

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2017 MTWCC 16**

**WCC No. 2017-4034**

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**DIANE SIKKEMA**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE CO.**

**Respondent/Insurer.**

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**ORDER GRANTING RESPONDENT'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

**Summary:** Petitioner seeks a 20% increase in the amount of benefits under § 39-71-2907, MCA, and her attorney fees under §§ 39-71-611 and -612, MCA, for Respondent's alleged unreasonable delay in authorizing a surgery. Respondent moves for partial summary judgment. It argues that Petitioner cannot recover her attorney fees on her medical benefits under §§ 39-71-611 or -612, MCA — which generally provide that this Court can award attorney fees if it adjudicates a dispute over compensation and the insurer's denial or delay was unreasonable — because it authorized the surgery prior to adjudication, and further argues that this Court cannot award attorney fees on the 20% increase because this increase is a "penalty" and not "compensation." Petitioner objects to the summary judgment motion, arguing that the statutes do not preclude her from recovering attorney fees on her claim for a 20% increase in the full amount of benefits due under § 39-71-2907, MCA — which Petitioner argues is not a penalty, but rather additional compensation.

**Held:** Respondent is entitled to summary judgment on Petitioner's claim for attorney fees. This Court cannot award attorney fees on Petitioner's medical benefits because Respondent authorized the surgery before this Court adjudicated the dispute. Nor can this Court award attorney fees if Petitioner obtains a 20% increase in her benefits because case law from the Montana Supreme Court and this Court establishes that the 20% increase under § 39-71-2907, MCA, is a penalty, not compensation.

¶ 1 Respondent Liberty Northwest Insurance Co. (Liberty) moves for summary judgment on the issue of whether Petitioner Diane Sikkema can recover attorney fees under §§ 39-71-611 or -612, MCA, which generally provide that this Court can award attorney fees if it adjudicates a dispute over compensation and the insurer's denial or delay was unreasonable. Liberty argues that Sikkema cannot recover her attorney fees on her medical benefits because it authorized her surgery without an adjudication from this Court. Liberty also argues Sikkema cannot recover her attorney fees if she proves that Liberty unreasonably delayed authorizing her surgery which therefore entitles her to a 20% increase in her medical benefits under § 39-71-2907, MCA — the only other issue left in this case — because the 20% increase is a “penalty” and not “compensation.” Sikkema opposes Liberty's motion.

### UNDISPUTED FACTS

¶ 2 On February 25, 2008, Sikkema filed a claim for compensation after suffering an injury to her left knee and foot.

¶ 3 Liberty accepted liability for the claim and paid benefits.

¶ 4 In 2014, Sikkema and Liberty settled the indemnity portion of her claim, but left medical benefits open.

¶ 5 On March 3, 2017, Martin Gelbke, MD, recommended that Sikkema undergo total left-knee arthroplasty. Dr. Gelbke declined to offer a causation opinion, and Liberty denied authorization for the recommended treatment.

¶ 6 On May 25, 2017, Sikkema obtained a causation opinion from Alexander LeGrand, MD, who had previously treated Sikkema. He opined that her need for total left-knee arthroplasty was related to her industrial injury.

¶ 7 On June 2, 2017, Sikkema filed a Petition for Hearing, asking this Court to find Liberty liable for the total left-knee arthroplasty. Sikkema also alleged that Liberty's denial of liability for her arthroplasty was unreasonable and prayed for her costs and attorney fees under §§ 39-71-611 and -612, MCA, and a 20% increase in benefits under § 39-71-2907, MCA.

¶ 8 On June 19, 2017, prior to any ruling from this Court, Liberty authorized Sikkema's total left-knee arthroplasty.

## LAW AND ANALYSIS

¶ 9 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.<sup>1</sup> The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 10 This case is governed by the 2007 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect on the date of Sikkema's industrial accident.<sup>2</sup>

¶ 11 Sikkema asserts that Liberty's delay in authorizing her total left-knee arthroplasty was unreasonable. Thus, she asserts that she is entitled to a 20% increase in her medical benefits under § 39-71-2907, MCA, which provides, in relevant part:

(1) 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:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(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.

¶ 12 Sikkema also asserts she is entitled to her attorney fees under §§ 39-71-611, and -612, MCA, because of Liberty's allegedly unreasonable denial of authorization for her total left-knee arthroplasty. 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

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<sup>1</sup> ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

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

(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.

Section 39-71-612, MCA, states, in relevant part:

(1) If an insurer pays or submits a written offer of payment of compensation under this chapter but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, reasonable attorney fees and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

(2) An award of attorney fees under subsection (1) may be made only if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

¶ 13 Liberty argues that Sikkema cannot recover her attorney fees on her medical benefits because §§ 39-71-611 and -612, MCA, require, *inter alia*, this Court to adjudicate a claim for compensation before awarding attorney fees. Here, Liberty accepted liability for Sikkema's total left-knee arthroplasty without an adjudication from this Court. In addition to the plain language of the statutes, Liberty points to many cases which support its position.<sup>3</sup> Moreover, Liberty argues that Sikkema cannot recover attorney fees if she prevails on her claim for a 20% increase under § 39-71-2907, MCA, because the increase is a penalty and not compensation and §§ 39-71-611 and -612, MCA, allow a penalty only on compensation.

¶ 14 Liberty is correct that this Court cannot award Sikkema her attorney fees on her medical benefits under §§ 39-71-611 or -612, MCA. The plain language of § 39-71-611 (1), MCA, states that this Court can award attorney fees only if it adjudges a claim for compensation. Likewise, § 39-71-612(1), MCA, states that this Court can award attorney fees only when it adjudicates a controversy over compensation. Pursuant to this plain language, the Montana Supreme Court and this Court have ruled that a claimant cannot recover attorney fees if the insurer accepts liability before this Court adjudicates the

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<sup>3</sup> See, e.g., *Yearout v. Rainbow Painting*, 222 Mont. 65, 68, 719 P.2d 1258, 1259 (1986) (holding, "the statute authorizing attorney's fees, § 39-71-611, MCA, is clear and unambiguous. If an insurer denies liability for a claim for compensation, the insurer is liable for attorney's fees if the claim is later *adjudged* compensable by the Workers' Compensation judge. It is clear from the language of the statute that there must be an adjudication of compensability before an award of attorney's fees is authorized.").

dispute.<sup>4</sup> Indeed, case law establishes that this Court cannot award attorney fees even in cases where the insurer accepted liability the day before trial,<sup>5</sup> at the beginning of trial,<sup>6</sup> or after the close of evidence.<sup>7</sup> Because Liberty authorized Sikkema's surgery before this Court adjudicated the dispute, this Court cannot award Sikkema her attorney fees for these medical benefits under either §§ 39-71-611 or -612, MCA.

¶ 15 Moreover, Liberty is correct that this Court cannot award Sikkema her attorney fees even if it determines that Sikkema is entitled to a 20% increase under § 39-71-2907, MCA. This Court so held in *Galetti v. Montana Power Co.*<sup>8</sup> When *Galetti* was at the Supreme Court, the court held that Galetti was entitled to his attorney fees and a "20 percent penalty" under § 39-71-2907, MCA (1983), and referred to the 20% increase as a "penalty" throughout its Opinion.<sup>9</sup> On remand, Galetti argued that this Court should award him attorney fees not only on his compensation benefits, but also on the 20% increase under § 39-71-2907, MCA.<sup>10</sup> This Court disagreed, ruling that the 20% increase is a penalty and not compensation.<sup>11</sup> This Court explained:

His argument for fees with respect to the penalty is without merit. Attorney fees are governed by section 39-71-612, MCA (1983) and apply only to "compensation," i.e. benefits, payable to the claimant under the Workers'

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<sup>4</sup> *Cosgrove v. Indus. Indem. Co.*, 170 Mont. 249, 552 P.2d 622 (1976) (even when WCA is construed liberally in favor of the claimant, no attorney fees are available under § 92-616, RCM — the predecessor to § 39-71-611, MCA — unless the claim is adjudicated); *Arneson v. Travelers Prop. Cas.*, 2006 MTWCC 7 (this Court could not award attorney fees where insurer paid outstanding, undisputed medical bills after claimant petitioned this Court, but prior to adjudication); see also *McNeel v. Holy Rosary Hosp.*, 228 Mont. 424, 742 P.2d 1020 (1987) (where insurer accepted the claim the day before trial, no attorney fees could be awarded under § 39-71-611, MCA, because no adjudication occurred); *Vanbouchaute v. Montana State Fund*, 2007 MTWCC 37 (at the close of evidence at trial, this Court indicated that it intended to rule in the claimant's favor regarding authorization of surgery, and the insurer authorized the surgery prior to this Court's formal ruling, therefore, this Court could not award the claimant her attorney fees because the insurer authorized the surgery before the claim was adjudged compensable); *Stevens v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 1997 MTWCC 45 (although pre-1987 version of § 39-71-612, MCA, and its predecessor § 92-618, RCM, allowed attorney fees where a case resulted in a "settlement," the legislature removed the "settlement" language, thereby allowing an award of attorney fees only when a case is adjudicated) (citing *Madill v. State Comp. Ins. Fund*, 280 Mont. 450, 930 P.2d 665 (1997)); *S.L.H. v. State Comp. Ins. Fund*, 2000 MT 362, 303 Mont. 364, 15 P.3d 948 (for a claimant to receive attorney fees, § 39-71-612, MCA, as amended, requires that the issue be brought before the court for adjudication, and the judge must award more compensation than that offered by the insurer).

<sup>5</sup> *McNeel*, 228 Mont. at 426, 741 P.2d at 1021.

<sup>6</sup> *Yearout*, 222 Mont. at 66, 719 P.2d at 1259.

<sup>7</sup> *Vanbouchaute*, ¶ 39.

<sup>8</sup> 2002 MTWCC 60.

<sup>9</sup> *Galetti*, 2000 MT 234, ¶¶ 26-32, 301 Mont. 314, 8 P.3d 812.

<sup>10</sup> *Galetti*, 2002 MTWCC 60, ¶ 1.

<sup>11</sup> *Galetti*, 2002 MTWCC 60, ¶ 1.

Compensation Act. A penalty is not “compensation.” It is what it says it is – a “penalty.”<sup>12</sup>

¶ 16 Sikkema, however, asks this Court to overrule *Galetti* and “make new law.” Sikkema argues that *Galetti* is not good law because it did not follow the plain language of § 39-71-2907, MCA. Sikkema notes that the word “penalty” does not appear in § 39-71-2907, MCA, and points to the language stating that if the insurer unreasonably delays payment of benefits, then this Court may “increase by 20% the full amount of benefits due a claimant.” Sikkema argues that the 20% increase is comprised of “extra benefits . . . to compensate . . . the claimant for the delay/denial.” Since the WCA uses the words “benefits” and “compensation” interchangeably,<sup>13</sup> Sikkema argues that a 20% increase in benefits under § 39-71-2907, MCA, is compensation, and that the adjudication of a 20% increase is an adjudication of the amount of compensation due. Thus, she argues that if she prevails on her claim for the 20% increase, she can recover her attorney fees under §§ 39-71-611 and -612, MCA.

¶ 17 This Court finds no merit in Sikkema’s argument. As Liberty points out, the Supreme Court has deemed the 20% increase under § 39-71-2907, MCA, a “penalty” since at least 1993<sup>14</sup> and in its decision in *Galetti*.<sup>15</sup> Thus, on remand, when this Court ruled that § 39-71-2907, MCA, provides for a “penalty,” and not “compensation,” this Court’s ruling was mandated by existing case law.

¶ 18 Moreover, Liberty also points to § 39-71-2905(1), MCA, which states, in relevant part:

The penalties and assessments allowed against an insurer under [chapter 71] are the exclusive penalties and assessments that can be assessed by the workers’ compensation judge against an insurer for disputes arising under [chapter 71].

Liberty argues that the 20% increase in § 39-71-2907, MCA, is a penalty to which § 39-71-2905, MCA, is referring.

¶ 19 Case law supports Liberty’s interpretation. In *Wunderlich v. Lumbermens Mutual Casualty Co.*, the Supreme Court cited § 39-71-2905, MCA, in support of its conclusion

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<sup>12</sup> *Galetti*, 2002 MTWCC 60, ¶ 1.

<sup>13</sup> See *Carlson v. Cain*, 216 Mont. 129, 137, 700 P.2d 607, 613 (1985). Sikkema points out that while the specific statutory language *Carlson* discussed in which “benefits” and “compensation” are used interchangeably has since changed, there are numerous other instances within the WCA.

<sup>14</sup> *Lovell v. State Comp. Mut. Ins. Fund*, 260 Mont. 279, 289-90, 860 P.2d 95, 102-03 (1993).

<sup>15</sup> *Galetti*, 2000 MT 234, ¶¶ 26-32.

that the 20% increase in § 39-71-2907, MCA, is a penalty.<sup>16</sup> After stating that § 39-71-2905, MCA, gives this Court broad jurisdiction over disputes under the WCA, the court explained:

The [Workers' Compensation Court] also is specifically authorized to award assessments and penalties expressly provided in chapter 71 for disputes arising under that chapter. Section 29-71-2905, MCA. **Section 39-71-2907, MCA, contains such a penalty.**<sup>17</sup>

The court also called the 20% increase in § 39-71-2907, MCA, a “straightforward penalty provision” and explained it “clearly reflects [the legislature’s] intent to permit the Workers’ Compensation Court to assess a penalty against an insurer in disputes under Title 39, chapter, 71, MCA . . . .”<sup>18</sup>

¶ 20 In short, when §§ 39-71-2905(1) and -2907, MCA, are read together, as the Supreme Court did in *Wunderlich*, the 20% increase in § 39-71-2907, MCA, is a penalty.<sup>19</sup> As this Court explained in *Galetti*, a claimant cannot recover her attorney fees on the penalty because §§ 39-71-611 and -612, MCA, allow attorney fees only on compensation.

¶ 21 Since Liberty authorized Sikkema’s knee surgery prior to adjudication by this Court, Sikkema may not recover her attorney fees on her medical benefits under §§ 39-71-611 or -612, MCA. Moreover, since the 20% increase in § 39-71-2907, MCA, is a penalty and not compensation, Sikkema may not recover her attorney fees under §§ 39-71-611 or -612, MCA, even if she prevails on her claim that Liberty’s delay in authorizing her surgery was unreasonable. Liberty is therefore entitled to partial summary judgment.

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<sup>16</sup> 270 Mont. 404, 411, 892 P.2d 563, 568 (1995).  
<sup>17</sup> *Wunderlich*, 270 Mont. at 411, 892 P.2d at 568 (emphasis added).  
<sup>18</sup> *Wunderlich*, 270 Mont. at 410, 892 P.2d at 567.  
<sup>19</sup> See *Ford*, ¶ 38 (the court reads statutes together because when interpreting statutes, it views them as part of a whole statutory scheme, and construes them so as to forward the purpose of that scheme) (citations omitted).

ORDER

¶ 22 Respondent's motion for partial summary judgment is **GRANTED**.

DATED this 26th day of September, 2017.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Chris J. Ragar  
Larry W. Jones

Submitted: September 8, 2017