IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 8

WCC No. 2018-4356

MICAH WINSLOW

Petitioner

vs.

NEW HAMPSHIRE INSURANCE CO.

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Respondent initially denied liability for Petitioner's claim, asserting that Petitioner's lumbar-spine condition preexisted his employment and that Petitioner did not injure his lumbar spine in the course of his employment. However, shortly before trial, Respondent accepted liability. Petitioner proceeded to trial, seeking a penalty and his attorney fees.

Held: Petitioner is not entitled to a penalty or his attorney fees. Respondent's denial of liability was reasonable because it had a legitimate defense to liability. Moreover, Petitioner is not entitled to his attorney fees or costs because this Court did not adjudicate his claim for benefits.

¶ 1 The trial in this matter was held on June 6, 2019, in Kalispell. Petitioner Micah Winslow was present and represented by Kraig W. Moore. Respondent New Hampshire Insurance Co. (New Hampshire) was represented by G. Andrew Adamek. Damon Morris, claims adjuster for New Hampshire, was also present.

¶ 2 Exhibits: This Court admitted Exhibits 1 through 46 and 48 through 97. Nothing was offered as Exhibit 47.

¶ 3 Witnesses and Depositions: This Court admitted the depositions of Winslow and Trevor Sager. This Court admitted the video-recorded depositions of Damon Morris, Lance Lerud, Steve Purkey, Jean Rattigan, Tomas Hanson, and Greg Vanichkachorn, MD. Morris and Winslow were sworn and testified at trial.

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

> Issue One: Whether Respondent unreasonably denied Petitioner's claim, thereby entitling Petitioner to a 20% penalty under § 39-71-2907, MCA.
>
> Issue Two: Whether Petitioner is entitled to his attorney fees and/or costs under § 39-71-611, MCA.

FINDINGS OF FACT

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

¶ 6 Winslow was credible in the sense that, in his claim and in this litigation, he provided information and answered questions to the best of his recollection and had no intent to deceive. However, he has a poor memory and is not always a reliable historian or witness.

¶ 7 From August 2014 to June 2017, Winslow worked as a dishwasher at the Famous Dave's Bar-B-Que restaurant (Famous Dave's).

¶ 8 In mid-June 2017, Winslow began working for Walmart in Kalispell. His job duties included unloading the semi-trailers with the store's new inventory, which Walmart's employees call "throwing truck."

¶ 9 While throwing truck on July 6, 2017, Winslow told Tomas Hanson, a coworker, that he hurt his low back. Hanson paged Jean Rattigan, their manager, and told her that Winslow had hurt his back. Rattigan came to the receiving area and then took Winslow to fill out Walmart's injury forms.

¶ 10 Steve Purkey, who was a manager at Walmart, helped Winslow fill out an Associate Incident Report, which they both signed. Purkey filled out part of the form, writing that Winslow hurt his low back while reaching to catch a falling box at approximately 4:50 p.m. Winslow told Purkey that he had preexisting problems with sciatica. Thus, in response to a question asking if the employee had previously been treated for a similar injury, Purkey checked the "yes" box. In the area next to the box, someone wrote: "Had a workers[']comp claim filed for same thing at previous employment."[1]

¶ 11 Winslow did not think he could walk to his truck. Thus, Purkey got Winslow a cart.

¶ 12 On July 7, 2017, Alan Dugan, who was a manager at Walmart, filled out a witness statement, although he did not personally witness the accident and relied on what others

[1] The parties did not produce sufficient evidence for this Court to make a finding as to who wrote this statement. Purkey testified that it was not his handwriting. And, the handwriting does not appear to be Winslow's.

had told him. Dugan wrote, “As a box was falling off of rollers Micah reached for it [and] felt a pull in his back muscles.” Dugan also filled out a Video Request Form to obtain the video of the area where Winslow worked. In the “Description of Accident” area of the form, Dugan wrote, “A box was falling off of [the] rollers while unloading [the] truck on [the general merchandise] side. As [Winslow] reached to catch the box, [he] felt a strain in [his] lower back.”

¶ 13 Also on July 7, 2017, Lance Lerud, Walmart’s store manager, filled out Walmart’s Manager Investigation Report, based on what he read on the other documents and what others had told him. In the box instructing the manager to describe what happened, Lerud wrote, “While throwing truck, box fell off line, reached to catch and strained back.”[2] Lerud also prepared a First Report of Injury or Occupational Disease (First Report). In the section for “description of accident,” it states, in relevant part: “While unloading the truck a box fell. Micah reached for it as it fell.”[3]

¶ 14 On July 7, 2017, Winslow saw Anne E. Armstrong, PA-C, at Big Sky Family Medicine, complaining of low-back pain with pain radiating into his left leg. Armstrong’s note states, in relevant part:

> Micah is a 32-year-old male [who] presents to urgent care with his mother because he sustained an injury to his low back while working at Walmart yesterday. He was unloading freight from a semi-truck. This is a new job for him over the course of the last 2 weeks. The freight is packed high and something fell. He caught the freight and when he stood up straight he had a sudden onset of low back pain with pain radiating down to the left mid calf. He’s having difficulty leaning to the right side since that time and he feels that his muscles are spasming. . . . He has been seen here for back spasm in the past, most recently in October 2016 and notes that he was given steroids and muscle relaxers which were helpful for him. He’s had a few minor strains in the past from lifting heavy items when he used to work at Famous Dave[’]s; otherwise, he denies a history of major injuries or surgeries to the back in the past.

Armstrong recommended conservative care and prescribed a pain medication, a steroid, and a muscle relaxer. Armstrong determined that Winslow could not work due to his “acute low back injury” with pain and radiculopathy.

¶ 15 At the time of the incident, New Hampshire insured Walmart. Sedgwick Claims Management, Inc. was New Hampshire’s third-party administrator. Damon Morris adjusted Winslow’s claim. Morris was a relatively new adjuster. At the time, he was handling approximately 200 claims and, at times, was “overwhelmed.”

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[2] All caps removed.

[3] All caps removed.

¶ 16 Morris received Winslow's claim on July 7, 2017. Morris received the First Report and the other documents from Walmart, and a two-hour video of Walmart's general merchandise receiving area, the general area where Winslow worked, for the day and time of Winslow's alleged injury. Morris saw two things that he considered "red flags" during his review of the documents. First, Winslow was a new employee. Second, Winslow had preexisting low-back problems and the Associate Incident Report stated that he had a workers' compensation claim for the "same thing" at his previous employment.

¶ 17 On July 14, 2017, Winslow returned to Big Sky Family Medicine. He still had constant pain in his low back, with pain radiating into his left leg. Armstrong recommended an MRI. Armstrong again determined that Winslow could not work due to his "acute low back pain and injury . . . [and] radiculopathy."

¶ 18 Winslow underwent an MRI on July 15, 2017, which showed, *inter alia*, a lumbar disc herniation with nerve impingement.

¶ 19 On July 17, 2017, Morris called Winslow to take a statement. Winslow told Morris that he injured his low back while catching a falling box. Winslow also told Morris that there were no witnesses to his injury. Winslow stated that after his injury, he was in severe pain and that he was "unable to walk" and had to use a motorized cart to get from the store to his truck. In response to Morris's question about his prior low-back problems, Winslow told Morris that he had one prior incident; he stated that he had pulled a muscle in his back two years previously. He told Morris that he took anti-inflammatories and was better in four days.

¶ 20 Morris sent Winslow a release for his medical records and a "Medical History Form," which asked Winslow to list the medical providers that he had seen in the previous ten years, with instructions for Winslow to sign the release, fill out the form, and return them. Winslow did not return these forms.

¶ 21 On July 18, 2017, Morris reviewed part of the video of Walmart's receiving area for general merchandise. The video shows Walmart's general merchandise receiving area from 3:50 p.m. to 5:50 p.m. on July 6, 2017. However, it does not show Walmart's employees inside the semi-trailer as they unloaded the boxes. The video shows Winslow walking through the area several times. The video also shows Winslow using a pallet jack to move large boxes and pushing and pulling a conveyor roller into place to unload a semi-trailer. At 4:46 p.m., the video shows Winslow walking back into the receiving area from the semi-trailer, picking up his water bottle, and walking next to the conveyor rollers for approximately 15 feet. While walking, he picks up his left foot and places it in front of his right foot. Although his gait is altered when compared to how he was walking in the earlier parts of the video, the change is barely perceptible. At 4:47 p.m., he stops walking, places his left hand on his low back, and bends to his right. He then straightens up, walks back toward the semi-trailer, takes a drink, and then turns and walks along the conveyor rollers and out of the picture.

¶ 22 Although Morris did not know what Winslow looked like, Morris watched part of the video to see if it supported Winslow's claim that he was injured while throwing truck. Morris noted that the video does not show any employee attempting to catch the boxes falling off the conveyor rollers nor any employee having substantial difficulty walking. Morris's claim note states:

> Employees are seen in the back room unloading a truck with the conveyor rollers. At 4:49 some boxes are seen falling off the rollers. There is no injury seen. [Injury] is reported to have happened inside the unloading truck. There is no clear moment of injury or employee showing obvious signs of pain or discomfort.

¶ 23 On July 21, 2017, Winslow saw Armstrong. Given Winslow's MRI results, Armstrong referred him to a neurosurgeon. Armstrong again determined that Winslow could not return to work.

¶ 24 On August 1, 2017, Winslow returned to Big Sky Family Medicine and saw Doug S. Marbarger, PA-C. Marbarger noted that Winslow had worked one day on a light-duty job at Walmart, but, "Prior to starting work he was getting radiculopathy to the level of the knee and after his only day of work the radiculopathy was starting to affect his left foot, with some foot drop."

¶ 25 Also on August 1, 2017, Winslow saw Stephen Campbell, MD, a neurosurgeon. Dr. Campbell recommended surgery.

¶ 26 On August 7, 2017, Winslow called Morris to inquire about wage-loss benefits. Morris told Winslow that he was waiting for Winslow's medical records, both current and prior. Winslow told Morris that he had filled out the list of providers and asked one of his medical providers to fax it to Morris. Morris then called Big Sky Family Medicine to obtain Winslow's medical records and the list of his medical providers. Big Sky Family Medicine did not have Winslow's list of providers, but sent Winslow's medical records, starting with Armstrong's record from July 7, 2017.

¶ 27 On August 8, 2017, Morris sent Winslow a letter informing him that New Hampshire was denying liability for his claim. Morris explained:

> The reason your claim is being denied is because we still have not been able to obtain prior medical records. We have sent Authorization for Release of [M]edical Records and Reports forms to you in the mail but have not yet received back the filled out forms. This information is important for us to make a determination on your claim.

¶ 28 Also on August 8, 2017, Winslow returned to Dr. Campbell. Dr. Campbell had reviewed a 2009 CT scan of Winslow's lumbar spine. Winslow decided to proceed with surgery.

¶ 29 On August 10, 2017, Winslow filled out and sent in Sedgwick's List of Medical Providers/Facilities form. However, Winslow did not list any of the providers he had seen before his Walmart employment.

¶ 30 On August 14, 2017, Morris sent a request to Kalispell Regional Medical Center (KRMC) for Winslow's medical records.

¶ 31 On August 10, 2017, a representative from Dr. Campbell's office called Morris to obtain authorization for Winslow's surgery. Morris informed her that he would not authorize the surgery because he was still investigating Winslow's claim.

¶ 32 On August 18, 2017, Winslow underwent lumbar-spine surgery.

¶ 33 On September 6, 2017, Morris's supervisor reviewed Winslow's file. She noted, "[d]enial due to request for prior medical records as [injured associate] had an injury with a different employer prior to starting work for Walmart." She recommended, "[c]ontinue to deny the claim until past records have been received." She also recommended sending a letter to Dr. Campbell asking for his causation opinion.

¶ 34 Morris did not ask Dr. Campbell for a causation opinion, because he did not think a causation opinion would carry much weight without consideration of Winslow's prior medical records, which he still did not have.

¶ 35 New Hampshire requested an ISO claims index to obtain information about Winslow's prior claims. However, it did not reveal a prior claim for a low-back injury.

¶ 36 On October 23, 2017, New Hampshire's attorney sent Winslow's attorney a letter explaining the reasons for its denial. New Hampshire's attorney also requested a list of the medical providers Winslow had seen and a signed medical release so it could obtain Winslow's prior records. The letter states, in relevant part:

> The Insurer's denial is based in part upon the necessity to review prior treatment records and from the adjuster's review of the video surveillance which does not reportedly depict the occurrence of a work injury as described by Mr. Winslow. Mr. Winslow has acknowledged that he suffered a prior similar low back work injury with periodic strains occurring while he was employed with Famous Dave's BBQ. The only prior wc claim found in his claims index is a 2002 Liberty Mutual claim involving a f[a]inting event. He has treated at KRMC or Big Sky Family Medicine as recently as October 2016 for low back spasm. Dr. Campbell mentions a 2009 CT scan within his examination notes. Mr. Winslow did not identify his prior provide[r]s for this care in his provider list. KRMC rejected the Insurer's form medical release as well. I have prepared the enclosed KRMC form release. I have also prepared a general release used by my office to gather workers' compensation claim medical records. Please arrange for

> your client's signature and return of both releases to my office. I will copy you with the records requests as the[y] go out and with a complete response from any provider as they are received in my office. Please also provide a supplemental list of medical providers who have evaluated or treated Mr. Winslow for any level of his spine dating back to July 6, 2007.

¶ 37 On November 6, 2017, New Hampshire's attorney sent a letter to Winslow's attorney, again requesting that Winslow provide a list of the medical providers he had seen before he started working for Walmart. New Hampshire's attorney also requested a signed medical release.

¶ 38 Winslow's attorney returned a medical release signed by Winslow. However, Winslow's attorney did not provide a list of the medical providers Winslow had seen before he started working for Walmart.

¶ 39 On November 27, 2017, New Hampshire's attorney wrote to Winslow's attorney, again requesting a list of the providers he had seen before he started working for Walmart.

¶ 40 New Hampshire's attorney requested medical records from KRMC, Dr. Campbell's office, and Armstrong's clinic.

¶ 41 On January 18, 2018, KRMC sent Winslow's medical records dating back to 2015. KRMC included three medical records from visits in which Winslow reported low-back pain. A record from January 21, 2015, states that Winslow had low-back pain with pain radiating to his left knee from an incident at Famous Dave's. It states:

> Pt is 29 yo male presenting to the clinic with back pain x two days. Went to work and every time he went to bend to pick some[th]ing up he had worsening pain. Pain is constant, worsening with bending, lifting, walking. Radiation of pain down to the left knee. No numbness or tingling down feet. No leg weakness/sad[d]le anesthesia. Denies any recent injuries or prior back injuries. Washes dishes for work at Famous Dave's. Lifted a barrel (smoker grease, weighing upwards of 200 lbs,[)] and had some pain after this. The pain had resolved, and after lifting this again, developed the pain he is experiencing today. Denies other injuries or concerns.

A record from March 26, 2016, states that Winslow felt acute, right-sided low-back pain after working in his crawl space. It states, in relevant part:

> Presents to the clinic with complaints of pain in his lower back noted over the past several days. States that he was working on his home in the crawl space prior to onset of these symptoms. States that he feels as though his "muscles are locking up." . . . [F]eels as though pain is exacerbated by bending. Denies . . . tin[gl]ing, numbness or weakness in his lower extremities. Denies history of prior back injuries or surgeries.

A record from October 22, 2016, documents a gradual onset of low-back pain. It states, in relevant part:

> Micah is a 31 yo male who presents to the clinic with low back pain (catching), unable to stand up. Over the week, was building up but not keeping him from doing anything, now is worsening since yesterday. Has had a few similar prior episodes. No prior back injury.

¶ 42 Because the initial documents from Walmart stated that Winslow had injured his low back while working at Famous Dave's, Morris was not surprised by the medical record from January 1, 2015. However, Morris noted that Winslow had not told him that he had injured his low back while working in a crawl space nor that he had the gradual onset of low-back pain in the fall of 2016.

¶ 43 On February 20, 2018, Winslow's attorney sent a letter to Armstrong which asked her, *inter alia*, for her opinion as to whether Winslow injured his lumbar spine in the course of his employment with Walmart while lifting or catching a box weighing more than 50 pounds.

¶ 44 On March 20, 2018, Armstrong responded to Winslow's attorney's letter. She noted that she did not know the weight of the box but checked the line to indicate that she thought that, "Mr. Winslow's back condition on July 7, 2017, and resulting MRI results were caused by the industrial injury of July 6, 2017."

¶ 45 Winslow's attorney sent Armstrong's response to Morris. However, Morris did not give Armstrong's causation opinion much weight because he did not think that she had sufficient information.

¶ 46 On July 19, 2018, Winslow filed his Petition for Hearing, seeking a ruling that he suffered a compensable injury in the course of his employment with Walmart, a penalty under § 39-71-2907, MCA, and his attorney fees and costs under § 39-71-611, MCA.

¶ 47 On August 13, 2018, New Hampshire filed its Response to Petition for Hearing. New Hampshire alleged that Winslow did not suffer an injury in the course of his employment with Walmart; it alleged that Winslow's lumbar-spine condition was preexisting. New Hampshire noted that Winslow had reported low-back pain with pain radiating into his left leg before his alleged injury at Walmart.

¶ 48 In October 2018, New Hampshire's attorney took witness statements from Hanson, Rattigan, Purkey, and Lerud.

¶ 49 In his initial answer to New Hampshire's Interrogatory No. 4, in which New Hampshire asked Winslow to identify all medical providers he had seen since July 6, 2007, Winslow identified only those medical providers he had seen since his industrial accident.

¶ 50 On November 18, 2018, Winslow served a supplemental answer in which he identified the medical providers he had seen since 2008.

¶ 51 On December 11, 2018, New Hampshire took Winslow's deposition. Winslow testified that he was unloading the semi-trailer when "the box started to fall, [I] tried to catch it, and then when I stood up fully, that's when I had all the pain . . . ." He testified that the excruciating pain radiated down his left leg and into his foot. He testified that he yelled to Hanson, who was at the other end of the dock, and said that he had hurt his back. Winslow testified that Hanson asked if he could continue to work, but that he replied that he could not. He testified that he was in so much pain that he could not lift his left foot and had to drag it as he attempted to walk. Winslow testified that Rattigan came to the area, and that she took him to the office. He testified that he could not step forward with his left leg and, thus, "hobbled along dragging my leg to the office."

¶ 52 On December 19, 2018, Winslow saw Greg Vanichkachorn, MD, MPH, FACOEM, for an independent medical examination, at the request of his attorney. Dr. Vanichkachorn accepted Winslow's story that he had the sudden onset of pain when he caught a falling box and opined that catching a falling box is a mechanism of a lumbar-spine injury. Thus, Dr. Vanichkachorn opined that Winslow suffered an injury while catching the box. Dr. Vanichkachorn stated:

> In my medical opinion, the examinee's work injury resulted in a new lumbar disc herniation with radiculopathy. This injury also resulted in exacerbation of the examinee's previous lumbar spondylosis. This exacerbation and new injury necessitated a left L5 laminectomy for L5-6 discectomy. The examinee's spondylosis developed slowly over time and became symptomatic after his injury.

¶ 53 Upon receipt of Dr. Vanichkachorn's report, New Hampshire began paying Winslow temporary total disability benefits under a reservation of rights, retroactive to December 19, 2018.

¶ 54 On January 9, 2019, Winslow took Rattigan's deposition. Rattigan testified that after Hanson told her that Winslow injured his back, she went to the receiving area. According to Rattigan, Winslow told her that he was reaching for a box and hurt his back; she denied that Winslow told her that he injured his back while attempting to catch a falling box. Rattigan also testified that Winslow stated, "this happens a lot, and I think I just need a few days' rest, and usually I'm better after that." She testified that while walking to the conference room, Winslow was walking slower than normal.

¶ 55 On February 11, 2019, Dr. Campbell replied to a letter from Winslow's attorney in which he checked a box stating that he concurred with Dr. Vanichkachorn's findings.

¶ 56 On March 26, 2019, Winslow took Purkey's deposition. Purkey testified that while he was filling out paperwork with Winslow after his accident, Winslow stated he had reoccurring sciatica that "comes and goes."

¶ 57 On March 26, 2019, Winslow took Hanson's deposition. Hanson's testimony as to the mechanism of injury differed from Winslow's. Hanson testified that he was two feet away from Winslow when Winslow said he hurt his back. Hanson explained: "I was in the truck with him, and he went to grab a box, and he didn't even grab a box, and then he said his back was hurt . . . ." As he testified, Hanson demonstrated the action of reaching with two hands at a level slightly above head height. Hanson also testified that Winslow did not limp, did not drag his left leg, nor exhibit any other sign of injury.

¶ 58 On April 25 and May 6, 2019, New Hampshire took Dr. Vanichkachorn's deposition. Dr. Vanichkachorn testified that he based his initial opinion that Winslow suffered an injury, in part, on Winslow's history that he was catching a falling box and that if Winslow did, in fact, catch a falling box, then it was his opinion that Winslow injured his lumbar spine while working for Walmart. However, Dr. Vanichkachorn testified that if Hanson's testimony that Winslow was just reaching for a box was accurate, then it was his opinion that it was only "possible" that Winslow suffered an injury at that time. For the first time, Dr. Vanichkachorn watched parts of the video of Walmart's receiving area. Dr. Vanichkachorn explained that he did not see Winslow exhibit any signs of a lumbar-spine injury when he walked through the area and when using the pallet jack. However, Dr. Vanichkachorn watched the part of the video in which Winslow walked into the receiving area from the semi-trailer and thought that Winslow was walking with a "slightly" altered gait. Dr. Vanichkachorn testified that Winslow's altered gait and his lean to his right were signs of a lumbar-spine injury and convinced him on a more-probable-than-not basis that Winslow suffered a lumbar-spine injury while unloading the truck.

¶ 59 On May 7, 2019, New Hampshire accepted liability for Winslow's claim.

Resolution

¶ 60 The issue of whether an insurer's denial of liability was reasonable is an issue of fact.[4]

¶ 61 In *Marcott v. Louisiana Pacific Corp.*, the Montana Supreme Court recognized three ways that an insurer's denial is unreasonable. First, an insurer is unreasonable if it denies liability on the facts but there are no legitimate factual disputes.[5] Second, an insurer is unreasonable if it denies liability on the law notwithstanding that "a court of competent jurisdiction has clearly decided [the] issue regarding compensability in

[4] *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)).

[5] *Marcott*, 275 Mont. at 203-04, 911 P.2d at 1133-34.

advance of [the] insurer's decision to contest compensability."[6] Third, an insurer is unreasonable if it denies liability without conducting an adequate investigation, which includes a duty to make a "reasoned review of all available evidence in the case . . . followed by an impartial evaluation of the evidence reviewed."[7]

¶ 62 Winslow raises numerous arguments in support of his position that New Hampshire did not conduct an adequate investigation and that there were no legitimate factual disputes. However, none convinced this Court that New Hampshire's initial and continued denial of liability was unreasonable.

¶ 63 First, Winslow argues that New Hampshire had no reason to obtain his prior medical records and that its denial of liability because he did not provide it with a list of his prior medical providers was unreasonable. Winslow asserts that although he had preexisting low-back problems, he was able to work. He argues that his release from work after his incident at Walmart is irrefutable proof that he suffered a new injury. However, a release from work is insufficient to prove an injury under the Workers' Compensation Act (WCA), which provides that a claimant has the burden of proving an injury, which includes the aggravation of a preexisting condition, with objective medical findings and a medical causation opinion.[8] New Hampshire knew from the outset of Winslow's claim that he had preexisting low-back problems. Therefore, Winslow's prior medical records for his low back were relevant to determine whether his symptoms were from his preexisting condition, in which case New Hampshire would not be liable, or whether he suffered an injury in the course of his employment with Walmart, in which case New Hampshire would be liable.[9] Winslow had a duty to provide New Hampshire with a list of the medical providers he had previously seen for low-back problems[10] so it could obtain his prior medical records and compare them to his current medical records

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[6] *Marcott*, 275 Mont. at 205, 911 P.2d at 1134 (alterations added) (citation omitted).

[7] *Marcott*, 275 Mont. at 209-11, 911 P.2d at 1137-38 (citation omitted).

[8] *See* § 39-71-119(1)(a), MCA (providing that an injury includes, "internal or external physical harm to the body that is established by objective medical findings"); § 39-71-407(3)(a)(i), (ii), MCA (providing that claimant must establish by a preponderance of the evidence that "a claimed injury has occurred" or that "a claimed injury has occurred and aggravated a preexisting condition"). *See also Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶¶ 44-49, 365 Mont. 405, 282 P.3d 687 (holding 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).

[9] *See Thompson v. Mont. State Fund*, 2004 MTWCC 14, ¶¶ 8-9 (citation omitted) (ruling that insurer was entitled to claimant's medical records from subsequent back injury claims under § 39-71-604, MCA, because the records "are plainly relevant to the State Fund's continued liability for the claimant's 1996 claim. If he suffered one or more material aggravations to the same body part injured in 1996, the State Fund is relieved altogether of liability for continued treatment of his low back.").

[10] *See* § 39-71-604(1), MCA (stating, in relevant part, that "the worker shall file with the insurer all reasonable information needed by the insurer to determine compensability").

to see if there was a change in his objective medical findings.[11] New Hampshire's denial of liability on the grounds that Winslow did not provide it with a list of his prior medical providers was reasonable.

¶ 64 Second, Winslow argues that New Hampshire's denial of liability was unreasonable because the video conclusively proves that he was injured while catching a falling box and undercuts Hanson's testimony that he was just reaching for a box and Rattigan's testimony that he said he was just reaching for a box. Nevertheless, the video is not direct evidence of a new injury. The video does not show the inside of the semi-trailer. Thus, it does not show the moment of injury, which could be strong circumstantial evidence of a new injury, nor conclusively resolve the dispute over the mechanism of injury. Indeed, the video calls into question Winslow's credibility. In his statement on July 17, 2017, Winslow told Morris that, after his injury, he could barely stand and was "unable to walk." The video, however, does not show Winslow with such severe symptoms. Rather, the video shows Winslow walking with a very slightly altered gait, still lifting his left foot and placing it in front of his right. The video does not show Winslow having trouble standing. Because of these discrepancies, Morris had a reasonable basis at the beginning of Winslow's claim to question whether Winslow was truthful when he reported that he was injured in the semi-trailer. Furthermore, at his deposition, Winslow testified that he could not lift his left foot and had to drag it as he attempted to walk which, again, calls into question Winslow's credibility because the video does not show such severe symptoms. New Hampshire is correct that the video gave it reasonable grounds to question Winslow's credibility and contest his claim that he suffered an injury in the semi-trailer.[12]

¶ 65 Third, Winslow asserts that New Hampshire's denial was unreasonable because it did not obtain Dr. Campbell's causation opinion, as recommended by Morris's supervisor on September 6, 2017. However, at that time, New Hampshire did not have his prior medical records because Winslow had not provided a list of his prior medical providers. Consequently, Dr. Campbell would not have had sufficient information to give a causation opinion worthy of any weight.[13]

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[11] *See* § 39-71-604(2), MCA (provides that a claim for benefits authorizes disclosure to the insurer relevant health care information and stating, "Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery.").

[12] *See generally Rose v. Mont. State Fund*, 2004 MTWCC 70 (finding that claimant's story that he reinjured his back in a fall was not credible and ruling that he did not have a compensable injury because he merely had a flareup of his pain due to his preexisting low-back condition and deconditioning).

[13] *See, e.g.*, *Russell v. Watkins & Shepard Trucking Co.*, 2008 MTWCC 36, ¶¶ 64-65 (rejecting a physician's causation opinion on grounds that physician did not know about the claimant's preexisting condition); *Leys v. Liberty Mut. Ins.*, 2019 MTWCC 10, ¶ 151 (rejecting a physician's opinion because the physician did not have sufficient information about the claimant's preexisting health history, including her preexisting conditions).

¶ 66 Fourth, Winslow argues New Hampshire was unreasonable because it did not accept liability upon receipt of Armstrong's causation opinion in March 2018. However, New Hampshire had several reasons to question Armstrong's causation opinion. At that time, Winslow had still not provided New Hampshire with a list of the providers he had previously seen for his low back and, therefore, New Hampshire did not know whether there were any additional records. Thus, New Hampshire had grounds to question whether Armstrong had a sufficient basis for her opinion. Moreover, it is evident that Armstrong based her opinion in large part on the history Winslow gave her. Nevertheless, by that time, New Hampshire had reason to question Winslow's credibility because of the discrepancies between his statement and the video and the discrepancies between his statement and his prior medical records.[14] Finally, Armstrong is a physician's assistant at an urgent care clinic and was not Winslow's treating physician for his herniated disc nor the aggravation of his preexisting spondylosis.[15] Although her causation opinion is entitled to some weight, it was reasonable for New Hampshire to insist upon an informed causation opinion from a physician, who would have better credentials to opine to the cause of a lumbar-spine injury.

¶ 67 Fifth, Winslow argues that New Hampshire's denial was unreasonable because it did not accept liability after receiving Dr. Vanichkachorn's report. However, upon receipt of Dr. Vanichkachorn's report, New Hampshire had reason to question Dr. Vanichkachorn's causation opinion because he based it upon Winslow's claim that he had the sudden onset of pain when he caught a falling box and, at that time, New Hampshire had information indicating that was not what had occurred. There is no merit to Winslow's claim that New Hampshire unfairly surprised him by raising the issue of the mechanism of injury at the eleventh hour. In New Hampshire's Response to Petition for Hearing, it indicated that a Walmart employee with the first name "Thomas" disputed the mechanism of injury "reported by Petitioner." And, in Respondent's Witness and Exhibit List, New Hampshire listed Hanson as a witness and stated he would testify to, *inter alia*, the "Walmart work event as observed by him." New Hampshire also listed Rattigan as a witness and stated she would testify to, *inter alia*, "Observations of Petitioner after event [and] [c]omments made by Petitioner after event." The dispute over the mechanism of injury was relevant, as Dr. Vanichkachorn testified that if Hanson's testimony was truthful, then his opinion would be that it was only "possible" that Winslow was injured at Walmart, which would be insufficient to prove New Hampshire's liability.[16]

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[14] *See, e.g.*, *Warburton v. Liberty Nw. Ins. Corp*., 2016 MTWCC 1, ¶¶ 47, 60-61 (ruling that claimant's treating physicians' causation opinions were not entitled to any weight because claimant misled them about the severity of her fall). *See also Christensen v. Rosauer's Supermarkets, Inc*., 2003 MTWCC 62, ¶ 26 (rejecting a physician's causation opinion that was based on the history the claimant gave him, which this Court found to be false).

[15] *See* § 39-71-116(41)(c), MCA (providing that a physician assistant can be a treating physician only "if there is not a [licensed physician with hospital admitting privileges] in the area where the physician assistant is located).

[16] § 39-71-407(3)(b), MCA ("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.").

¶ 68 Finally, Winslow asserts that the fact that New Hampshire ultimately accepted liability is proof positive that its denial was unreasonable. However, an insurer may reassess its position upon the receipt of new information. Here, New Hampshire was able to see Winslow, Rattigan, and Hanson testify and, thereby, assess their credibility. New Hampshire also took Dr. Vanichkachorn's deposition, at which he watched parts of the video for the first time and testified that the video persuaded him that Winslow suffered a new injury while unloading the semi-trailer. This Court agrees with New Hampshire that this was a close case and the scales did not convincingly tip in Winslow's favor until Dr. Vanichkachorn's testimony.

¶ 69 As explained in *Marcott*, § 39-71-2907, MCA, "was never intended to eliminate the assertion of a legitimate defense to liability."[17] Here, although this Court is convinced that Morris was handling too many claims in the summer of 2017, he conducted a complete investigation into Winslow's claim and uncovered a legitimate defense to liability, specifically that the evidence did not support Winslow's claim that he suffered a new injury in the course of his employment at Walmart. Although New Hampshire ultimately determined that the weight of the evidence supported Winslow's claim, this was not a case in which there were no legitimate issues of fact. Accordingly, this Court finds that New Hampshire's denial of liability was reasonable.

CONCLUSIONS OF LAW

¶ 70 This case is governed by the 2015 version of the WCA since that was the law in effect at the time of Winslow's industrial injury.[18]

Issue One: Whether Respondent unreasonably denied Petitioner's claim, thereby entitling Petitioner to a 20% penalty under § 39-71-2907, MCA.

¶ 71 Section 39-71-2907, MCA, provides that this Court "may increase by 20% the full amount of benefits due a claimant" if the insurer has unreasonably refused to make the payments.

¶ 72 This Court has found that New Hampshire's denial of liability was reasonable. Accordingly, Winslow is not entitled to a penalty under § 39-71-2907, MCA.

Issue Two: Whether Petitioner is entitled to his attorney fees and/or costs under § 39-71-611, MCA.

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

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

[17] *Marcott*, 275 Mont. at 205, 911 P.2d at 1134 (citations omitted).

[18] *Ford,* ¶ 32 (citation omitted); § 1-2-201, MCA.

(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.

¶ 74 At the outset, Winslow is not entitled to his attorney fees because this Court has found that New Hampshire's denial of liability was reasonable.

¶ 75 Moreover, because New Hampshire accepted liability before trial, Winslow is not entitled to his attorney fees or costs. The Montana Supreme Court has held and this Court has ruled that under the plain language of § 30-71-611, MCA, a claimant cannot recover his attorney fees unless this Court actually adjudicates the dispute.[19] This Court has explained, "case law establishes that this Court cannot award attorney fees even in cases where the insurer accepted liability the day before trial, at the beginning of trial, or after the close of evidence."[20]

¶ 76 Notwithstanding, Winslow argues that New Hampshire has not actually accepted liability because, at trial, Morris testified that he still questions the mechanism of injury. Winslow asserts that because New Hampshire has not accepted that he sustained his injury while catching a box, it can rescind its acceptance of liability for his injury at any time. Winslow asks this Court to weigh the evidence and find that he suffered an injury while catching a falling box in the course of his employment, which he asserts will be the adjudication that New Hampshire is liable for his claim. He asks this Court to then weigh

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[19] *Yearout v. Rainbow Painting*, 222 Mont. 65, 68, 719 P.2d 1258, 1259 (1986) (holding, "the statute authorizing attorney's fees, § 39-71-611, MCA, is clear and unambiguous. If an insurer denies liability for a claim for compensation, the insurer is liable for attorney's fees if the claim is later *adjudged* compensable by the Workers' Compensation judge. It is clear from the language of the statute that there must be an adjudication of compensability before an award of attorney's fees is authorized."); *Cosgrove v. Indus. Indem. Co.*, 170 Mont. 249, 552 P.2d 622 (1976) (even when the WCA is construed liberally in favor of the claimant, no attorney fees are available under § 92-616, RCM — the predecessor to § 39-71-611, MCA — unless the claim is adjudicated); *Arneson v. Travelers Prop. Cas.*, 2006 MTWCC 7 (ruling that this Court could not award attorney fees where insurer paid outstanding, undisputed medical bills after claimant petitioned this Court, but prior to adjudication); *McNeel v. Holy Rosary Hosp.*, 228 Mont. 424, 742 P.2d 1020 (1987) (where insurer accepted the claim the day before trial, no attorney fees could be awarded under § 39-71-611, MCA, because no adjudication occurred); *Vanbouchaute v. Mont. State Fund*, 2007 MTWCC 37 (at the close of evidence at trial, this Court indicated that it intended to rule in the claimant's favor regarding authorization of surgery, and the insurer authorized the surgery prior to this Court's formal ruling, therefore, this Court could not award the claimant her attorney fees because the insurer authorized the surgery before the claim was adjudged compensable); *Stevens v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 1997 MTWCC 45, Conclusions of Law, 2 (although pre-1987 version of § 39-71-612, MCA, and its predecessor § 92-618, RCM, allowed attorney fees where a case resulted in a "settlement," the legislature removed the "settlement" language, thereby allowing an award of attorney fees only when a case is adjudicated) (citing *Madill v. State Comp. Ins. Fund*, 280 Mont. 450, 930 P.2d 665 (1997)); *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶¶ 51, 53, 303 Mont. 364, 15 P.3d 948 (for a claimant to receive attorney fees, § 39-71-612, MCA (1987-present) requires that the issue be brought before the court for adjudication, and the judge must award more compensation than that offered by the insurer).

[20] *Sikkema v. Liberty Nw. Ins. Co.*, 2017 MTWCC 16, ¶ 14 (citations omitted).

the evidence and find that New Hampshire's refusal to unconditionally accept liability was unreasonable.

¶ 77 However, Winslow's argument is based on a faulty premise. New Hampshire's acceptance of liability was unconditional, thereby conceding that Winslow suffered an injury arising out of and in the course of his employment with Walmart and that it is liable for that injury.[21] Thus, it cannot rescind its acceptance without having legal grounds to do so, such as proving that Winslow has engaged in fraud.[22]

¶ 78 Moreover, because New Hampshire has accepted liability for Winslow's injury, there is no longer a justiciable controversy over the mechanism of injury. While the mechanism of injury can be a factor this Court uses to decide whether a claimant was injured in the course of his employment, this Court does not need to decide the mechanism of injury once the insurer concedes that "a claimed injury has occurred" or that "a claimed injury has occurred and aggravated a preexisting condition,"[23] because that is all that is necessary for the insurer to be liable for the claim. Thus, once New Hampshire accepted liability for Winslow's injury, the dispute over the mechanism of his injury became a moot question — i.e., "one which existed once but because of an event or happening, it has ceased to exist and no longer presents an actual controversy."[24] This Court does not have jurisdiction to decide moot questions.[25]

¶ 79 Winslow also argues that this Court can award him attorney fees pursuant to its inherent "equitable power." Winslow urges this Court to follow cases in which the Montana Supreme Court has held that a party can recover its attorney fees under

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[21] *See* § 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 . . . .").

[22] *Narum v. Liberty Nw. Ins. Corp*., 2008 MTWCC 30, ¶ 42, *aff'd* 2009 MT 127, 350 Mont. 252, 206 P.3d 964 (ruling, "Respondent cannot accept liability for a claim, settle the claim, and then un-accept the claim at a later date because it has changed its mind about whether it should have accepted liability in the first place."). *See also Leys*, ¶¶ 161, 164 (citations omitted) (explaining the general rule that "once an insurer accepts liability it may not thereafter argue that the injury or condition for which liability has been accepted was not caused by the industrial accident or disease," but that an insurer may rescind its acceptance of liability if it thereafter discovers that the claimant engaged in fraud or if the parties were operating under a mutual mistake of fact).

[23] § 39-71-407(3)(a)(i) and (ii), MCA.

[24] *Alexander v. Bozeman Motors, Inc*., 2012 MT 301, ¶ 28, 367 Mont. 401, 291 P.3d 1120 (citations omitted).

[25] *See, e.g.*, *Stewart v. Liberty Nw. Ins. Corp*., 2012 MTWCC 11, ¶¶ 26-27, *aff'd* 2013 MT 107, 370 Mont. 19, 299 P.3d 820 (explaining that there is no justiciable controversy over medical benefits during the time that the insurer had accepted liability and was paying medical benefits and that the judicial controversy did not arise until the insurer denied liability for additional medical benefits); *Hernandez v. ACE USA*, 2003 MTWCC 47, ¶ 4 (citation omitted) (explaining, "Courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions.").

principles of equity or under an exception to the American Rule.[26] Winslow argues that because he was forced to commence litigation against an insurer to obtain benefits, it would be inequitable to require him to pay his attorney fees and costs.

¶ 80 However, this Court does not have the authority to award attorney fees or costs outside of the boundaries set by § 39-71-611, MCA, because a specific statute controls over other statutes[27] and over common law.[28] Section 39-71-611, MCA, specifically sets forth the law regarding the award of attorney fees and costs in disputes over the denial of workers' compensation benefits; therefore, the cases on which Winslow relies are inapplicable.[29]

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[26] Winslow cites the following cases: *Foy v. Anderson*, 176 Mont. 507, 511, 580 P.2d 114, 116 (1978) (holding that district court had the power to grant attorney fees to a party forced to defend against a frivolous action pursuant to its "power to grant complete relief under its equity power."); *Trustees of In. Univ. v. Buxbaum*, 2003 MT 97, ¶ 46, 315 Mont. 210, 69 P.3d 663 (holding that § 27-8-313, MCA, provides discretionary authority for an award of attorney fees in a declaratory judgment action when the district court deems such an award "necessary or proper."); *Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 36, 315 Mont. 231, 69 P.3d 652 (holding "that an insured is entitled to recover attorney fees, pursuant to the insurance exception to the American Rule, when the insurer forces the insured to assume the burden of legal action to obtain the full benefit of the insurance contract, regardless of whether the insurer's duty to defend is at issue."); *Mountain W. Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶ 14, 308 Mont. 29, 38 P.3d 825 (explaining, "One of the recognized equitable exceptions to the American rule is the common fund doctrine."); *Montanans for Responsible Use of Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶¶ 59-69, 296 Mont. 402, 989 P.2d 800 (holding that litigants may obtain attorney fees under the private attorney general doctrine).

[27] *See, e.g.*, *Simms v. Schabacker*, 2014 MT 328, ¶ 29, 377 Mont. 278, 339 P.3d 832 (citations omitted) ("It is a maxim of statutory interpretation that a general statute will yield to a specific statute.").

[28] § 1-1-108, MCA (stating, in relevant part, "In this state there is no common law in any case where the law is declared by statute."); § 1-2-103, MCA (stating, in relevant part, "The statutes establish the law of this state respecting the subjects to which they relate . . . .").

[29] *See also S.L.H.*, ¶ 53 (rejecting policy argument that a claimant should be able to recover his attorney fees under § 39-71-612, MCA (1987-present), if the insurer unreasonably denies liability for benefits and then accepts liability "on the courthouse steps" because "the explicit language of the statute precludes such a reading").

JUDGMENT

¶ 81 Winslow is not entitled to a penalty under § 39-71-2907, MCA.

¶ 82 Winslow is not entitled to his attorney fees or his costs under § 39-71-611, MCA.

¶ 83 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 this 7th day of May, 2020.

/s/ DAVID M. SANDLER
JUDGE

c: Kraig W. Moore
G. Andrew Adamek

Submitted: June 14, 2019