Barker's statement that Rick was "active" at work in the days following his accident is without support. Although MDT did not keep detailed records of what Rick did each day, the evidence shows that Rick started each morning with a two-hour drive in his snowplow and that he spent a substantial amount of time in the days after his accident plowing, including the two days before his death.

¶ 85 Finally, this Court is convinced that Dr. Barker's bias is the reason he ignored and rejected the evidence indicating that Rick sustained trauma in the accident and the evidence that he was sedentary. This Court has previously condemned the "use of argumentative and slanted introductory letters to IME physicians," warned that "[s]uch letters may undermine the credibility of the IME," and explained, "The more slanted the presentation of so-called 'factual' material, the less confidence the Court is likely to have in the expert's opinion. The hazard is greater where the facts are misstated or mischaracterized."⁶ Keltz's testimony that she was not trying to "characterize" the evidence for Dr. Barker in her cover letter was not credible. The obvious purpose of her cover letter — which was slanted, argumentative and, through omissions, misleading — was to obtain medical opinions that contradicted Dr. Clancy's. This Court does not have

⁶ *Davis v. Credit General Ins. Co.*, 2000 MTWCC 48, "Held" paragraph, ¶ 59.

confidence in Dr. Barker's opinions because he steadfastly stuck to State Fund's script, as set forth in Keltz's cover letter, even when shown evidence undercutting Keltz's statement of "facts."

¶ 86 Dr. Barker's bias was also evidenced by his statement in his report that there was "no objective information to firmly establish the cause of death," the intent of which was to support State Fund's denial of liability. At trial, Dr. Barker acknowledged that he had no basis to question Dr. Majxner's and Dr. Kuehl's diagnosis of a pulmonary embolism. It was evident that Dr. Barker "modified" his cause-of-death opinion because it was unsupportable, and he did not want to be cross examined on that opinion. This Court is unlikely to give weight to experts who create an issue where none exists.

¶ 87 Accordingly, based on all the evidence and Dr. Patterson's, Dr. Majxner's, and Dr. Clancy's causation opinions, this Court finds as follows:

¶ 87a Rick did not have a preexisting blood clotting disorder.

¶ 87b Rick did not have blood clots in his veins before his crash on February 8, 2016.

¶ 87c Rick's crash on February 8, 2016, caused sufficient physical trauma to trigger a clotting response, i.e., to cause Rick's blood to become hypercoagulable.

¶ 87d Rick's hypercoagulable state caused blood clots to form in his veins.

¶ 87e Rick's blood would not have become hypercoagulable and the blood clots would not have formed but for the crash.

¶ 87f Rick was sufficiently sedentary in the days following his crash to cause his clots to enlarge.

¶ 87g On the morning of Sunday, February 14, 2016, a blood clot dislodged and travelled to Rick's heart and blocked his pulmonary artery, thereby becoming a pulmonary embolism.

¶ 87h Dr. Majxner and Dr. Kuehl saw objective medical evidence of a pulmonary embolism in the ER, including the cardiac ultrasounds which showed clots inside Rick's enlarged right ventricle.

¶ 87i Rick died as a direct result of his pulmonary embolism.

¶ 87j Rick's accident was the primary cause of his pulmonary embolism under § 39-71-119(5), MCA; i.e., his accident was greater than 50% of the cause of his pulmonary embolism and resulting death.

Reasonableness

¶ 88 The issue of whether an insurer's denial of liability was reasonable is an issue of fact.⁷

¶ 89 MaryShaun argues that State Fund did not conduct an adequate investigation and asserts that if it had, it would have found evidence from which the only conclusion was that Rick's death was a compensable injury. This Court agrees with MaryShaun that State Fund's investigation of the facts was amateurish. However, in *Marcott*, the Montana Supreme Court explained: "In the final analysis, it remains the claimant's burden to prove the compensability of his injury by a preponderance of the evidence."⁸ The court also explained that an insurer does not have an "affirmative duty to ask the claimant specific follow-up questions to uncover facts additional to, or different from, those provided by the claimant in an effort to establish facts upon which the compensability of the injury might be more clear."⁹

¶ 90 Here, there was a legitimate dispute as to whether MaryShaun had sufficient medical causation evidence to prove her case. Before litigation, MaryShaun relied on Dr. Clancy's and Dr. Majxner's causation opinions, as set forth in their affidavits. However, based on the information MaryShaun and her attorneys provided to Dr. Clancy and Dr. Majxner, they thought that Rick's accident was more severe than it was, which was part of the reason they thought that Rick suffered sufficient trauma in the accident to cause a clotting response that resulted in his pulmonary embolism. Moreover, Dr. Majxner's record from the ER states that MaryShaun told him that Rick was not feeling poorly before he collapsed, thereby creating an issue as to whether Rick suffered any trauma in the accident. Although this Court ultimately found that Dr. Clancy's and Dr. Majxner's causation opinions were persuasive, it was reasonable for State Fund to assert that their opinions were not entitled to any weight because the bases of their opinions were inaccurate. As a final point, the evidence which MaryShaun asserts that State Fund would have discovered, which was evidence that Rick hit his chest into the steering wheel and that he called Lundgren Chiropractic for an appointment, would not have conclusively proved her case. Thus, this Court finds that State Fund's denial of liability was reasonable.

⁷ *Marcott v. La. Pac. Corp.*, 275 Mont. 197, 203, 911 P.2d 1129, 1133 (1996) (citing *Stordalen v. Ricci's Food Farm*, 261 Mont. 256, 258, 862 P.2d 393, 394 (1993)).

⁸ *Marcott*, 275 Mont. at 212, 911 P.2d at 1138 (internal citation omitted).

⁹ *Marcott*, 275 Mont. at 211, 911 P.2d at 1138.

CONCLUSIONS OF LAW

¶ 91 This case is governed by the 2015 version of the WCA because that was the law in effect at the time of Rick’s alleged industrial injury.¹⁰

Issue One: Did Donald “Rick” Mize suffer an injury, arising out of and in the course of his employment on February 8, 2016?

¶ 92 Section 39-71-119, MCA, states, in relevant part:

(1) “Injury” or “injured” means:

(a) internal or external physical harm to the body that is established by objective medical findings;

(b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or

(c) death.

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

(d) caused by a specific event on a single day or during a single work shift.

...

(5)(a) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition.

(b) “Primary cause”, as used in subsection (5)(a), means a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition.

¶ 93 Section 39-71-407, MCA states, in relevant part:

(3)(a) An insurer is liable for an injury, as defined in 39-71-119, only if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or

(ii) a claimed injury has occurred and aggravated a preexisting condition.

¹⁰ *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

(b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.

.....
(10) An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker's condition to the original injury.

¶ 94 Section 39-71-116(22), MCA, states, “[o]bjective medical findings’ means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.”

¶ 95 In *Ford v. Sentry Casualty Co.*, the Montana Supreme Court held that under the 1995-present version of these statutes, claimants have the burden of proving an injury with objective medical findings and causation with medical expertise or opinion.¹¹

¶ 96 Here, MaryShaun carried her burden of proving the four elements of a case for death benefits under these statutes.

¶ 97 First, because Rick died, MaryShaun proved an injury under § 39-71-119(1)(c), MCA.

¶ 98 Second, MaryShaun proved Rick’s death, and the cause of his death, with objective medical evidence. The cardiac ultrasounds showed an enlarged right ventricle and clots therein, which are objective medical findings of a pulmonary embolism.

¶ 99 Third, MaryShaun proved that Rick was in an accident under § 39-71-119(2), MCA. In *Wall v. National Union Fire Ins. Co.*, this Court ruled that a claimant who felt excruciating pain in his knee after stepping 12 to 18 inches off a ladder to the ground “clearly” suffered an unexpected traumatic incident, thereby satisfying the requirement of an “accident.”¹² Likewise, Rick suffered an unexpected traumatic incident when the snowplow’s wing unexpectedly crashed into the guardrail, thereby causing his body to suddenly and unexpectedly shift and hit the cab’s interior. This incident is identifiable by time and place of occurrence as it occurred around 6:00 a.m. on February 8, 2016, at the 38 mile marker on Highway 191. Moreover, the incident is identifiable by the part of the body affected because this Court has found that when Rick’s body hit the truck cab’s interior, his blood became hypercoagulable and he developed clots, at least one of which traveled to his heart on the morning of February 14, 2016, and blocked his pulmonary artery. Finally, the incident was caused by a specific event on a single day and during a

¹¹ *Ford*, ¶¶ 44-49.

¹² 1998 MTWCC 11, ¶¶ 14, 15, 62.

single work shift because it was caused by a collision between Rick's wing plow and the guardrail that occurred during his shift.

¶ 100 Fourth, MaryShaun proved with medical causation opinion that Rick's accident was the primary cause of his death, thereby satisfying § 39-71-119(2) and (5) and -407(3) and (10), MCA. In *Cheetham v. Liberty Northwest Ins. Corp.*, this Court addressed the "primary cause" requirement for conditions such as pulmonary embolisms in § 39-71-119(5), MCA, as amended in 1995.¹³ While strenuously working in hot weather, Cheetham felt light headed, felt tightness in his chest, and had difficulty breathing.¹⁴ After being life flighted to a hospital, he was diagnosed with an aortic dissection, which is a tear in the inner wall of the aorta, which compromises circulation.¹⁵ This Court explained that -119(5)(a) requires "proof that the industrial accident was the primary cause of claimant's cumulative condition."¹⁶ This Court also explained that, for a claim to be compensable, -119(5)(b) requires the claimant to prove with a physician's "apportionment opinions" that the accident contributed at least 51% to the condition.¹⁷ Applying these standards, this Court ruled that Cheetham's aortic dissection was compensable, notwithstanding that his hypertension had caused preexisting degeneration of his aortic wall that made him susceptible to dissection. This Court based its decision on the apportionment opinions of two physicians, who testified that Cheetham's overexertion at work contributed 51% or more to the dissection when compared to his preexisting aortic disease.¹⁸

¶ 101 Here, MaryShaun met her burden of proving that Rick's accident was the primary cause of his "cumulative condition," which was his pulmonary embolism and resulting death. This Court has found that Rick did not have a blood clotting disorder and was not in a hypercoagulable state before the accident, and Dr. Patterson, Dr. Majxner, and Dr. Clancy persuasively testified that Rick's blood would not have become hypercoagulable and that he would not have developed the clot that became a pulmonary embolism but for his accident. And, Dr. Patterson persuasively testified, and Dr. Clancy persuasively asserted, that Rick's accident was greater than 50% of the cause of his pulmonary embolism and resulting death.

¶ 102 Accordingly, MaryShaun proved that Rick's death arose out of and in the course of his employment on February 8, 2016.¹⁹ She is therefore entitled to death benefits.

¹³ 1997 MTWCC 37. For the Montana Supreme Court's interpretation of the prior version of § 39-71-119(5), MCA, see *Gaumer v. Mont. Dep't of Highways*, 243 Mont. 414, 795 P.2d 77 (1990) (interpreting the 1987-1993 version of the subsection).

¹⁴ *Cheetham*, Findings of Fact, ¶¶ 4-7.

¹⁵ *Cheetham*, Findings of Fact, ¶¶ 9-10.

¹⁶ *Cheetham*, Conclusions of Law, 2 (citations omitted).

¹⁷ *Cheetham*, Conclusions of Law, 2.

¹⁸ *Cheetham*, Findings of Fact, ¶¶ 18-19, Conclusions of Law, 2.

¹⁹ See *Wood v. Ulmer's Car & Truck*, 236 Mont. 353, 769 P.2d 1264 (1989) (holding that an injury need not materialize at work so long as the requisite degree of causation between it and the accident is shown and that

¶ 103 State Fund argues that MaryShaun did not prove that Rick suffered an injury nor that he was in an accident under § 39-71-119, MCA. Nevertheless, its arguments are not persuasive.

¶ 104 Although Rick died, State Fund asserts that MaryShaun was required to prove that he suffered an injury under § 39-71-119(1)(a), MCA. State Fund maintains that the injury for which MaryShaun seeks benefits is Rick's trauma and that his pulmonary embolism and resulting death are not themselves injuries, but the effects of his claimed injury. Because no physician saw objective medical evidence of trauma, such as bruises or lacerations, State Fund maintains that MaryShaun did not carry her burden of proving that Rick suffered an injury under -119(1)(a).

¶ 105 Notwithstanding, State Fund's argument fails under the plain language of the WCA. Under § 39-71-407, MCA, a claimant is required to prove only one injury, the injury for which she seeks benefits. Section 39-71-407(3)(a), MCA, states, in relevant part, that "[a]n insurer is liable for **an injury** . . . only if **the injury** is established by objective medical findings and if the claimant establishes that it is more probable than not that: (i) **a claimed injury** has occurred"²⁰ The injury for which MaryShaun seeks benefits is not Rick's trauma. Rather, the injury for which she seeks benefits is Rick's death, which is, by itself, an injury under § 39-71-119(1)(c), MCA. Because the word between -119(1)(b) and -119(1)(c) is "or," MaryShaun is correct that subsection -119(1) is disjunctive and that she need only prove that Rick had an injury under one part of -119(1).²¹ Because Rick died, he had an injury under -119(1)(c), which is sufficient to prove that element of her claim for death benefits.

¶ 106 Despite State Fund's claim, this Court's decision in *TG v. Montana Schools Group Ins. Authority*²² does not support its argument that when claimant asserts that a blow to the body has caused an internal injury, she is required to prove trauma with objective medical evidence, such as bruising or lacerations, **and** prove the internal injury with objective medical evidence. TG, who worked as an aide in a special education classroom,

substantial evidence supported that claimant's heart attack was a compensable injury where the event that deprived his heart of enough oxygen to continue pumping probably occurred when he was exposed to carbon monoxide at work the previous day).

²⁰ (Emphasis added). See also § 39-71-407(1), MCA (stating, "For workers' compensation injuries, each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer covered under plan No. 1, plan No. 2, and the state fund under plan No. 3 that it insures who receives **an** injury arising out of and in the course of employment or, in the case of death from the injury, to the employee's beneficiaries, if any."). (Emphasis added).

²¹ See, e.g., *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶¶ 12, 14, 395 Mont. 160, 437 P.3d 142 (citations omitted) (internal quotation marks omitted) (explaining that when subsections of statute are disjunctive, "findings that satisfy one subsection are sufficient"). See also *Gray v. Mont. State Fund*, 2014 MTWCC 2, ¶ 26 (ruling that the word "or" in a statutory list makes the statute disjunctive and, therefore, that one element in the list is sufficient to satisfy the statute).

²² 2018 MTWCC 1.

had preexisting fibromyalgia.²³ A special needs student hit and pinched her on two occasions, which resulted in bruising that resolved before her physician observed it.²⁴ She claimed, *inter alia*, that the assaults aggravated her preexisting fibromyalgia and that the aggravation was a compensable injury under §§ 39-71-119(1)(a) and -407(3)(a)(ii), MCA.²⁵ Although this Court recognized that bruising can serve as an objective medical finding of an injury,²⁶ this Court did not rule against TG because her bruises had resolved by the time she saw her physician. Rather, this Court ruled that TG did not prove that she suffered a compensable injury under §§ 39-71-119(1)(a) and -407(3)(a)(ii), MCA, because she did not prove the alleged aggravation of her fibromyalgia with any objective medical evidence.²⁷ This Court based its decision on TG's physician's finding that the objective medical evidence of her fibromyalgia was "unchanged."²⁸

¶ 107 A fair reading of *TG* shows that this Court did not rule that TG failed to prove an injury on the grounds her physician did not see her bruises. It is evident that if TG had been able to prove that her fibromyalgia had worsened with objective medical evidence, and that the cause of the worsening was the assaults with persuasive medical opinion testimony, then this Court would have ruled that she had a compensable injury under §§ 39-71-119(1)(a) and -407(3)(a)(ii), MCA, and *Ford*, even though her bruises had resolved by the time she saw her physician. Thus, *TG* does not support State Fund's argument that MaryShaun did not meet her burden of proving an injury because she did not introduce objective medical evidence of Rick's trauma.²⁹

¶ 108 Moreover, assuming for the sake of argument that MaryShaun was required to prove that Rick suffered an injury under § 39-71-119(1)(a), MCA, she carried her burden. If this case is analyzed under -119(1)(a), the injury — i.e., the "internal or external physical harm to the body" — for which MaryShaun seeks benefits is the blood clot that became a pulmonary embolism, which was a latent injury — i.e., a "hidden" or "invisible" injury³⁰ — until the morning of Sunday, February 14, 2016, when Dr. Majxner and Dr. Kuehl diagnosed it with objective medical evidence.

²³ *TG*, ¶ 3.

²⁴ *TG*, ¶¶ 8, 10, 31, 32.

²⁵ *TG*, ¶ 1.

²⁶ *TG*, ¶ 31.

²⁷ *TG*, ¶ 32.

²⁸ *TG*, ¶ 32.

²⁹ See also *Cheetham*, Conclusions of Law, 2 (ruling that Cheetham's aortic dissection was an injury under § 39-71-119(1)(a) and (2), MCA, because it was internal physical harm that was established by objective medical findings, even though there was no objective medical evidence of his overexertion, which caused his aortic dissection).

³⁰ See § 39-71-601(2)(b), MCA (stating that the statute of limitations for filing a workers' compensation claim is extended in cases of "latent injury"). See also *Tinker v. Mont. State Fund*, 2008 MTWCC 33, ¶ 28, *aff'd* 2009 MT 218, 351 Mont. 305, 211 P.3d 194 (citation omitted) (defining "latent injury" as a "hidden or invisible" injury).

¶ 109 Finally, there is no merit to State Fund’s argument that MaryShaun failed to prove that Rick was in an accident under § 39-71-119(2), MCA. State Fund maintains that because MaryShaun did not present objective medical evidence of Rick’s trauma, she did not prove the part of his body that was affected in the collision, as required by -119(2)(c). However, here again, the injury for which MaryShaun seeks benefits is Rick’s death, which was caused by a pulmonary embolism. MaryShaun proved that the part of Rick’s body that was affected in his unexpected traumatic incident was his blood, which became hypercoagulable.

¶ 110 In sum, MaryShaun met her burden of proving that Rick’s death arose out of the course of his employment and is a compensable injury under the WCA. State Fund is therefore liable for death benefits.

Issue Two: Did Donald “Rick” Mize suffer an occupational disease, arising out of and in the course of his employment, which began on February 8, 2016, and resulted in his death on February 14, 2016?

¶ 111 Because of this Court’s resolution of Issue One, Issue Two is moot.

Issue Three: Is MaryShaun entitled to her attorney fees, a penalty, and/or her costs?

¶ 112 Section 39-71-611(1), MCA, states:

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.

¶ 113 Section 39-71-2907(1), MCA, provides, in relevant part:

The workers’ compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

...
(b) prior or subsequent to the issuance of an order by the workers’ compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

¶ 114 MaryShaun is not entitled to her attorney fees nor a penalty under these statutes because this Court has found that State Fund’s denial of liability was reasonable.

¶ 115 MaryShaun asserts that this Court should assess a penalty and award her attorney fees because State Fund's attorneys improperly hindered her efforts to interview MDT employees. While this Court can sanction attorneys for improper conduct during litigation,³¹ neither § 39-71-611, MCA, nor § 39-71-2907, MCA, allow this Court to assess a penalty and attorney fees for such misconduct; rather, these statutes provide that this Court can assess a penalty and attorney fees only when the insurer's refusal to pay or delay in paying benefits was unreasonable. Again, State Fund's denial of liability was reasonable. Accordingly, MaryShaun is not entitled to attorney fees under § 39-71-611(1)(c), MCA, nor a penalty under § 39-71-2907(1)(b), MCA.

JUDGMENT

¶ 116 Rick sustained an injury which arose out of and in the course of his employment on February 8, 2016; thus, State Fund is liable for death benefits.

¶ 117 MaryShaun is not entitled to her attorney fees under § 39-71-611(1)(c), MCA, nor a penalty under § 39-71-2907(1)(b), MCA.

¶ 118 MaryShaun is entitled to her costs under § 39-71-611(1), MCA. After awarding MaryShaun her costs in accordance with ARM 24.5.342, this Court will certify this Judgment as final.

DATED this 6th day of May, 2020.

/s/ DAVID M. SANDLER
JUDGE

c: Anthony F. Jackson, Monte D. Beck, and Michael G. Black
Thomas E. Martello and Nick Mazanec

Submitted: January 15, 2019

³¹ See, e.g., § 39-71-2901(2), MCA (stating, in relevant part, that the "workers' compensation court has power to: . . . (b) provide for the orderly conduct of proceedings before it and its officers . . ."). See also ARM 24.5.306(2)(i) (providing that the WCC can sanction attorneys for misconduct); ARM 24.5.326 (providing that WCC can sanction attorneys for discovery abuse). This Court makes no decision regarding whether State Fund's attorneys engaged in misconduct.