IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 19

WCC No. 9803-7941

HERMAN GONZALES, FAWN LYONS and KEN LAUDATO

and all others similarly situated

Petitioners

vs.

MONTANA POWER COMPANY

Respondent/Insurer/Employer.

ORDER ADOPTING SPECIAL MASTER'S DUTY DECISION

Case Summary: Claimants, who are former or present Montana Power Company (MPC) employees, brought action on behalf of themselves and other similar MPC employees seeking impairment awards. Testimony taken earlier in the case established that claims adjusters are aware that certain medical conditions and medical procedures are likely to result in impairment awards and that adjusters should solicit an impairment rating and pay any award due without a specific request or demand by the claimant. The parties agreed to a settlement procedure under which the Court appointed Professor David Patterson as a special master to initially review certain legal questions and thereafter audit MPC claims files to determine which claimants are entitled to impairment awards. Patterson issued a determination concerning MPC's duties with regard to impairment. While both parties agree with the broad determination that a duty exists, they disagree as to particular aspects of the determination.

Held: Upon review of Patterson's duty Order, the Order is affirmed and adopted by the Court. (1) A duty to conduct an investigation into and pay impairment awards in cases where the nature of the injury or medical procedure is such that a reasonable adjuster would consider it likely to result in an impairment rating and award arises by implication from the penalty provisions of the Workers' Compensation Act, section 39-71-2907, MCA. (2) It is not unreasonable for claims adjusters to rely on claimant's counsel, where represented, to bring the probability of an impairment rating to their attention. (3) The 1993 provision for distribution of a brochure prepared by the Department of Labor and Industry does not diminish the duty.

Topics:

Insurers: Duties. Insurers have a duty to request an impairment rating and pay any undisputed impairment award where the nature of the injury or the medical procedure undergone by a claimant are such that a reasonable claims adjuster would recognize that the injury or procedure is likely to result in an impairment rating.

I**nsurers: Duties.**The fact that a claimant is represented by counsel is a factor in determining the duty in the specific case. It is not unreasonable for adjusters to rely on counsel to bring any entitlement to an impairment award to their attention.

Insurers: Duties. The 1993 statute requiring that insurers distribute a brochure, which is prepared by the Department of Labor and Industry, to claimants does not relieve insurers of their duty to seek impairment ratings and pay impairment awards.

Impairment: Impairment Ratings. Insurers have a duty to request an impairment rating and pay any undisputed impairment award where the nature of the injury or the medical procedure undergone by a claimant are such that a reasonable claims adjuster would recognize that the injury or procedure is likely to result in an impairment rating.

¶1 The petition in this case alleges that Montana Power Company (MPC), which is self-insured, failed to pay impairment awards to many of its injured employees who should have received them. Pursuant to an agreement of the parties, this Court appointed Professor David J. Patterson (Patterson) as its special master in this case. On November 16, 2000, Patterson filed his determination concerning MPC's duty to its injured workers. Both parties object to his determination.

¶2 I attach a copy of Patterson's determination. It sets out the agreement of the parties, the scope of the Court's review, and Patterson's resolution of the duty issue.

The Duty Determination

¶3 The parties agree *in general terms* that MPC had a duty to advise its injured workers of their entitlement to impairment awards. However, they disagree as to the scope and circumstances of that duty.

¶4 After extensive discussion, Patterson made a number of specific determinations regarding MPC's duties. Specifically, he determined:

- Where probable that claimant's injury will result in an impairment rating, MPC had a duty to tell claimant to obtain an impairment rating and to advise him of the significance of the rating.

- The duty includes telling the claimant the need for, and significance of, a maximum medical improvement determination.
- The duty applies to cases arising prior to the Supreme Court decision in *Holton v. F.H. Stoltz Land and Lumber Co.,* 195 Mont. 263, 637 P.2d 10 (1981).
- A 1993 law requiring distribution of a workers' compensation informational brochure prepared by the Department of Labor and Industry did not relieve MPC of its duty.
- The duty does not extend to claimants who were or are represented by attorneys.

(Special Settlement Master's Duty Decision at 15-16.) Patterson also determined that the Unfair Claim Settlement Practices Act of the Montana Insurance Code, §§ 33-18-201, MCA, is inapplicable to MPC's duties. (*Id*. at 15.)

The Parties' Objections to the Duty Determination

¶5 Petitioners have only a single objection to Patterson's determinations, and that is to his finding that MPC's duty does not extend to claimants who were or are represented by attorneys.

¶6 MPC's objections are more complex and textured. Initially, it agrees that there is a duty to inform claimants whose injuries will probably result in an impairment rating, however, it points out that determining what is "probable" is not easy. It asks for more guidance as to the duty: "[T]he Court should definitely give some meat to what will be expected as to how MPC can determine when it is 'probable' that a claimant has an IR [impairment ratable] injury." (MPC's Objections/Comments to the Duty Issue Ruling at 6.) Second, MPC objects unequivocally to the determination that any duty is owed after the 1993 legislation requiring distribution of a brochure. (*Id*. at 2-3.)

Discussion

¶7 Disposition of the objections requires an understanding of the source and nature of the duty. Patterson provides a scholarly analysis, and I will simply weigh in here with some additional comments.

¶8 Initially, the insured's duty to claimants arises directly from statute. Since 1975, Montana statutes have provided for a penalty to be assessed against insurers who unreasonably delay or refuse benefits which are properly due claimants. § 39-71-2907, MCA. This Court and the Supreme Court have frequently interpreted and applied the statute. Those decisions have required the courts to determine what constitutes unreasonable delay or refusal. To make those determinations, the courts have had to ascertain what duties insurers owe claimants when adjusting claims. It is no stretch to say that section 39-71-2907, MCA, imposes, by necessary implication, a duty upon insurers to

adopt adjustment practices ensuring that claimants are promptly paid the benefits they are due.

¶9 Decisional law holds that an insurer has a duty to make a reasonable investigation prior to denying or terminating benefits. *Stevens v. State Compensation Mut. Ins. Fund,* 268 Mont. 460, 886 P.2d 962 (1994)(duty to conduct reasonable investigation into fraud allegations prior to terminating benefits in an accepted liability case); *Lovell v. State Compensation Mut. Ins. Fund,* 260 Mont. 279, 860 P.2d 95 (1993)(duty to conduct a reasonable investigation to determine whether social security offset which reduces benefits is appropriate -- "assumption" concerning ground for social security disability award is not reasonable); *Stordalen v. Ricci's Food Farm,* 261 Mont. 256, 862 P.2d 393 (1993) (insurer's denial of request for medical consultation unreasonable where none of the reasons advanced for the denial were justified).

¶10 In *Lovell* the Supreme Court held that the duty to investigate is "independent of, and unrelated to, any action by a claimant." 260 Mont. at 289, 860 P.2d at 102. At issue in that case was the applicability of social security offset. The offset applied only if the disability upon which the social security disability benefits was based was the same disability arising from the workers' compensation injury. The claims adjuster "assumed" the disabilities were the same and took the offset, which reduced the claimant's benefits to zero. In fact, the disabilities were not the same, and this Court awarded a penalty for taking the offset. The Supreme Court affirmed, invoking the language quoted above.

¶11 Apropos to the present case is *Holton v.F.H. Stoltz Land and Lumber Co.,* 195 Mont. 263, 637 P.2d 10 (1981). In that case, the parties agreed that the claimant had at least a 10% impairment, however, the insurer refused to pay because the claimant wanted more. The Supreme Court held that a penalty was warranted since the claimant was clearly entitled to the award. Construing the penalty statute -- section 39-71-2907, MCA -- the Court held, "The language of the statute makes it clear that the insurer has no absolute right to delay the payment of compensation until a formal hearing. Although the total amount of compensation may be in dispute, the insurer has a duty to promptly pay any undisputed compensation." 195 Mont. at 265, 637 P.2d at 13 (citations omitted.)

¶12 Entitlement to an impairment award has remained constant over the years despite legislative changes in benefits. Indeed, entitlement to an impairment award has been more specifically spelled out. § 39-71-703, MCA (1987-1999).

¶13 What I glean from section 39-71-2907, MCA, and the decisions thereunder is (1) a legal duty to pay an impairment award where due; and (2) a duty to make a reasonable investigation as to whether an impairment award is due. As the foregoing review of case law should make evident, the duty to investigate is not limited to denials of benefits but also encompasses a duty to make a reasonable investigation as to what benefits are properly due, *see Lovell*.[(1)]

¶14 However, as the Supreme Court has said time and time again, the question of reasonableness is a question of fact. *Lovell,* 260 Mont. at 288, 860 P.2d at 101; *Stordalen*, 261 Mont. at 258, 862 P.2d at 394; *Mintyala v. State Compensation Ins. Fund,* 276 Mont. 521, 528, 917 P.2d 442, 446 (1996). This principle is critical to the resolution of the parties' objections to Patterson's determination.

I. Duty - Claimants with Attorneys

¶15 Petitioners urge that an insurer's or self-insurer's[(2)] duty does not change just because a claimant may be represented by an attorney. While that statement may be true in the abstract -- i.e., the duty to reasonably investigate and pay benefits due remains constant as a guiding principle -- it begs the question as to what constitutes a reasonable investigation or claims adjustment practice under the particular facts or circumstances. As I noted in the previous paragraph, what is reasonable is a question of fact.

¶16 The fact that a claimant is represented by counsel is a fact of importance in determining the reasonableness of the insurer's investigation and claims adjustment. Attorneys have a duty to advise their clients of their rights, including the right to any impairment award. Rule 1.1 of the Rules of Professional Conduct requires that: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." A review of Montana Workers' Compensation Court and Supreme Court decisions over the past 20 years demonstrates that the claimants' bar in Montana has aggressively and competently pursued the interests of the injured workers. That is a fact surely not lost upon insurers and their adjusters. If a competent lawyer does not identify a claimant's entitlement to an impairment award, how can it be said that the insurance adjuster should have done so? Is it unreasonable for an adjuster to assume that claimants' lawyers are competent and will bring any possible entitlement to benefits to their attention? These questions are rhetorical. It is not unreasonable for insurers to be less vigilant in investigating and assessing a claimant's entitlement to an impairment award where the claimant is represented by an attorney.

¶17 Petitioners argue that the foregoing conclusion is contrary to the holding in *Ridley v. Guaranty National Ins.,* 286 Mont. 325, 951 P.2d 987 (1997). That case involved medical benefits available under an automobile insurance policy. The Supreme Court held that such benefits must be paid, even though no final settlement has been reached, where liability for the benefits is reasonably clear. 286 Mont. at 334, 951 P.2d. at 992. They urge that since the *Ridley* opinion does not condition the obligation upon whether a party is represented by an attorney, the obligation exists whether or not an attorney is involved. (Petitioner's Objection to Special Master's Decision of November 14, 2000 Regarding Duty at 2.) As with the abstract principal that an insurer has a duty to reasonably investigate and adjust claims, the principal is unassailable in the abstract but begs the ultimate question

as to when liability is reasonably clear. More importantly, the *Ridley*decision does not consider the insurer's duty to investigate or whether the involvement of an attorney affects the extent to which an investigation is necessary.

II. Duty in Light of Brochure Requirement

¶18 In 1993 the legislature added a requirement that the Department of Labor and Industry prepare a written brochure for distribution by insurers to claimants. The requirement set out in section 39-71-606(2), MCA (1993-1999), states:

> (2) The department shall make available to insurers for distribution to claimants sufficient copies of a document describing current benefits and entitlements available under Title 39, chapter 71. Upon receipt of a claim, each insurer shall promptly notify the claimant in writing of potential benefits and entitlements available by providing the claimant a copy of the document prepared by the department.

MPC urges that after July 1, 1993, the distribution of the brochures described in the quoted section discharged its duty to advise claimants of their possible entitlements to impairment awards. The argument is unpersuasive. On its face, the section does not relieve insurers of their obligation to reasonably investigate and adjust claims. The legislature did not repeal or amend section 39-71-2907, MCA. The section merely requires that insurers distribute the brochure, thus imposing upon them an additional, statutory duty.

III. Fleshing Out the Duty

¶19 MPC points out that an impairment rating is a "medical determination," see § 39-71-711, MCA. It does not dispute that where an impairment rating is received from a medical evaluator, it has a duty to follow-up. However, it asks for guidance as to its responsibility with respect to impairment ratings lacking an actual rating.

¶20 MPC is not required to become physician and medical expert. Its duty is to reasonably investigate and adjust claims. Testimony by George Wood, as well as by MPC's own current workers' compensation adjuster, establishes that claims adjusters are aware that certain conditions and medical procedures will, or are likely to, result in impairment ratings, and that in such cases it is standard practice to solicit impairment ratings. Using the case law previously cited as guidance, the duty of MPC is to investigate those claims, obtain impairment ratings, and pay any undisputed impairment awards.

¶21 The evidence taken by the Court at a previous hearing in this case, as well as the depositions (particularly of George Wood), establish some of the conditions and medical procedures which should have triggered further action by MPC. It is doubtful that the conditions and procedures identified in the testimony are exhaustive, but they provide a good beginning for any review of cases.

¶22 Moreover, the Stipulated Settlement Procedure which the parties have executed provides a mechanism which alleviates the need for further clarification. The parties agree that this matter shall be treated as a class action and identify the class as "those current and former employees of Montana Power Company ("MPC") that are or were entitled to impairment benefits under the Montana workers' compensation laws . . . " (Stipulated Settlement Procedure at 2.) They further agree that the special master appointed by the Court, or an "independent auditor," shall review MPC's workers' compensation files to determine which employees are entitled to impairment awards.[(3)] Finally, the stipulation expressly permits "medical reviews." (*Id.*) I endorse the procedures which the parties have adopted. The goal of the agreement is to identify injured workers who are entitled to impairment awards and pay the awards. The procedure which the parties have adopted, and which I have approved, allow medical review and thus do not depend upon a strict determination of MPC's duty in its prior adjustments of the claims.

¶23 I commend the parties for their agreement. It reflects their commitment to what I see as the "bottom line," which is to pay claimants the impairment awards they are due, and not become bogged down in time consuming litigation.

ORDER

¶24 Professor Patterson's duty determination is hereby adopted with the qualifications outlined in the foregoing discussion.

DATED in Helena, Montana, this 4th day of May, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c : Mr. Chris J. Ragar
Mr. W. Wayne Harper
Mr. David J. Patterson
Submitted: January 10, 2001
Attachment: Special Settlement Master's Duty Decision filed 11/16/00

1. In reaching this conclusion, I am aware of cases holding that an insurer has no duty to solicit claims, e.g., *Devlin v. Galusha, Higgins & Galusha,* 202 Mont. 134, 139, 655 P.2d 979, 981 (1982). Those cases, however, are inapposite since they deal with claims not even made.

2. Hereinafter, my reference to "insurers" will encompass both traditional insurers and self-insurers, such as MPC.

3. The actual language of the agreement is somewhat more complex than indicated, but the bottom line is as stated. The parties agree as to the class, which is defined as "those current and former employees of Montana Power Company ("MPC") that are or were entitled to impairment benefits under the Montana workers' compensation laws . . . ." They then agree that the special master or an independent auditor shall review MPC's workers' compensation claims files to "determine whether workers are to be included in a class of employees identified in this Stipulation." (Stipulated Settlement Procedure at 2.)

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Special Settlement Master

WCC No. 9803-7941

N THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

HERMAN GONZALES, FAWN LYONS, and KEN LAUDATO, and

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Petitioners

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Employer/Self-lnsurer/Respondent.

SPECIAL SETTLEMENT MASTER'S DUTY DECISION

Pursuant to the STIPULATED SETTLEMENT PROCEDURE (SSP) filed August 25, 2000, and the ORDER APPROVING THE SSP AND APPOINTING MASTER filed September 13, 2000, SPECIAL SETTLEMENT MASTER (SSM) David J. Patterson submits the following Duty Decision.

STIPULATED SETTLEMENT PROCEDURE

The SSP constitutes a resolution mechanism for issues involved in this litigation. In essence, it provides that this matter will be treated as a class action for purposes of this settlement procedure, and that the parties agree that the prerequisites to class action 23(a) and 23(b)(3) Mont.R.Civ.P. are satisfied as to two separate classes for purposes of this SSP. Paragraph 2 of the SSP recites that Class members consist of:

> those current and former employees of Montana Power Company (MPC) that are or were entitled to impairment benefits under Montana workers' compensation laws as defned by the AMA Guidelines of Impairment (4th Edition). The first sub-class of claimants shall include those current and former employees of MPC that were entitled to an Impairment Rating (IR) under Montana workers' compensation laws as defined by the AMA Guidelines of Impairment (4th Edition) at the time of the filing of the Petition in this litigation. The second sub-class of claimants shall consist of current and former employees of MPC that are or were entitled to impairment benefits under Montana workers' compensation laws as defined by the AMA Guidelines of Impairment (4th Edition) but whose receipt of the impairment benefits was unreasonably delayed or denied, but were not paid until after the fling of the Petition in this matter. The named Petitioners shall be in one or both sub-classes.

In other respects, the SSP provides that the SSM, or an independent auditor appointed by the SSM, shall review MPC workers' compensation files to determine whether workers are to be included in a class of employees identified in this SSP. Review details and process are provided in paragraph 3 of the SSP, but do not begin until after the duty issue is resolved.

Paragraph 4 of the SSP provides for the appointment of SSM David J. Patterson with authority to "decide all procedural, factual, and legal questions, including authority to attempt to settle all procedural, factual, and legal questions." The SSM also has authority to submit proposed orders to the Workers' Compensation Court (WCC) that the SSM deems warrant the Court's involvement. The SSM's primary responsibility is to undertake review of MPC's workers' compensation files, either personally or by appointment of an independent auditor, to identify potential members of the class of MPC employees established by this SSP and to decide applicable Holton award duty issues. Again, review and process detail are provided for in paragraph 4 of the SSP, but do not begin until after the duty issue is resolved.

As summarized above, the cornerstone, or key to the resolution of this matter under the stipulated process is resolution of any duty issues involving the payment of Holton awards. (Paragraph 5, SSP) Paragraph 5 SSP relates that "the parties have attempted to negotiate a resolution of duty issues related to the requirement as to when an employer would have a duty to pay a Holton award. The parties have been unable to resolve this issue."

The parties have stipulated to a briefing schedule: submission of briefs and reply briefs in support of their respective positions on the duty issue to the SSM in contemplation that the

SSM will issue a preliminary decision of the duty issue within 30 days of the submission of the parties' reply briefs. (Submission of initial briefing was delayed until the WCC's 9/13/2000 order approving SSP and appointing SSM) After the SSM has provided the parties the duty issue decision, each party has 15 days to file specific objections to SSM fudings; if objections are fled by any party to SSM's findings, the matter is then submitted to the WCC for a duty issue determination on a *de novo* basis, where the Court may require further briefing or argument on the duty issue. (See paragraph 5(a) & (b) SSP for specific schedule) Finally, if there are no objections to the SSM's decision on the duty issue, or after the WCC has ruled, if there are objections, the parties agree that the SSM's review shall immediately begin utilizing the SSM's decision or the WCC's duty ruling. (See 5(c) SSP) The remaining SSP paragraphs deal with stipulated collateral (but important) matters that provide for implementation of the duty decision. The immediate and primary responsibility of the SSM, or the WCC, if required, is to decide the duty issue. In this undertaking, paragraph 4, SSP specifies that: "A11 file review shall be protected and deemed confidential until such time as the SSM files any orders or fudings with the (WCC);" and that, "no review process shall be initiated until such time as the dutv issue in paragraph (5) is resolved." (Emphasis Supplied) (Paragraph 4, SSP, at page 3)

Accordingly, this SSM's DECISION is limited to the Legal Duty Issue under Montana Workers' Compensation law and practice.

LEGAL DUTY ISSUE

When Montana Power Company (MPC) has accepted a workers' compensation claim as compensable, and when it is probable that the claimant's injury would result in an impairment rating (IR) under American Medical Association (AMA) Guidelines of Impairment (4 Edition), does MPC have a legal duty to advise the Claimant to get an IR, and of the possibility of permanent partial disability (PPD) benefts being paid on the basis of the IR.

Sub-issues include consideration of various developments that have evolved in policy (statutes) and case law, and administration of Montana Workers' Compensation law. These are dealt with here, so far as possible, in the order presented by the parties; but, the controlling feature that drives resolution of most collateral issues is my ultimate conclusion:

> It is my OPINION, based on Petitioners' and MPC's briefs referencing reported authority, relevant file documents, and very credible expert testimony, that once MPC has accepted a workers' compensation claim as compensable, and it is probable that a Claimant's injury would result in an IR under applicable AMA Guidelines, that MPC has a legal duty to advise the Claimant to get an IR. and the legal significance of getting an IR.

SUMMARY: PARTIES' POSITIONS/ANALYSIS

Petitioners' basic analysis (as does that of MPC) focuses on the spirit, intent and central point of workers' compensation:

> "The rationale for adopting workers' compensation legislation was to **guarantee** workers with work related injuries some form of compensation in **exchange** for relinquishing any potential tort claims against their employers.
>
> The enactment of the Workers' Compensation Act was essentially a compromise between industry and labor--workers received guaranteed no-fault recovery, and industry was relieved of the possibility of large and potentially uncapped recoveries in the tort system." Lewis & Clark County v. Industrial Accident Bd., (1916) 52 Mont. 6, 8-11, 155 P. 268, 269-70. (Petitioners' Emphasis) (P. I, PETITIONERS' REPLY BRIEF)

In this context, Petitioners' position appears to be that even prior to Holton v. F. H. Stolze Land and Lumber Company, _ Mont._, 637 P.2d 10, (1981), (P. 2, PETITIONERS' DUTY BRIEF), the law imposed a duty on the insurer (here MPC) "to pay appropriate benefits and provide appropriate information to Claimants, " and that, "the duty is even more pronounced with the self-insured/employer, here MPC." In 1981, Holton clearly established that ". . . the insurer has no absolute right to delay the payments until a formal hearing," and that, ". . . although the total amount of compensation may be in dispute, the insurer has a duty to promptlv pay any undisputed compensation" (Emphasis Supplied, 637 P.2d 10, 13) Of course this pronouncement does not resolve the present controversy: Does the insurer/adjuster (here self-insured) have an affirmative duty to advise regarding the additional possible entitlement (IR), and its significance. Petitioners rest their pre-Holton conclusions on Professor Larson's compensation theory that:

> "The distinctive feature of compensation insurance is that, although it arises from a contract between the employer and the carrier, **it creates a sort of insured status in the employee which comes to have virtually an independent** existence.... Compensation insurance however has come to be an integral part of the compensation system; and **the ultimate object of that system is the assurance of appropriate benefits to employees.** The insurance carrier therefore stands in two relations: to the employer, to protect it from the burden of its compensation liability, and **to the employee, to ensure that he or she gets the benefits called for by the statute."** (Petitioners' Emphasis) Larson on Workers' Compensation, Section 92.21, p. 17-15 (sic). (Pgs. 2 & 3 of PETITIONERS' DUTY BRIEF)

Other commentators and courts have addressed this "special relationship" in workers' compensation, but need not be recited here; they are, in large part, redundant.

Petitioners also buttress their pre-Holton duty conclusions on the (then) existing statutory requirement (§ 39-71-104, MCA) that the act must be liberally interpreted in the Claimant's

favor; Petitioners' contentions indicate that the duty to advise regarding IR's always existed. Case authority provides, but does not address the important dispositive issue, particularly Devlin v. Galusha. Higgins. and Galusha, (1982), 202 Mont. 134, 655 **P.2d 979,** 981, that employers have no duty to solicit claims. (Cited on p. 5, MPC's DUTY BRIEF). But, Devlin and the other cases MPC cites along with it, only concern whether an employer/insurer is required to (initially) notify claimants to file a claim if they have **been hurt** on the job, and do not reach the present controversy: Whether MPC has a legal duty to advise Claimants of undisputed benefits, and the significance of obtaining an IR when a claim has been accepted as compensable. (SSM's Emphasis) Thus, the legal duty issue in pre-Holton claims has not been specifically resolved in the present context, but the rationale supporting the pivotal duty conclusion applies to pre-Holton cases as well.

MPC's LEGAL DUTY ASSUMPTIONS

MPC's legal duty assumptions are best presented on pages 2 and 3 of its DUTY ISSUE BRIEF, set out as follows:

> The Montana Supreme Court directly addressed the full breadth of authority and jurisdiction granted the Montana Workers' Compensation Court in the case of State ex rel. Pacific Employers Ins. Co. Court of State of Montana, (1988), 230 Mont. 233, 749 P.2d 522. The Court held:
>
> The Montana Workers' Compensation Court is a creature of statute. It has no constitutional status as its jurisdiction is fixed by the legislature. . . Ld. at 523.
>
> The Montana Supreme Court went on to delineate the sole method for addressing and defining the Workers' Compensation Court's jurisdiction when it provided that legislative amendment is required to "dehme the court's acquisition of jurisdiction. " L This finding has been consistently followed by the Montana Supreme Court when addressing any jurisdictional questions relative to the Workers' Compensation Court. See, Ingraham v. Champion Int'l. (1990), 342 Mont. 42, ?, 793 P.2d 769, 773 and its progeny. The implications of this jurisdiction have been made crystal clear by the many decisions that have held that the Workers' Compensation Court must always use the applicable law from the time of the injury to the Claimant. Worst v. Hardv Constr. Co. (1991), 249 Mont. 477, ?, 817 P.2d 231, 233. Consistent with this analysis, the Montana Supreme Court has held that:
>
> . . . any reasonable doubt as to the grant of a particular power will be resolved against the existence of the power.
>
> MPC v. Publ. Service Comm'n, (1983), 206 Mont. 359, 371, 671 P.2d 604, 609 (citing State v. Bovle (1921), 62 Mont. 97, 102, 204 P. 378, 379). Both Boyle and MPC v. PSC go directly to the point that a division of government [like the PSC or the Workers' Compensation Court] if created by a statute is, "a creature of owes its being to, and

is clothed with such powers as are clearly conferred upon it by statute. " Ld. From the time of Boyle, 1921, until today, any statutorily dehmed body must be able to fmd the "conferred" power or directive in an enacted statute before it can be applied to the litigants or parties before it.

With this clear guidance from the Montana Supreme Court, the Duty Issue, as all issues relative to the Montana Workers' Compensation Court, must be decided based upon the clear edicts of the Montana Legislature. Pacific Employers Ins. Co. 749 P.2d at 523. The Duty issue cannot be applied in this matter, unless it can be derived directly from the express language of an enacted statute.

MPC can state categorically in this matter that Counsel for the Petitioners will not be able to cite the Settlement Master to a dehmitive statute that requires any employer to advise employees that they may seek an impairment rating and receive a Holton Award. That is because no statute has ever been passed by the Montana legislature setting forth a duty to advise claimants of additional benefits if they receive an impairment rating. Rather, in 1993, for the first time the Montana legislature passed a "notice" statute. The Montana legislature directly addressed and enacted legislation requiring some "notification" to claimants by insurers in 1993. The legislature enacted subsection (2) of § 39-71-606, M.C.A.... (Section 39-71-606, MCA, is discussed later in this OPINION.)

On page 5 of MPC's REPLY BRIEF it admits that:

MPC would reiterate that while no case in Montana has directly addressed the issue presented in this matter, other states have addressed this issue or extremely similar issues. Clearly, these decisions are not binding on this Settlement Master, but they certainly are decisions that offer guidance on the law. In the case of Tooley v. North Dakota Workers' Compensation Bureau. 1994 N.D. LEXIS 89, 515 N.W.2d 137 (1994), the Supreme Court for the state of North Dakota addressed an issue that is extremely similar to the issue before this Court.

I have carefully examined the cases cited by MPC, and MPC's honest effort to analyze and apply them to the present situation. My difficulty with MPC's analysis, however, is twofold: (1) the cases do not address the precise duty issue involved in this matter, and (2) they arise in the context of different statutory schemes. In contrast, I am persuaded by Petitioners' MPC'S ultra literal approach in this matter would bring adjudication of the intention and meaning of worker's compensation statutes to a standstill in Montana. Of course the Workers' Compensation Court is a creature of statute; it has no constitutional status, and its jurisdiction is fixed by the legislature. And of course, there is no "definitive" statute that "literally," (specifically) sets out that an employer must always advise injured employees to seek an IR. But this entirely begs the question regarding the role of The Workers' Compensation Court. The legislature has assigned it the task of interpreting and

applying the law according to accepted doctrines of statutory interpretation. No legislature can ever anticipate all of the eventualities that may occur; that is why administrative agencies and courts, specialized or otherwise, exist. That is why the Workers' Compensation Court exists: To interpret and apply statutes that cannot possibly cover every employment relations matter, and to do so in a fashion that comports with decisions of the Montana Supreme Court. The Holton Court has spoken in this matter; the Workers' Compensation Court's duty is clear: Apply conventional statutory interpretation jurisprudence to carry out the law as explained in Holton, as understood, and supported here by most knowledgeable experts. Petitioners correctly explain: "There is also no specific statutory duty that says the insurer cannot lie to Claimant, that the insurer cannot conceal benefits, that the insurer can ignore the Claimant, that the insurer cannot discriminate against certain Claimants on the basis of sex or religion, etc." (Petitioners also rhetorically query: "Would MPC argue that it is allowed to do these things?") (P. 7, PETITIONERS' REPLY BRIEF)

SSM concludes that Petitioners' points are well-taken, especially dealing with the task at hand--interpreting the workers' compensation act as written by the legislature and interpreted by the WCC and the Supreme Court. (Of course, the legislature could address and resolve these specific issues that have not been previously decided)

Petitioners most significant statutory support is set out on page 9 of PETITIONERS' DUTY BRIEF:

Section 39-71-2203, MCA, provides:

> "No such policy shall be issued unless it contains the agreement of the insurer that it will **promptly pay to the person entitled to compensation, all the installments of compensation or other payments in this chapter provided for** and that the obligation shall not be affected by any default of the insured. . . Such agreement shall be construed to be a direct promise by the insured to the person entitled to compensation." (Petitioners' Emphasis)

Section 39-71-2108, MCA, provides in part:

> **Failure of employer to pay compensation - duty of Department.**"Upon the failure of the employer to pay any compensation provided for in this chapter upon the terms and in the amounts and at the times when the same becomes due and payable, the department shall upon demand to the person to whom compensation is due, [provided penalty]. . . "

Section 39-71-105(3), **MCA,** makes the declaration of public policy, in part:

> "Montana workers' compensation and occupational disease insurance systems are intended to be primarily self administering. Claimants should be able to speedily

obtain benefits, and employers should be able to provide coverage at reasonably constant rates. To meet these objectives, the system must be designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities."

Without a very broad and comprehensive duty on insurers to explain benefits, the system would maximize reliance on Courts and lawyers. (Petitioners' Conclusion and Emphasis)

Petitioners next attempt to apply the 1997 Unfair Claim Settlement Practices Act (UCSPA) Section 33-18-201, MCA; particularly § 33-18-201(6), MCA, which forbids a person, including self insurers, from:

(6) "neglect to attempt in good faith to effectuate prompt, fair, and equitable settlement of claims in which liability has become reasonably clear;.' . . . Petitioners assert that UCSPA provisions "are applicable to the handling and adjusting of workers' compensation claims." (Citing several cases in support, Pgs. 10 & 11, PETITIONERS' DUTY BRIEF).

Accepting as accurate Petitioners' portrayal of UCSPA workers' compensation applications, any present conclusions in this regard are premature, and exceed the SSM's assignment and will not be addressed at this point. This does not preclude consideration of UCSPA applications once the duty issue is resolved.

Petitioners' most persuasive arguments on the duty issue emanate from universally accepted workers' compensation *quid pro quo* balance that has protected systemic benefits to both employers and employees for nearly a century, and the clear meaning and implications of Holton itself.

Pre-1987 standard doctrines of legislative interpretation of social legislation resulted in interpretation that furthered implementation of the legislative intent to assist injured workers, and at the same time protect employers from large damage awards.

Holton itself clearly establishes that the insurer (here MPC) has a duty to promptly pay any undisputed benefits. Holton awards are benefits, and Petitioners' experts, whose credentials are also undisputed, credibly wrote and testified about minimum standards for handling a workers' compensation claim. As set out below by Petitioners:

"As part of the 1979 seminars, Mr. Wood presented CLAIMS MANAGEMENT PROCEDURE BY INSURER. These guidelines **are in the State Manual and** state:"

"The functions of the claims manager is to assure prompt processing and payment of proper claims. . . the claims manager must have current knowledge of and trends in, such diverse fields as statutory law and Court decisions, . . . mechanics of injury and illness, **healing periods and impairment evaluations** . . . The claims manager must **convey his specialized knowledge to the injured worker** in a timely,

straightforward and honest manner in order to assure that the benefits of the Workers' Compensation Act are made available to the industrial injured worker. . ." (Emphasis Supplied in PETITIONERS' DUTY BRIEF, p. 5)

At page 5 of PETITIONERS' DUTY BRIEF, Petitioners' report that Montana Workers' Compensation Manual by Norman Grosfield, published by the State Bar of Montana (1979) has long been the textbook at The University of Montana Law School. This is inaccurate. Norman Grosfield's manual is on Montana Law and Practice, the classic treatise, or reference, and always has been available in the law school library, but the Montana Law School textbook has always be written by Professor David J. Patterson.

Mr. Wood continued in deposition that:

1. He agrees that the ultimate object of the Workers' Compensation system is the assurance of appropriate benefits to employees; and he thinks that is the basis of worker's compensation since 1915 in this state; (p. 22;(7)(?)

2. The carrier stands in two relations: to the employer, to protect it from the burden of its compensation liability, and to the employee, to ensure that he or she gets the benefits called for by the statute; (Wood Depo., p. 22)

3. Full disclosure is one of the common themes that bind all adjusters together; Id.,p. 23)

4. Since 1979, the claims manager must convey his specialized knowledge including his specialized knowledge regarding healing periods and impairment evaluations, to the worker so that the benefits of the Act are made available to the worker. (Id., p. 25-27)

5. If the doctor did not do so already, the claims examiner should advise the Claimant to go back and get an impairment rating. (Id., p. 36)

6. He felt he had a responsibility to advise the worker to go and get an impairment rating; (Id., p. 37)

7. The Holton decision is a decision of the Court that said impairment is a benefit; (Id., p. 41)

8. He believes that the Supreme Court decision in Holton said that he had a responsibility to send the worker for an impairment rating if he thought an impairment rating is likely; (Id., p. 43)

After Holton, adjusters paid the Holton award as an undisputed benefit, according to Patrick Herron, a credible and experienced adjuster: ". . . those specific forms that I worked with the standard was to advise the individual claimant that they were entitled to an (IR) and that (the) IR may entitle them (sic) to further benefits. " Trial Transcript (TT, p. 82)

EMPLOYER AS INSURER

Petitioners' report (TT, P. 155) that "in discovery, MPC produced documentation titled, 'Workers' Compensation Claims Procedure."' At hearing in September, 1998, MPC explained that this procedure was part of a larger book or resource regarding the handling of insurance claims in general. Under the heading of "In-House Claims Handling Procedure for Workers' Compensation Claims," these documents state:

> "D. Specified Injuries
>
> In the event of specified injury loss to (or loss of use of an extremity, eyes, hearing, etc. . .
>
> 1. consult the attending physician for evaluation and impairment rating." (Exh. 2) Petitioners contend that MPC's own documents show some duty regarding impairment ratings.
>
> As to the State Bar guidelines, George Wood testified that these guidelines would be applicable from 1979 through the present. (Wood Depo., p. 44)

Holton established that the IR was a benefit to be paid, that a Claimant was automatically entitled to the IR if it was not disputed, without having to settle her or his claim.

Petitioners assert that: "An absolute corollary would be (is) the requirement the insurer advise (the) Claimant of the significance and importance of the (IR) . . ."; that, "without the insurer's duty to advise Claimants, many Claimants will never receive the Holton award, and Holton is rendered meaningless. . ." Petitioners further assert that, "having granted this benefit to the Claimant, the Holton decision must also be read as granting the claimant the means to enjoy the benefit" (Petitioners' Emphasis, PETITIONERS' DUTY BRIEF, P. 8) I agree.

Petitioners rely on an ancient (makeweight) maxim codified in Section 1-3-213, MCA, (". . . one who grants a thing is presumed to grant whatever is essential to its use. ") to support this asserted link between benefit and enjoyment of the benefit. (PETITIONERS' DUTY BRIEF, p. 8) But, although I agree with Petitioners' conclusion, I think the more apt reference would be: . . . "A promise made is a debt unpaid. . ." (Robert Service, "The Cremation of Sam McGee"). As Petitioners point out at pages 11 and 12 of their DUTY BRIEF:

> ". . . the insurers themselves clearly felt a duty to ascertain impairment ratings. (Petitioners' Emphasis) Both Patrick Herron and George Wood clearly felt a responsibility to generally guide workers to impairment ratings."

"As a self-insurer, **MPC should be held to an even more stringent standard and duty** of advising its Claimants. MPC also enjoys the tremendously superior bargaining position of also being the Claimant's employer. MPC holds control over receipt of benefits and also over the terms of employment. MPC has much more power and authority over the Claimant

in this self-insurer situation, than does a private carrier of the State-Fund. Some claimants will not challenge MPC's work comp actions, out of fear of their jobs. " (Petitioners' Emphasis) (PETITIONERS' DUTY BRIEF, Pgs. 11 & 12)

Further, MPC has a higher standard of care and duty to its own Claimants, because of the information supplied to its employees. MPC handouts to employees include MPC's "Employee Information," a three ring binder which states, "the Montana Power Company is committed to openness and honesty in both internal and external affairs." (Exh. 4, p. 2) Further, MPC tells its employees that its values are "fairness, integrity, respect, diligence and right behavior" (Exh. 6, p. 2), and that it "follows the spirit of the law as well as the letter of the law. " (Id., p. 3) MPC states, "to the fullest extent possible, **our company provides employees accurate and timely information on matters of importance** to the employee and the company." (L. p. 5) (Petitioners' Emphasis Added) "There are other similar representations by the company. In addition to everything else, this requires MPC to advise Claimants of likely or even possible Holton awards. " (PETITIONERS' DUTY BRIEF, Pgs. 11 & 12)

Petitioners conclude this discussion:

> "Even more than private insurers, MPC should be held to a higher and more stringent standard of providing information and advice to its Claimants (its employees) so that Claimants (its employees) receive the Holton award.-" (Parentheticals Supplied by SSM) (PETITIONERS' DUTY BRIEF, P. 13)

I agree that MPC, as a self-insured employer, owes a higher legal duty to advise its Claimants/Employees to get an IR, and the significance of that rating, than do private insurers. MPC made the "promise," and employees in the context of this employment and injury reparations scheme are entitled to rely on it.

CLAIMANTS' REPRESENTATlON BY COUNSEL

Next Petitioners assert that MPC has the same fiduciary duty to Claimants represented by counsel as to those unrepresented; MPC reminds that George Wood's deposition indicates otherwise; Petitioners then claim Mr. Wood's views are without authority, and so on.

Petitioners cannot have it both ways: (Extolling George Wood's expertise and experience in the same matter, and then rejecting his opinion when it suits their purpose.)

Petitioners hypothecate that some attorneys may be more experienced than others in representing Claimants in this area of the law; that other less knowledgeable attorneys may undertake a workers' compensation representation to assist an acquaintance or friend. Finally, Petitioners speculate that few Montana attorneys will even handle a workers' compensation case.

Petitioners' claims may be more or less true, but they beg the question. The question is: When an attorney does represent a Claimant in a workers' compensation case, is MPC responsible to advise the Claimant about her or his legal entitlement regarding IR's and their consequences? The answer is clearly no; the matter is then between attorney and client (Claimant). (See Montana Rules of Professional Conduct; concept embodied in Rule 4.2)

THE 1993 BROCHURES|

In 1993, the Montana Legislature required by statute that:

> "The department shall make available to insurers for distribution to Claimants sufficient copies of a document (brochures submitted below) describing current benefits and entitlements available under Title 39, Chapter 71. Upon receipt of a claim, each insurer shall promptly notify Claimant in writing of potential benefits and entitlements available by providing the Claimant a copy of the document prepared by the department. "

Petitioners contend that these brochures do not relieve MPC of its duty to advise Claimants of IR ratings, and their significance. MPC counters that post 1993 it fulfilled its Holton duties by distributing the brochures.

Petitioners submit the various brochures (or portions of them) on pages 18 and 19 of their DUTY BRIEF which they claim have remained essentially the same since 1993. The 1993 Brochure reads as follows:

> **What is workers' compensation?**
>
> "Workers' compensation is a program designed to:
>
> *provide, without regard to fault, wage loss benefits and medical benefits to workers suffering from a work related injury or occupational disease;
>
> *return the worker to the work forces as soon as possible;
>
> *be easy to access without professional help;
>
> *promptly provide legitimate benefits at reasonably constant rates to employers. "
>
> **What happens if I am partially disabled because of the injury?**
>
> "If your physician determines you have reached maximum medical improvement and you are able to return to work in some capacity but you are still physically impaired, you may be eligible for permanent partial disability benefits. These benefits are calculated at 66 2/3% of your wages at the time of injury - not exceed $181.00 a week. You cannot receive permanent partial disability benefits for more than 350 weeks. Contact your insurer for more information."

The 1995 Brochure makes a change as follows:

What happens if I am partially disabled because of the injury?

"If your physician determines you have reached maximum medical improvement and you may be eligible for permanent partial disability benefits if you have an actual wage loss resulting from the injury and a permanent impairment rating. If you have no wage loss, you remain eligible for an impairment award only. Contact your insurer for more information."

The 1996 Brochure provides:

What happens if I am partially disabled because of the injury?

"If your physician determines you have reached maximum medical improvement, you may be eligible for permanent partial disability benefits. If you have actual wage loss resulting from the injury and permanent rating greater than zero. If you have no wage loss, you remain eligible for an impairment award only. Contact your insurer for more information."

Again, the 1997 Brochure states:

What happens if I am partially disabled because of the injury?

"If your physician determines you have reached maximum medical improvement (MMI) you may be eligible for **permanent partial disability (ppd) benefits** if you have an actual wage loss resulting from the injury and a permanent impairment rating greater than zero. If you have no wage loss, you remain eligible for an impairment award only. Contact your insurer for more information.

Petitioners note that "the brochures for 1997, 1998, 1999, and 2000 are all similar in both the general information and the more specific information regarding partial disability."

Petitioners contend that the brochures do not relieve MPC of its Holton duties; that there is nothing to prove that the MPC Claimants received them; that the Workers' Compensation Act, itself, governs; that UCSPA and the common law is not superceded by the brochures (UCSPA previously ruled inapplicable at this time; common law arguments have been previously addressed); that the brochures are fatally defective insofar as advising Claimants of the significance of IR's; and, that brochures imply that physicians determine eligibility for permanent partial disability benefits (PPD).

Petitioners' essential analysis regarding the adequacy of the brochures to properly and legally advise Claimants in these respects is best presented in PETITIONERS' DUTY BRIEF, Pgs. 18 & 19.

"These brochures do not advise what the impairment rating is, do not advise that it comes from a medical doctor, do not advise that the insurer will pay for the impairment rating and do not advise that the doctor may have to be prompted to address the impairment rating. The brochures are inadequate. The brochures **do not advise:** 1. that the impairment rating is an undisputed minimum payment that Claimant is entitled to; 2. that the Claimant receives this benefits (sic) **without making "a settlement" of the claim;** i.e., the worker is settling future medical care, not settling the final permanent partial disability award and probably is not even settling that the impairment rating is the final or true impairment rating. (Petitioners' Emphasis)

This is absolutely crucial. **Numerous Claimants do not understand they are not settling their claim or even part of their claim** to receive benefits such as Holton awards. Claimants also do not understand the insurer will pay for the impairment evaluation and that the Holton award is an undisputed minimum with no surrender of rights to seek a higher rating. (Petitioners' Emphasis)

If a worker is paid a biweekly undisputed impairment rating, he can keep his right to seek another further impairment rating in the future if his condition deteriorates. The State Fund as a business practice will pay a second impairment rating, if the injury deteriorates after payment of the first impairment rating. (Petitioners' Emphasis)

Therefore, the information conveyed to the worker must include an explanation that the Holton award is not a 'settlement.' Its (sic) crucial to explain to the Claimants the significance of the impairment rating. Department of Labor (DOL) brochures fulfill no part of this function." Inapplicable California cite omitted by SSM).

This SSM concludes that Petitioners' assessment of the adequacy of the DOL brochures distributed by MPC in response to Title 39, Chapter 71 (notice requirements) is correct; that they do not provide adequate notice to Claimants . . . "that, they are not settling their claim or even part of their claim to receive benefits such as Holton awards;" that, they do not understand (that) the insurer (Petitioners' Emphasis) will pay for the impairment evaluation;" or that, "the Holton award is an undisputed minimum with no surrender of rights to seek a higher rating."

DUTY OWED TO CLAIMANTS, NOT DOCTORS

Petitioners' submission of this section in their brief is superfluous. (DUTY BRIEF, page 20) Of course the duty to inform of possible benefits is a duty to the Claimant, not to health care providers; it cannot be fulfilled by sending an insurance form to a medical doctor, with standard questions regarding maximum medical healing and IRs. These standard questions (form reports) sent early on in the healing process could not accurately indicate the likelihood of an IR, and it would likely be unusual for a medical doctor to understand

the legal import of Holton. Again, the adjuster must report IR potential to the claimant; this responsibility is not abdicated if MPC merely solicits the opinion of Claimant's doctor.

ADVISING CLAIMANT ABOUT IMPLICATIONS OF MAXIMUM MEDICALIMPROVEMENT (MMI)

This LEGAL DUTY DECISION necessarily includes MPC's duty to Claimants to explain the consequences of MMI determinations, specifically as they relate to IRs.

Otherwise, the Holton ruling would be circumvented and meaningless. MPC cannot excuse its duty to advise about IRs because it did not explain the significance of seeking prerequisite MMI determinations, and that IRs are inextricablility intertwined--one depends upon the other. MPC (insurer) must satisfy MMI requirements to legally comply with its IR duty responsibilities to injured workers whose claims have been accepted.

HYPOTHETICAL CLAIMANTS (RED HERRINGS)

On page 9 of MPC's DUTY BRIEF it makes reference to anticipated Petitioners' use of hypothetical Claimants, "rather than those set forth in the Petition . . . to impose the duty they seek." MPC characterizes this anticipated approach by Petitioners as ''Red Herrings.', Petitioners' rejoinder: ''It is not clear what point MPC is trying to make. MPC already stipulated that this is a class action (SSM's Emphasis) and that Petitioners represent a class of workers, some of whom are unknown." Petitioners speculate that more Holton awards will be discovered--that remains to be seen, utilizing this stipulated procedure; but for present purposes, SSM's unavoidable conclusion must be that this is a class action, and that the possibility of some presently unknown (hypothetical) participants appearing is the legal condition that prevails.

FINDINGS/CONCLUSIONS

1. Once MPC has accepted a workers' compensation claim as compensable, and it is probable that the Claimant's injury would result in an IR under applicable AMA Guidelines, MPC has a legal duty to advise the Claimant to get an IR, and the legal significance of getting an IR.

2. MPC's legal duty to advise Claimants to get an IR necessarily includes the duty to explain the need for, and the consequences of, obtaining MMI determinations, specifically as they relate to IR's.

3. MPC's legal duty to advise Claimants to get IR's and their legal significance, and its duty to explain the need for, and the consequences of obtaining MMI determinations as they relate to IR's, applies to pre-Holton cases.

4. MPC's post--1993 distribution of the brochures required by the 1993 amendment to § 39-71-606, MCA, does not relieve it of its legal duties to advise Claimants as provided in FINDINGS/CONCLUSIONS 1, 2, and 3 (above).

5. The Unfair Claim Settlement Practices Act (UCSPA), particularly§ 33-18-201(6), MCA, does not apply to, or support SSM's FINDINGS/CONCLUSIONS on MPC's legal duties to advise Claimants as provided in FINDINGS/ CONCLUSIONS 1, 2, and 3 (above).

6. MPC has no legal duty, as provided in FINDINGS/CONCLUSIONS 1, 2, and 3 (above) to advise injured workers who were, or are, represented by a lawyer.

\s\ David J. Patterson
Special Settlement Master