IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2014 MTWCC 12

WCC No. 2012-2947

NICK NEWLON

Petitioner

vs.

TECK AMERICAN INC (FORMERLY COMINCO)

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COURT – 01/06/15

AFFIRMED – 11/10/15

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: In 1996, Petitioner settled numerous workers' compensation claims against his previous employer with the understanding that he would retain lifetime medical benefits for his left-knee and back conditions. Petitioner did not obtain any treatment for his knee from 2000 until 2007. When Petitioner resumed treatment, Respondent paid until 2011, when it asserted a defense under § 39-71-704(1)(d), MCA, alleging that it was relieved of further liability because Petitioner had not used his medical benefits for more than 60 consecutive months. Petitioner contends that his medical benefits for his knee condition remain open from a claim which predated the addition of the 60-month limitation to the statute, or alternatively, that Respondent is equitably estopped from asserting the 60-month rule in this case. Respondent argues that Petitioner's current knee problems are due to his current employment, or alternatively, that Petitioner's claim is barred by a statute of repose, a statute of limitations, estoppel, or laches.

Held: Petitioner's claim is properly considered under the 1991 WCA, which contains a 60-month provision. However, Respondent is equitably estopped from asserting a defense under § 39-71-704(1)(d), MCA. Respondent has not proven that Petitioner's current knee condition is due to a superseding intervening cause. Respondent has not proven that Petitioner's claim is barred by a statute of repose, statute of limitations, estoppel, or laches. Petitioner is entitled to his costs.

Topics:

Statutes and Statutory Interpretation: Applicable Law. The Court rejected Petitioner's argument that his claim should be governed by the version of the WCA in effect in 1978, when Petitioner did not have a workers' compensation claim in 1978; rather, the insurer had referenced that year in some of its correspondence. Petitioner cited no authority for the proposition that a claim should be governed by an unsubstantiated date of injury which came about from an apparent clerical error.

Injury and Accident: Subsequent Injury. Even though the same insurer was at risk for Petitioner's initial industrial injury and his subsequent alleged injuries, this does not remove the claim from the usual analysis used by the courts in determining whether a subsequent injury is considered a new injury for liability purposes. The key question is whether Petitioner reached MMI from the earlier injury prior to suffering the later injury.

Injury and Accident: Subsequent Injury. While evidence regarding two industrial injuries Petitioner suffered in the 1970s was sparse, the Court concluded that he must have reached MMI for those injuries prior to suffering a new injury in 1991 because he continued to work in his time-of-injury position for approximately 15 years and no evidence indicated that he did ***not*** reach MMI in between. The Court therefore reasoned that Petitioner's current problems would be attributable to the 1991 industrial accident.

Proof: Burden of Proof: Affirmative Defenses. Where Respondent alleged that it was relieved of liability because of a superseding intervening cause, but offered no support of that defense, the Court rejected Respondent's contention. Once Petitioner met his burden of proving a work-related injury with evidence that the injury is the cause of his present disability, the burden to prove an affirmative defense against that claim shifted to the insurer.

Equity: Equitable Estoppel. Where Petitioner set forth an argument for each element of equitable estoppel and Respondent did not dispute that Petitioner had satisfied the elements, the Court concluded that Petitioner had met the elements of equitable estoppel.

Jurisdiction: Dispute. Where Petitioner sought the continuation of medical benefits and Respondent denied liability for those benefits, a dispute over benefits exists so as to satisfy this Court's jurisdictional requirements.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-601. Section 39-71-601(2), MCA, applies to the Department and does not refer to the powers of this Court. Therefore, the Court rejected Respondent's argument that it precludes this Court from applying equitable estoppel in circumstances not enunciated within the statute.

Jurisdiction: Estoppel. The Court rejected Respondent's argument that it lacks the jurisdiction to use equitable estoppel as a remedy, noting that the Montana Supreme Court endorsed the use of this remedy in this Court in several decisions, including *Mellem v. Kalispell Laundry & Dry Cleaners*, 237 Mont. 439, 443, 774, P.2d 390, 392 (1989), *Beery v. Grace Drilling*, 260 Mont. 157, 165-66, 859 P.2d 429, 434-35 (1993), and *Selley v. Liberty Northwest Ins. Corp.*, 2000 MT 76, ¶¶ 14-30, 299 Mont. 127, 998 P.2d 156.

Jurisdiction: Workers' Compensation Court. The Court rejected Respondent's argument that it lacks the jurisdiction to use equitable estoppel as a remedy, noting that the Montana Supreme Court endorsed the use of this remedy in this Court in several decisions, including *Mellem v. Kalispell Laundry & Dry Cleaners*, 237 Mont. 439, 443, 774, P.2d 390, 392 (1989), *Beery v. Grace Drilling*, 260 Mont. 157, 165-66, 859 P.2d 429, 434-35 (1993), and *Selley v. Liberty Northwest Ins. Corp.*, 2000 MT 76, ¶¶ 14-30, 299 Mont. 127, 998 P.2d 156.

Remedies: Estoppel. Medical benefits may constitute the basis for equitable estoppel.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-704. Where Respondent did not dispute that Petitioner met the six factors of equitable estoppel, but rather raised jurisdictional arguments against estoppel which this Court rejected, the Court concluded that Respondent was equitably estopped from denying payment of Petitioner's medical benefits under § 39-71-704(1)(d), MCA.

¶ 1 The trial in this matter occurred on October 9, 2013, at the Workers' Compensation Court. Petitioner Nick Newlon appeared and was represented by Margaret Dufrechou. Larry W. Jones represented Respondent Teck American, Inc. (formerly Cominco) (Teck American).

¶ 2 Exhibits: I admitted Exhibits 3 through 12 without objection. I admitted portions of Exhibits 1 and 2 without objection and admitted the remainder of those exhibits over Teck American's objections.

¶ 3 Witnesses and Depositions: Newlon and Connie Newlon were sworn and testified. The parties agreed that the depositions of Newlon, Connie Newlon, and John Michelotti, M.D., can be considered part of the record.

¶ 4 Issues Presented: The parties presented several issues for resolution, which I have restated as follows:

> Issue One: Which version of the Montana Workers' Compensation Act (WCA) governs this dispute;[1]
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> Issue Two: Whether Newlon's claim is barred because of a superseding intervening cause;
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> Issue Three: Whether Teck American is equitably estopped from denying medical benefits under the claim on the basis of the provisions of § 39-71-704(1)(d), MCA (1991);
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> Issue Four: Whether Newlon's claim is barred either by a statute of limitations or a statute of repose;
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> Issue Five: Whether Newlon's claim is barred by estoppel;
>
> Issue Six: Whether Newlon's claim is barred by laches; and
>
> Issue Seven: Whether Newlon is entitled to his costs pursuant to § 39-71-611, MCA.

FINDINGS OF FACT

¶ 5 Newlon testified at trial. I found him to be a credible witness albeit an unreliable historian. Cominco, Teck American's predecessor, hired Newlon as a miner in 1972.

[1] Although the parties did not list this as an issue in the Pretrial Order, the parties noted elsewhere in the Pretrial Order that they could not agree as to which version of the WCA controls this case.

Newlon injured his left knee at some point in the 1970s. Prior to trial, Newlon stated in an affidavit that he had no independent recollection of the dates of his knee injuries, although he remembered the first one occurred in the 1970s.[2] During his deposition, Newlon testified that his first left-knee injury occurred in 1974.[3] At trial, he testified that he injured his left knee at work in 1977 or 1978. He continued to have problems with his left knee after this industrial injury. Newlon testified that his knee would stiffen and sometimes it would give out on him.[4] Newlon testified that he never took time off work because of this knee injury, but he was often in pain.[5]

¶ 6 Newlon estimated that during the time he worked for Cominco, he filed between 10 and 15 workers' compensation claims. Newlon explained that the company's policy required workers to report every injury, no matter how minor.[6] On a few occasions, Newlon filed claims for his left knee. In 1991, he injured his left knee when he fell while handing equipment to a co-worker. Newlon testified that although he reported that injury, it was not a new claim, but was "on the original one."[7]

¶ 7 Connie Marie Newlon (Connie) is married to Newlon.[8] Connie testified at trial. I found her to be a credible witness. Connie testified that Newlon has had ongoing problems with his left knee since his industrial accident in the 1970s, and she cannot recall any time in which he has been symptom-free since then.[9]

¶ 8 On October 3, 1991, Newlon injured his left knee in the course and scope of his employment with Teck American's predecessor Cominco.[10]

¶ 9 Newlon worked for Cominco until the mine closed in 1993.[11] After the mine shut down, Newlon did some construction work in Helena. In 1995, he moved to Elko, Nevada, to work in a gold mine.[12]

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[2] Affidavit of Petitioner, Docket Item No. 42, ¶ 2.

[3] Newlon Dep. 30:17-22.

[4] Trial Test.

[5] Trial Test.

[6] Trial Test.

[7] Trial Test.

[8] Connie Dep. 5:22-25.

[9] Trial Test.

[10] Pretrial Order, Docket Item No. 54, Statement of Uncontested Facts, at 2.

[11] Trial Test.

[12] Newlon Dep. 7:18-25.

¶ 10 On April 7, 1993, and February 14, 1996, Newlon underwent surgery on his left knee.[13] By April 1996, Newlon had reached maximum medical improvement (MMI) from the February 14, 1996, surgery.[14] Newlon continued to have symptoms after the 1996 surgery.[15]

¶ 11 Newlon testified that he did not obtain any further treatment on his knee after he returned to work following the 1996 surgery until he returned to Montana some years later.[16] However, he continued to have problems with his left knee. Newlon testified that he was unable to stand up and put weight on his knee if he knelt on it, and he had trouble with swelling underneath his knee.[17] Newlon also began to have problems with his right knee.[18] Newlon testified that his knees have progressively worsened.[19]

¶ 12 In 1996, Hugh D. Moore, Cominco's assistant manager, contacted Newlon to discuss settlement of all Newlon's existing workers' compensation claims.[20] Moore had been a geologist at Cominco.[21] Newlon, pro sé, agreed to settle all of his claims with the understanding that he would receive $25,000 and that future medical care for his left knee and back would be covered by Cominco's insurer.[22]

¶ 13 Cominco prepared the settlement documents. Newlon signed the documents and Moore forwarded them to the Montana Department of Labor & Industry (Department). Moore enclosed a note which stated, "The special provisions are that the medical is retained by the claimant or left open in the two cases indicated but closed in all others."[23] The caption of the Petition for Compromise and Release Settlement (Petition for Settlement) listed 15 separate claim numbers "AND ANY AND ALL OTHER

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[13] Pretrial Order, Statement of Uncontested Facts, at 2.

[14] Pretrial Order, Statement of Uncontested Facts, at 2.

[15] Pretrial Order, Statement of Uncontested Facts, at 3.

[16] Newlon Dep. 10:9-13.

[17] Newlon Dep. 14:4-13.

[18] Newlon Dep. 15:16-19.

[19] Newlon Dep. 18:15-17.

[20] Pretrial Order, Statement of Uncontested Facts, at 2-3.

[21] Pretrial Order, Statement of Uncontested Facts, at 4.

[22] Pretrial Order, Statement of Uncontested Facts, at 2-3.

[23] Ex. 1 at 6. (Emphasis in original.)

. . . CLAIMS . . . ."[24] The Petition for Settlement included the notation, "MEDICAL RETAINED ON 9/8/83-CAI-13088 (LOWER BACK) AND 1-92-05620-8 (LEFT KNEE)."[25]

¶ 14 Newlon testified that he and Moore never discussed any specific dates of injury for his left-knee claim.[26] They never discussed specific claim numbers, and Newlon stated that he never knew his claim numbers.[27]

¶ 15 Newlon acknowledges that at the time he agreed to the settlement, he was unfamiliar with Montana's workers' compensation law, he knew that Moore was not an attorney, and Moore did not attempt to explain the law to him.[28] Newlon made no attempt to find out what his rights were under the law.[29] At the time Newlon and Moore negotiated the settlement, he and Moore were friends and socialized together. Newlon agrees that Moore did not put any pressure on him to settle his claims. Moore died sometime after the 1996 settlement.[30]

¶ 16 Connie testified that she knew Moore as a social acquaintance, and she knew that Moore and Newlon were negotiating a settlement of Newlon's workers' compensation claims against Cominco.[31] Connie was not involved in their discussions, but Newlon told her that "he would be fully covered the rest of his life."[32]

¶ 17 Newlon testified that when he signed the settlement documents, he anticipated needing further medical treatment for his left knee and low back.[33] He testified that he was only concerned about keeping medical benefits open for his left knee and low back because all of his other work-related injuries had fully healed.[34] Newlon testified that when he asked for medical benefits to remain open on his left knee and low back, he

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[24] Ex. 1 at 8.

[25] Pretrial Order, Statement of Uncontested Facts, at 2-3.

[26] Trial Test.

[27] Trial Test.

[28] Pretrial Order, Statement of Uncontested Facts, at 4.

[29] *Id.*

[30] Pretrial Order, Statement of Uncontested Facts, at 3.

[31] Connie Dep. 8:22 – 9:8.

[32] Connie Dep. 9:9-21.

[33] Newlon Dep. 59:3-6.

[34] Newlon Dep. 59:23 – 60:4.

was not thinking of a specific claim or date of injury, but just that he wanted his left-knee and low-back problems covered.[35]

¶ 18 Newlon testified that when he discussed settling his claim with Moore, Newlon was concerned about future medical treatment for his left knee because he was still having problems with it. By that time, he had had two surgeries and he understood from his medical providers that he would need additional treatment for his left knee in the future.[36] Newlon told Moore that he was willing to settle his claim, but that he wanted "coverage for life." Moore agreed to those terms. Newlon testified that Moore did not tell him that there were any limitations on his lifetime coverage. Newlon explained that when he signed the settlement documents, he did so understanding that he would never have to worry about the expense of medical treatment for his left-knee injury because Cominco was going to cover it for the rest of his life.[37]

¶ 19 Newlon testified that he asked for $25,000 to settle his claim because he believed that was a figure Cominco might agree to. Moore agreed to Newlon's conditions and stated that he would send Newlon the necessary paperwork for the settlement. Newlon testified that he ultimately received papers which contained those terms. He signed the papers and received $25,000 and an agreement that his medical benefits would be covered for the rest of his life. Newlon testified that he was happy with the settlement and believed it was fair.[38]

¶ 20 Newlon testified that he asked for $25,000 because what he really wanted was a guarantee regarding medical coverage, and he thought that if he asked for a small amount of cash, he would be more likely to get the medical coverage he wanted.[39] Newlon did not seek legal advice prior to signing the settlement documents.[40] Newlon testified that he did not think he needed to do so because all he wanted was for his knee and back conditions to be covered, and he understood that he was getting that from the settlement terms.[41] Newlon testified that if he had any reason to believe that he would not receive lifetime medical coverage in exchange for settling, he would not have settled his claim. Newlon explained that prior to settling his claim, Cominco was paying

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[35] Newlon Dep. 60:23 – 61:15.

[36] Trial Test.

[37] Trial Test.

[38] Newlon Dep. 46:3-15.

[39] Newlon Dep. 49:13-20.

[40] Newlon Dep. 53:24 – 54:1.

[41] Newlon Dep. 54:2-7.

his medical bills, so he would have had no incentive to settle if settling would have closed his medical benefits.[42]

¶ 21 At the time of the 1996 settlement, Newlon believed that he would have "lifetime medical benefits" on his left knee.[43] Newlon was not thinking about any specific claim regarding the left knee when he entered into the settlement agreement.[44] The parties agree that Newlon would not have signed the settlement if he had known that he would not have "lifetime medical benefits" on his left knee.[45]

¶ 22 Connie testified that she and Newlon never saved money to pay for future knee surgery because they understood that it would be covered as part of his settlement.[46]

¶ 23 After the 1996 settlement, Newlon did not obtain any medical treatment until 2000.[47] At that time, he was having problems with his left knee. It was unstable and would give out on him. If he knelt, he had to roll onto his side and stretch his legs out before he could stand up because his knee would lock. He was in pain and had swelling in the area underneath his knee. Newlon took ibuprofen for the pain and swelling. Newlon testified that some days were better than others, but he was never symptom-free.[48]

¶ 24 In approximately 2000, Newlon returned to Montana and worked in the construction industry.[49] In 2001, Newlon began working as a groundskeeper for the Montana State Veterans Cemetery at Fort Harrison. He has worked there continuously since then.[50] Newlon testified that the more he walks at work, the more he has knee symptoms, including his knees giving out and throwing him off balance. Newlon testified that his knees give out unpredictably and have done so while he was walking on flat surfaces, such as when grocery shopping.[51] Newlon testified that the walking he does at work at the cemetery has aggravated his knees.[52]

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[42] Newlon Dep. 58:21 – 59:2.

[43] Pretrial Order, Statement of Uncontested Facts, at 4.

[44] *Id.*

[45] *Id.*

[46] Trial Test.

[47] Pretrial Order, Statement of Uncontested Facts, at 3.

[48] Trial Test.

[49] Newlon Dep. 8:1-10.

[50] Pretrial Order, Statement of Uncontested Facts, at 2.

[51] Newlon Dep. 19:20 – 20:8.

[52] Newlon Dep. 23:22-25.

¶ 25 Newlon testified that he did not seek medical treatment for his left knee between 2000 and 2007. He explained that he had difficulty with his insurer in Nevada, and when he returned to Montana, it took months to arrange authorization and a referral to see a doctor. Newlon then received treatment. Newlon testified that if he had known he was in danger of losing his benefits if he did not see a doctor for five years, he would have sought medical treatment sooner, and he believes his symptoms would have justified seeing a doctor because he had ongoing pain.[53]

¶ 26 On April 4, 2007, Will Snider, D.O., saw Newlon, who reported left-knee pain and swelling. Dr. Snider noted that Newlon reported that "this is an old Workman's Comp injury and the case has remained open." Dr. Snider examined Newlon and did not see appreciable swelling but found moderate tenderness at the posterior lateral aspect of the knee. He recommended referral to a local orthopedic specialist for further evaluation and treatment.[54]

¶ 27 Newlon did not obtain further medical treatment until June 2007 when he treated with John Michelotti, M.D. The parties agree that the time between Newlon's medical treatments exceeded 60 months.[55]

¶ 28 On approximately June 11, 2007, Newlon began treating with Dr. Michelotti for left-knee pain and swelling.[56] Dr. Michelotti is board-certified in orthopedic surgery and has a subspecialty board certification in sports medicine.[57] At that time, Newlon reported that his left knee had been doing well and that he had not been experiencing problems with his left knee until approximately two and a half months prior to this appointment.[58] Dr. Michelotti diagnosed him with left-knee osteoarthritis and a left-knee medial meniscus tear.[59] Dr. Michelotti and Newlon decided on a course of conservative care pending approval under his workers' compensation claim.[60]

¶ 29 On June 20, 2007, Tiffany Jaeger-Nystul, Claims Manager for Putman & Associates, approved Dr. Michelotti's Request for Preauthorization.[61] She also wrote to Dr. Michelotti regarding Newlon's June 11, 2007, appointment. Jaeger-Nystul informed

[53] Trial Test.

[54] Ex. 9.

[55] Pretrial Order, Statement of Uncontested Facts, at 3.

[56] Pretrial Order, Statement of Uncontested Facts, at 2.

[57] Michelotti Dep. 6:13-22.

[58] Pretrial Order, Statement of Uncontested Facts, at 2.

[59] Ex. 10 at 1.

[60] Ex. 10 at 2.

[61] Ex. 10 at 3.

Dr. Michelotti that Newlon had injured his left knee and back on November 20, 1978. She noted that Newlon's medical treatment for his left knee had been "sporadic throughout this claim," and asked Dr. Michelotti to clarify whether Newlon's current medical treatment was related to his 1978 industrial injury claim. Dr. Michelotti responded that it was more probable than not that Newlon's need for ongoing medical treatment was related to his November 20, 1978, industrial injury, and explained that Newlon's condition was a progressive deterioration.[62]

¶ 30 Newlon testified that Teck American paid his medical bills when he treated with Dr. Michelotti in 2007, and if he had known that Teck American intended to deny his medical treatment in the future, he would have saved money towards the knee surgery that he knew he would eventually need.[63]

¶ 31 From June 11, 2007, through July 16, 2009, Dr. Michelotti treated Newlon with a series of injections in his left knee and with prescriptions for nonsteroidal anti-inflammatory drugs. Teck American paid for all of this treatment.[64]

¶ 32 Newlon testified that the numbers and letters on the correspondence he received from Teck American did not mean anything to him because he had never seen a case number. He never had a reason to question the accuracy of the company's records.[65] Furthermore, Teck American continued to pay his medical bills.[66]

¶ 33 On October 2, 2009, Jaeger-Nystul, then Claims Examiner for Brentwood Services Administrators, Inc. (Brentwood), wrote to Newlon and informed him that she had scheduled him for an independent medical examination (IME) with Catherine Capps, M.D., for the purpose of addressing future medical treatment for his claim.[67]

¶ 34 On October 29, 2009, Dr. Capps conducted an IME of Newlon. Dr. Capps reviewed medical records related to Newlon's left knee from 1993 forward. She referenced October 3, 1991, as Newlon's date of injury for his left knee.[68] Dr. Capps found Newlon to be "an extremely poor historian," noting that "his history was off by over 20 years" because Newlon believed his knee injury occurred in 1973, not 1993. However, Dr. Capps found Newlon's history not to match the medical records, and,

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[62] Ex. 1 at 14.

[63] Trial Test.

[64] Pretrial Order, Statement of Uncontested Facts, at 3.

[65] Trial Test.

[66] Trial Test.

[67] Ex. 1 at 16.

[68] Ex. 11 at 1-2.

"Finally, I just told him that this is when it occurred and he seemed to be accepting of those facts."[69] Dr. Capps diagnosed Newlon with "[s]tatus post left knee medial meniscal tear with partial medial meniscectomy x2, with residual medial compartment arthrosis."[70] She opined that Newlon had arthritic change in his left knee, partially due to the surgical procedures and partially due to normal aging and genetics.[71] She opined that the left-knee condition was in part related to his 1991 workers' compensation claim.[72]

¶ 35 On January 8, 2010, Jaeger-Nystul approved a Request for Preauthorization from Dr. Michelotti for a series of injections to Newlon's left knee.[73]

¶ 36 On April 27, 2010, Newlon filed a First Report of Injury or Occupation Disease for an occupational disease claim regarding his right-knee condition arising out of his employment with the Department of Military Affairs (DMA). On May 3, 2010, Montana State Fund (State Fund), DMA's insurer, denied liability for the claim.[74]

¶ 37 On August 27, 2010, Dr. Michelotti noted that he wanted to try a different type of injection into Newlon's left knee to help alleviate his symptoms. However, Dr. Michelotti opined, "He certainly may require a total knee replacement in the future . . . ."[75]

¶ 38 In September 2010, Jaeger-Nystul approved a request for authorization from Dr. Michelotti for another series of injections in Newlon's left knee.[76]

¶ 39 On December 21, 2011, Teck American's counsel informed Newlon's counsel that Teck American believed that it was not liable for further medical care of Newlon's left knee under § 39-71-704(1)(d), MCA (1991), also known as the "60-month rule." Teck American asserted that Newlon had not received covered medical care for his knee from 1996 until 2007. Teck American further alleged that the 1996 Petition for Settlement reserved Newlon's medical benefits only on his 1991 knee claim while

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[69] Ex. 11 at 5-6.

[70] Ex. 11 at 8.

[71] *Id.*

[72] Ex. 11 at 9.

[73] Ex. 10 at 27.

[74] Pretrial Order, Statement of Uncontested Facts, at 3.

[75] Ex. 10 at 37.

[76] Ex. 10 at 36.

closing benefits on Newlon's earlier knee claims. Teck American agreed to pay medical benefits under a reservation of rights while working towards a resolution.[77]

¶ 40 On May 14, 2012, Dr. Michelotti examined Newlon, who complained of increased knee pain and difficulties with his left knee giving out. Dr. Michelotti found that the injections were no longer working and that Newlon could not tolerate anti-inflammatories because of an unrelated medical issue. Dr. Michelotti opined that Newlon's best option would be a total knee replacement.[78]

¶ 41 On May 24, 2012, Teri Bohnsack denied Dr. Michelotti's Request for Preauthorization for knee replacement surgery.[79]

¶ 42 On March 11, 2013, Dr. Michelotti opined that Newlon's left-knee diagnosis is osteoarthritis, which is the same diagnosis he reached when he first examined Newlon.[80] During Dr. Michelotti's deposition on that date, he reviewed Newlon's deposition where Newlon described his job duties at Fort Harrison.[81] Dr. Michelotti proposed treating Newlon's osteoarthritis with a total knee replacement.[82]

¶ 43 The parties agree that on a more probable than not basis, the causes of Newlon's left-knee osteoarthritis are his work at the cemetery, the two previous knee operations, his age, and his work history after 1993. The parties further agree that Newlon's two previous surgeries are the leading cause of his left-knee osteoarthritis. The parties also agree that it is more probable than not that Newlon's two surgeries changed the anatomical structure of his left knee and that his work at the cemetery aggravated, and continues to aggravate, his preexisting left-knee condition.[83]

¶ 44 Dr. Michelotti opined that Newlon's work at Fort Harrison, his two arthroscopic surgeries, aging, and environment all contributed to his development of osteoarthritis.[84] Dr. Michelotti testified that he is unfamiliar with Newlon's pre-1993 work history.[85] He opined that Newlon's 1993 and 1996 meniscectomy surgeries are the leading cause of

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[77] Pretrial Order, Statement of Uncontested Facts, at 3.

[78] Ex. 10 at 64-65.

[79] Ex. 10 at 68.

[80] Pretrial Order, Statement of Uncontested Facts, at 2.

[81] *Id.*

[82] *Id.*

[83] Pretrial Order, Statement of Uncontested Facts, at 3.

[84] Michelotti Dep. 35:4-22.

[85] Michelotti Dep. 35:21-22.

his current left-knee problems.[86] He explained that the surgeries changed the anatomical structure of Newlon's knee and caused his knee to move differently.[87] Dr. Michelotti opined that Newlon's knee is currently aggravated by his job duties and would be aggravated by things like twisting, climbing, squatting, and lifting in awkward positions.[88]

CONCLUSIONS OF LAW

¶ 45 Newlon bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[89]

Issue One: Which version of the Montana Workers' Compensation Act governs this dispute?

¶ 46 The law in effect on the date of a worker's industrial accident controls his claim.[90] In the present case, the parties disagree as to the date of Newlon's industrial injury. Newlon argues that the industrial injury at issue occurred in 1978 because, "[c]orrespondence from the Respondent's agents promoted the notion that the claim had occurred in 1978."[91] Newlon argued that Teck American treated his knee claim as if it was a 1978 claim, and referred to 1978 as the date of injury in correspondence to Newlon's medical provider and legal counsel.[92] However, Newlon previously contended that from Teck American's records, it appeared that he had a left-knee injury on May 7, 1974, and a left-leg injury on April 7, 1976.[93] At trial, Newlon's counsel acknowledged that Newlon probably did not have a knee claim in 1978, but alleged that Teck American referred to Newlon's knee claim as a 1978 claim when in fact it was probably a 1974 claim.[94]

¶ 47 Newlon has not argued, however, that his present claim should be considered under the version of the Workers' Compensation Act (WCA) in effect at the time of the

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[86] Michelotti Dep. 36:5-12.

[87] Michelotti Dep. 36:15-21.

[88] Michelotti Dep. 37:8 – 38:1.

[89] *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).

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

[91] Newlon's Trial Brief, Docket Item No. 53, at 8.

[92] Closing argument.

[93] Petitioner's Response to Respondent's Second Motion for Summary Judgment and Petitioner's Request for Summary Judgment (Newlon's Summary Judgment Response Brief), Docket Item No. 41, at 1.

[94] Closing argument.

1974 injury. Teck American argues – and Newlon does not dispute – that under the version of the statute which would have been in effect at the time of his 1974 injury, his medical benefits would have been limited to 36 months from the date of his injury barring an extension granted by the "division." Therefore, Teck American argues, "The net effect is that when Newlon settled his claims in 1996, there were no medical benefits from his 1974 claim to settle. Any entitlement to them had been extinguished by operation of the statute."[95]

¶ 48 Newlon cites no authority for the proposition that a claim should be governed by the law in effect on an unsubstantiated date which apparently began appearing in correspondence due to a clerical error. While the evidence regarding Newlon's industrial injuries from the 1970s is scant, neither of the parties in this case seem to believe that a 1978 industrial injury to the left knee occurred. Newlon's claim cannot be controlled by the laws in effect on the date of what appears to be a nonexistent industrial injury.

¶ 49 The existing records indicate that Newlon suffered at least three industrial injuries from which his knee problems may have originated: May 7, 1974, April 7, 1976, and October 3, 1991.

¶ 50 In *Tinker v. Montana State Fund*,[96] this Court held:

> This Court and the Montana Supreme Court have consistently held that in cases where a claimant suffers an alleged subsequent injury or aggravation to a preexisting condition, the insurer at the time of the second injury only escapes liability if the claimant had not reached MMI from the previous injury. Conversely, the insurer at risk at the time of the first injury only escapes liability if the claimant ***had*** reached MMI from the previous injury. Even though the same insurer was at risk for both Petitioner's alleged industrial injury and his alleged subsequent occupational disease, I see no cause to distinguish his case on this point alone, as the facts of Petitioner's case remain the same regardless of whether it was a single insurer or not. Since no evidence indicates that Petitioner ever reached MMI from his industrial injury, any subsequent progression of that injury is attributable to the initial injury and Petitioner therefore does not have a viable occupational disease claim.[97]

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[95] Second Motion for Summary Judgment, Supporting Brief and Request for Hearing (Teck American's Summary Judgment Opening Brief), Docket Item No. 36, at 9-10.

[96] 2008 MTWCC 33 (*aff'd*, 2009 MT 218, 351 Mont. 305, 211 P.3d 194).

[97] *Tinker*, ¶ 23. (Internal citations omitted.) (Emphasis in original.)

¶ 51 I find that the *Tinker* analysis applies to the present case, since the facts indicate that Newlon had an initial industrial injury to his left knee on May 7, 1974, followed by subsequent injuries on April 7, 1976, and October 3, 1991. As the Court indicated in *Tinker*, even though the same insurer – in this case Teck American – was at risk for both the initial industrial injury and the alleged subsequent injuries, this does not remove the claim from the usual analysis used by the courts in determining whether a subsequent injury is considered a new injury for liability purposes.

¶ 52 As noted above, the key question is whether the claimant reached MMI from the earlier injury prior to suffering the later injury. While the evidence concerning Newlon's May 7, 1974, and April 7, 1976, industrial injuries is sparse, the following is clear: Newlon continued to work in his time-of-injury job position after the April 7, 1976, industrial injury and remained at full duty until October 3, 1991 – a period of approximately 15 years. Given this fact, and in the absence of any evidence which suggests Newlon did ***not*** reach MMI for these earlier injuries prior to October 3, 1991, I conclude that it is more probable than not that he did so. Therefore, under the *Tinker* analysis, Newlon's left-knee problems are attributable to the October 3, 1991, industrial injury rather than the earlier industrial injuries.

¶ 53 Aside from some exceptions not applicable here, every statute takes effect on the first day of October following its passage and approval unless a different time is prescribed in the enacting legislation.[98] Since Newlon's industrial injury occurred on October 3, 1991, the 1991 version of the WCA applies.

Issue Two: Whether Newlon's claim is barred because of a superseding intervening cause.

¶ 54 Teck American argues that the Court should find that Newlon's work at the cemetery is an intervening superseding cause which would end Teck American's liability for Newlon's knee condition. Teck American states:

> Imagine that Newlon came to his job at the cemetery in 2001 with exactly the knee condition he had, but that it was entirely the result of a non-occupational injury and the two surgeries it necessitated. Imagine that the claim before this Court was based on Dr. Michelotti's deposition testimony about aggravation and that Newlon claimed an OD. It would obviously be compensable because the chain of natural progression of the

[98] § 1-2-201(1)(a), MCA.

non-occupational knee condition would have been broken by the intervention of the occupational wear and tear.[99]

¶ 55 Newlon points out that his treating physician, Dr. Michelotti, opined that the leading cause of his current knee condition is the two previous knee surgeries, which were, in turn, necessitated by his industrial injuries.[100]

¶ 56 While Teck American presents a hypothetical, asserts that it is analogous to the facts of Newlon's claim, and further asserts that its hypothetical would "obviously be compensable," it has not offered any statutory or case law support for its argument, nor has it given the Court any insight into the bases for its assertions.

¶ 57 Once a claimant has proven a work-related injury and produced evidence that the injury is a cause of a present disability, an insurer who alleges that subsequent events are the actual cause of the claimant's current disability has the burden of proving that allegation, which is in the nature of an affirmative defense, by a preponderance of the evidence.[101] Teck American has not met that burden.

¶ 58 Teck American has offered no support of its affirmative defense. In other cases, this Court has declined to consider arguments unsupported by authority.[102] In the present case, Teck American has raised several affirmative defenses which, for the most part, are largely unsupported.[103] I conclude Newlon's claim is not barred because of a superseding intervening cause.

Issue Three: Whether Teck American is equitably estopped from denying medical benefits under the claim on the basis of the provisions of § 39-71-704(1)(d), MCA (1991).

¶ 59 Newlon argues that Teck American should be equitably estopped from denying his claim under § 39-71-704(1)(d), MCA, also known as the "60-month rule." In *Selley v. Liberty Northwest Ins. Corp.*, the Montana Supreme Court stated:

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[99] Teck American's Summary Judgment Opening Brief at 14, incorporated by reference into Teck American's Trial Brief, Docket Item No. 52, at 7. *See also* Minute Book Hearing No. 4486, Docket Item No. 44, which memorializes a conference with the parties in which I declined to rule on the pending motions for summary judgment pursuant to ARM 24.5.329(1)(b), but stated that the arguments raised by the parties in their respective briefs were preserved for trial.

[100] Newlon's Summary Judgment Response Brief at 17, incorporated by reference into Newlon's Trial Brief at 6.

[101] *Briney v. Pacific Employers Ins. Co.*, 283 Mont. 346, 351, 942 P.2d 81, 84 (1997) (citing *Walker v. United Parcel Serv.*, 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993)).

[102] *See, e.g.*, *Vraspir v. Montana State Fund*, 2004 MTWCC 32, ¶ 2.

[103] *See infra* Issues Five and Six.

> As a general matter, estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse. . . .
>
> [S]ix elements are necessary in order to establish an equitable estoppel claim: (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse. A party must establish all six elements before the doctrine can be invoked. Equitable estoppel must be established by clear and convincing evidence.[104]

¶ 60 The court further noted that wrongdoing is not necessary to invoke equitable estoppel. It explained:

> Classically, the function of the doctrine of equitable estoppel is the prevention of fraud, actual or constructive. However, this does not imply that the party sought to be estopped must have possessed an actual intent to deceive, defraud or mislead the other party at the inception of the transaction.[105]

The court noted that in modern usage, equitable estoppel is invoked to prevent an inequitable result.[106]

1. Representation or concealment of material fact

¶ 61 To fulfill the first element of equitable estoppel, Newlon must establish the existence of conduct, acts, language, or silence amounting to a representation or

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[104] 2000 MT 76, ¶¶ 9-10, 299 Mont. 127, 998 P.2d 156. (Citations omitted.)

[105] *Selley*, ¶ 12. (Citations omitted.)

[106] *Selley*, ¶ 14.

concealment of material facts.[107] Newlon contends that this element is met by Teck American's representation that, by entering into the settlement agreement with his medical benefits left open, Newlon would enjoy medical benefits for his knee for the rest of his life.[108]

2. Actual, constructive, or imputed knowledge

¶ 62 To fulfill the second element of equitable estoppel, Newlon must establish that the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party.[109] Newlon acknowledges that the known facts in this case suggest that Teck American lacked actual knowledge that the 60-month rule could apply to Newlon's case until December 2011, and further notes that it is unlikely that Moore was ever aware of the existence of the 60-month rule. Newlon notes that it was likely that the individuals involved in adjusting his claim after 2000 understood that his medical benefits arose from a 1978 date of injury which was referenced both in the adjusters' notes and correspondence and in the records of the Department of Labor & Industry. However, Newlon argues that knowledge of the correct claim number and date of injury for his claim should be imputed to Teck American. Newlon alleges, "The insurer is responsible for assigning claim numbers, and it was reasonable for all other parties involved to rely on the insurer to identify correctly its own claim."[110]

3. Truth to the other party

¶ 63 To fulfill the third element of equitable estoppel, Newlon must establish that the truth concerning these facts must be unknown to him at the time it was acted upon.[111] Regarding this element, Newlon contends that it is undisputed that he was unaware that his lifetime medical benefits could be jeopardized by the 60-month rule, and further notes that while the settlement documents made no reference to the injury date for which his medical benefits were reserved, Teck American's correspondence referenced an injury date which would have allowed his medical benefits to continue without regard to the 60-month rule, thereby signaling to someone with knowledge of the law that the 60-month rule was not a potential bar to Newlon's benefits.[112]

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[107] *Selley*, ¶¶ 9-10.

[108] Newlon's Summary Judgment Response Brief at 11-13.

[109] *Selley*, ¶¶ 9-10.

[110] Newlon's Summary Judgment Response Brief at 13-14.

[111] *Selley*, ¶¶ 9-10.

[112] Newlon's Summary Judgment Response Brief at 14.

4. Intent or expectation that conduct will be acted upon

¶ 64 To fulfill the fourth element of equitable estoppel, Newlon must establish that the conduct was done with the intention or expectation that it would be acted upon by him, or have occurred under circumstances showing it to be both natural and probable that he would act upon it.[113] Regarding this element, Newlon argues that it was both natural and probable for him to believe that his medical benefits would remain open without any limitation under the 60-month rule.[114]

5. Conduct relied upon by other party

¶ 65 To fulfill the fifth element of equitable estoppel, Newlon must establish that the conduct was relied upon by him and led him to act.[115] Newlon asserts that his belief that his medical benefits remained open regardless of the 60-month rule lulled him into a false sense of security and this understanding caused him to believe that he could safely postpone treatment of the knee symptoms he was experiencing. He further contends that because he believed that he need not fear the termination of his medical benefits in his lifetime, he felt no need to set aside any money for future medical treatment of his knee.[116]

6. Change of position for the worse

¶ 66 To fulfill the sixth element of equitable estoppel, Newlon must establish that he acted upon the conduct in such a manner as to change his position for the worse.[117] Newlon contends that he satisfies this element because his belief in his entitlement to lifetime medical benefits for his knee lulled him into a false sense of security and his failure to more promptly seek treatment for his knee problems – resulting in Teck American's denial of further benefits under the 60-month rule – changed his position for the worse.[118]

¶ 67 A party must establish all six elements of equitable estoppel before the doctrine can be invoked.[119] In the present case, Newlon has set forth an argument for each of the six elements and Teck American does not dispute that Newlon has satisfied the

[113] *Selley*, ¶¶ 9-10.

[114] Newlon's Summary Judgment Response Brief at 14-15.

[115] *Selley*, ¶¶ 9-10.

[116] Newlon's Summary Judgment Response Brief at 15.

[117] *Selley*, ¶¶ 9-10.

[118] Newlon's Summary Judgment Response Brief at 15-16.

[119] *Selley*, ¶¶ 9-10.

elements of equitable estoppel. Rather, Teck American argues that the remedy of equitable estoppel is not available to Newlon in this matter. Teck American presents two arguments: (1) that this Court lacks the jurisdiction to grant equitable estoppel; and (2) that payment of medical benefits cannot be the basis for an equitable estoppel argument. I therefore conclude that Newlon has satisfied the six elements of equitable estoppel and move on to consider Teck American's two arguments that the remedy of equitable estoppel is not available to Newlon.

¶ 68 Teck American argues that this Court lacks the jurisdiction to resolve a dispute via the remedy of equitable estoppel. Teck American maintains that this Court, as a court of limited jurisdiction, does not have the power to employ equitable estoppel.[120] Teck American points to *Thompson v. State*[121] and argues that the Montana Supreme Court's holding in that case applies to Newlon's situation.

¶ 69 In *Thompson*, the Montana Supreme Court held that this Court had erred in issuing a declaratory judgment because the court found that this Court lacked the jurisdiction to issue a declaratory judgment under the circumstances of that case. In reaching its decision, the court noted that this Court is a court of limited jurisdiction, and does not have the general jurisdiction granted to district courts over all cases in law and in equity.[122] The court noted that courts of limited jurisdiction, such as this Court, have only such power as is expressly conferred by statute.[123]

¶ 70 In *Thompson*, the court considered the interplay between § 2-4-501, MCA, which governs declaratory rulings by agencies, and § 39-71-2905(1), MCA, which sets forth the jurisdiction of this Court. The court held:

> Taken together, these statutes authorize the WCC to issue declaratory rulings only in the context of a dispute concerning benefits under the Workers' Compensation Act and only as to the applicability of any statutory provision, rule, or order of the agency to that dispute.
>
> ¶ 26 Here, the Workers' Petition did not demand benefits or a declaratory judgment concerning the applicability of workers' compensation statutes to

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[120] Teck American's Trial Brief at 3.

[121] 2007 MT 185, 338 Mont. 511, 167 P.3d 867.

[122] *Thompson*, ¶ 24. (Citation omitted.)

[123] *Id.*

> a particular dispute over benefits. Indeed, the Workers concede in their brief that "[h]ere, no benefits are at issue."[124]

¶ 71 Since *Thompson*, this Court has incorporated the question of whether a "dispute over benefits" exists in matters in which its jurisdiction is questioned.[125] In the present case, a dispute over benefits unquestionably exists. Newlon is seeking the continuation of his medical benefits, which Teck American is currently denying. Therefore, this jurisdictional requirement, as set forth in *Thompson*, is met.

¶ 72 However, Teck American further argues that this Court is specifically precluded from invoking equitable estoppel because the jurisdiction to grant estoppel is set forth in § 39-71-601(2)(c), MCA. Teck American asserts, "Under the rule of statutory construction *express unius est exclusion alterius* the grant of that remedial power in this specific context implies it is not available in any other context."[126]

¶ 73 Section 39-71-601(2), MCA, states:

> The department may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:
> (a) lack of knowledge of disability;
> (b) latent injury; or
> (c) equitable estoppel.

¶ 74 In *Walker v. Credit General Ins. Co.*, upon which Teck American relies, this Court considered whether the language of § 39-71-414, MCA (1991, 1997), allowed an agreement not approved by the Department to constitute a compromise settlement. The Court held that it did not, because the statute at issue contemplated Department approval. The Court reasoned:

> In *Fletcher* [*v. Paige*, 124 Mont. 114, 118, 220 P.2d 484, 486 (1950)] the statute in question permitted beer and malt liquor signs to be displayed at breweries and warehouses. The Court held that by implication the statute precluded signs in other places:
>
> > In providing that signs advertising beer or malt liquor can be placed upon a brewery or premises where beer or malt liquor

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[124] *Thompson*, ¶¶ 25-26.

[125] *See, e.g.*, *Miller v. Liberty Mut. Fire Ins. Corp.*, 2008 MTWCC 18 (WCC determined it had jurisdiction to hear a constitutional challenge to an administrative rule where a dispute over benefits exists); *Robinson v. Montana State Fund*, 2008 MTWCC 55 (WCC determined it did not have jurisdiction to hear Petitioner's challenge to rules and statutes outside the context of a dispute over benefits).

[126] Teck American's Trial Brief at 3 (citing *Walker v. Credit Gen. Ins. Co.*, 1999 MTWCC 53, ¶ 9).

> was lawfully stored or kept, it logically follows that beer cannot be advertised by signboard or billboards in any other place. This is merely an application of the familiar maxim of expressio unius est exclusio alterius.[127]

¶ 75 I find Teck American's argument unpersuasive in the present case for two reasons: First, § 39-71-601(2), MCA, refers not to the powers of this Court, but to the Department. Therefore, under Teck American's argument, it would be the Department which would be precluded from applying equitable estoppel in other circumstances. Secondly, having compared the Montana Supreme Court's reasoning in *Fletcher* to the present case, I believe that Teck American's argument is backwards. The application of *expressio unius est exclusio alterius* in the same manner as the court applied it in *Fletcher* would mean that the Department could only waive the time requirement by lack of knowledge of disability, latent injury, or equitable estoppel *and no other means*. That is also consistent with this Court's application of the maxim in *Walker*, which set forth the procedure by which a compromise settlement could be achieved.

¶ 76 While the undeniable presence of a dispute over benefits would remove any jurisdictional question in this case from being under *Thompson*, I further note that equitable estoppel not only has been used as a remedy by this Court in multiple decisions, but has been endorsed as a remedy in this Court by decisions of the Montana Supreme Court. For example, in *Mellem v. Kalispell Laundry & Dry Cleaners*, the Montana Supreme Court reversed and remanded a decision of this Court in which this Court had dismissed a claimant's appeal from a Department decision on the grounds that the claimant had failed to perfect her appeal. The Montana Supreme Court held that the Department was equitably estopped from arguing that the claimant had failed to perfect her appeal because the Department had provided the claimant with misleading information for doing so.[128]

¶ 77 In *Beery v. Grace Drilling*, the Montana Supreme Court affirmed this Court's rejection of the claimant's equitable estoppel argument. In considering the record on appeal, the Montana Supreme Court found that the claimant failed to meet the first element of equitable estoppel and further found that, even if the claimant had met the first element, the claimant could not have satisfied the sixth element. Pertinent to the present case, I note that the Montana Supreme Court endorsed this Court's equitable

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[127] *Walker*, ¶ 9.

[128] 237 Mont. 439, 443, 774 P.2d 390, 392 (1989).

estoppel analysis and made no suggestion that this Court did not have the jurisdiction to consider an argument for equitable estoppel.[129]

¶ 78 In *Selley v. Liberty Northwest Ins. Corp.*, the Montana Supreme Court noted, "Today, we apply the doctrine of equitable estoppel to prevent an inequitable result."[130] In that case, the court reversed and remanded a decision of this Court in which this Court had concluded that the insurer was not equitably estopped from asserting a defense to the claimant's claim under § 39-71-116(30), MCA (1993).[131] The Montana Supreme Court analyzed the six elements of equitable estoppel, concluded that the claimant had met them, and reversed and remanded the case to this Court.[132]

¶ 79 Furthermore, in *Wiard v. Liberty Northwest Ins. Corp.*, the claimant argued that the insurer should be equitably estopped from asserting § 39-71-704(1)(d), MCA (1991), as a defense.[133] This Court rejected the claimant's equitable estoppel argument not on jurisdictional grounds, but on its merits, and the Montana Supreme Court affirmed this Court's analysis.

¶ 80 Therefore, I find no support for Teck American's contention that this Court lacks the jurisdiction to consider equitable estoppel in situations in which benefits are in dispute.

¶ 81 However, Teck American further contends that the payment of medical benefits cannot be the basis for an equitable estoppel argument. Teck American argues that this position is consistent with the holding of *Wassberg v. Anaconda Copper Co.*[134] In *Wassberg*, the Montana Supreme Court considered whether Wassberg's employer had waived the one-year statute of limitations of § 39-71-601(1), MCA, by acts or representations giving rise to an equitable estoppel. The court noted that estoppel commonly arises when an employer pays an injured worker sums which lull the worker into failing to timely file for workers' compensation benefits.[135] The court found, however, that this situation did not occur in Wassberg's case because his employer merely paid his medical bills. The Court noted that it had previously held in a similar

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[129] 260 Mont. 157, 165-66, 859 P.2d 429, 434-35 (1993).

[130] *Selley*, ¶ 14.

[131] *Selley*, ¶ 30.

[132] *Selley*, ¶¶ 15-30.

[133] 2001 MTWCC 31, *aff'd*, 2003 MT 295, 318 Mont. 132, 79 P.3d 281.

[134] 215 Mont 309, 317, 697 P.2d 909, 914 (1985).

[135] *Id.*

case that medical payments were not sufficient compensation to warrant tolling the statute of limitations under the particular facts of that case.[136]

¶ 82 The *Wassberg* analysis is simply not the blanket prohibition on medical benefits constituting the basis for equitable estoppel that Teck American makes it out to be. Not only is it a fact-specific situation, but it – and the case upon which it relies – involve situations in which the court considered whether medical benefits were sufficient to toll the statute of limitations for filing a claim, not the 60-month rule of § 39-71-704(1)(d), MCA.

¶ 83 I am not persuaded by either Teck American's jurisdictional argument or its argument that equitable estoppel cannot be raised in situations involving the payment of medical benefits. Conversely, Newlon has met the six factors of equitable estoppel. I therefore conclude that Teck American is equitably estopped from denying payment of Newlon's medical benefits under § 39-71-704(1)(d), MCA.

Issue Four: Whether Newlon's claim is barred either by a statute of limitations or a statute of repose.

¶ 84 In setting forth this issue in the Pretrial Order, the parties did not specify which specific statute or statutes they believed might pose a bar to Newlon's claim. However, from their arguments, it appears that the only applicable statute is § 39-71-704(1)(d), MCA. Since I have already concluded that Teck American is equitably estopped from denying medical benefits under this claim on the basis of § 39-71-704(1)(d), MCA, this issue is moot.

Issue Five: Whether Newlon's claim is barred by estoppel.

¶ 85 Teck American further raises an estoppel argument as a bar to Newlon's claim.[137] However, as set forth in Issue Three, above, six elements must be proven by clear and convincing evidence. In the present case, Teck American did not lay out its arguments for the six elements; rather, it merely stated that Newlon had lost his entitlement to medical benefits before Teck American made any payments in 2007, and further stated that no evidence indicates that Moore had an obligation to explain the law to Newlon.[138] Teck American offers no explanation as to how these contentions satisfy the six elements of estoppel. I therefore conclude Newlon's claim is not barred by estoppel.

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[136] *Id.* (citing *Frost v. Anaconda Co.*, 198 Mont. 216, 645 P.2d 419 (1982)).

[137] Teck American's Summary Judgment Opening Brief at 12, incorporated by reference into Teck American's Trial Brief at 7.

[138] *Id.*

Issue Six: Whether Newlon's claim is barred by laches.

¶ 86 Teck American argues that if the Court concludes that it has the jurisdiction to grant Newlon relief under the doctrine of equitable estoppel, then laches is a complete bar to Newlon's claim.[139] Teck American's argument as to the application of laches, however, relates to whether Newlon would be entitled to reopen the settlement in this matter.[140] At one time during the course of this case, Newlon asserted that he was entitled to reopen the settlement. Newlon later withdrew this assertion. Newlon argues now that Teck American's laches argument is moot in light of Newlon's withdrawal of his attempt to reopen the settlement.[141]

¶ 87 Teck American presents no counter-argument and I do not see how its laches argument applies to the current issues in this matter. I therefore conclude Newlon's claim is not barred by laches.

Issue Seven: Whether Newlon is entitled to his costs pursuant to § 39-71-611, MCA.

¶ 88 Under § 39-71-611, MCA, an insurer shall pay reasonable costs if the insurer denies liability or terminates compensation benefits for a claim and if this Court adjudges the claim compensable. In the present case, since Teck American terminated Newlon's benefits and I have adjudged Newlon's claim compensable, I further conclude that he is entitled to his costs.

JUDGMENT

¶ 89 This dispute is governed by the 1991 Montana Workers' Compensation Act.

¶ 90 Petitioner's claim is not barred because of a superseding intervening cause.

¶ 91 Respondent is equitably estopped from denying medical benefits under the claim on the basis of the provisions of § 39-71-704(1)(d), MCA.

¶ 92 The issue of whether Petitioner's claim is barred by either a statute of limitations or a statute of repose is moot.

¶ 93 Petitioner's claim is not barred by estoppel.

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[139] Teck American's Trial Brief at 6.

[140] Teck American's Summary Judgment Opening Brief at 11-12.

[141] Newlon's Summary Judgment Response Brief at 16.

¶ 94 Petitioner's claim is not barred by laches.

¶ 95 Petitioner is entitled to his costs pursuant to § 39-71-611, MCA.

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

DATED in Helena, Montana, this 8th day of May, 2014.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Margaret Dufrechou
Larry W. Jones

Submitted: November 8, 2013