IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 54

WCC No. 2002-0547

MONTANA CONTRACTOR COMPENSATION FUND

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer

RON RUSCO

Respondent/Claimant.

DECISION AND JUDGMENT REGARDING LOCKHART ATTORNEY FEES

Summary: Montana Contractor Compensation Fund (MCCF) brought this action for indemnification from Liberty Northwest Insurance Corporation (Liberty), the insurer for a prior injury. MCCF alleged that a subsequent injury, for which it was at risk, was an immaterial and temporary aggravation of claimant's original industrial back injury which was covered by Liberty. It urged that claimant's current condition and disability are attributable to the prior injury. This Court previously found for MCCF. Claimant's attorneys are now seeking *Lockhart* attorney fees with respect to medical benefits paid by MCCF for claimant's surgery.

Held: Claimant's attorneys are entitled to *Lockhart* attorney fees only if the medical benefits were paid as a result of their efforts. In this *Belton* type case, the evidence shows that once a claim was brought to the attention of the second insurer, the natural course of investigation resulted in the payment. The contribution of the claimant's attorneys was to set in motion events that eventually led to the lodging of a claim with the second insurer. That contribution does not entitle them to *Lockhart* fees.

As to which insurer is initially responsible for benefits in a *Belton* situation, *Abfalder v. Nationwide Mutual Fire Ins. Co.*, 2003 MT 180, indicates that the insurer at risk for a subsequent injury or aggravation is liable until "it proves, or until another insurance company agrees, that it [the other company] should pay benefits." (Quoting from *Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405, 409-10 (1983).) Claimant's assertion that he had not reached MMI, or that he suffered an aggravation which was only temporary or

immaterial, does not change that responsibility. *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund*, 2001 MTWCC 56, is overruled insofar as it conflicts with this holding.

Topics:

Attorney Fees: Medical Benefits. Pursuant to *Lockhart v. Hampshire Ins. Co.*, 1999 MT 205, ¶ 25, 295 Mont. 467, 984 P.2d 744, a claimant's attorney who secures disputed medical benefits on behalf of the claimant is entitled to a lien for attorney fees with respect to such benefits. However, the medical benefits must in fact be disputed and must in fact be obtained through the attorney's efforts.

Attorney Fees: Medical Benefits. Medical benefits are not disputed for purposes of an award of attorney fees under *Lockhart v. Hampshire Ins. Co.*, 1999 MT 205, ¶ 25, 295 Mont. 467, 984 P.2d 744, where the claimant initially failed to submit his claim to the second insurer in a *Belton* situation (*Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405 (1983)), and where once submitted the insurer requested additional information so it could properly evaluate his claim.

Cases Discussed: *Lockhart v. Hampshire Ins. Co.*, 1999 MT 205, ¶ 25, 295 Mont. 467, 984 P.2d 744. Pursuant to *Lockhart v. Hampshire Ins. Co.*, 1999 MT 205, ¶ 25, 295 Mont. 467, 984 P.2d 744, a claimant's attorney who secures disputed medical benefits on behalf of the claimant is entitled to a lien for attorney fees with respect to such benefits. However, the medical benefits must in fact be disputed and must in fact be obtained through the attorney's efforts.

Cases Discussed: *Lockhart v. Hampshire Ins. Co.*, 1999 MT 205, ¶ 25, 295 Mont. 467, 984 P.2d 744. Medical benefits are not disputed for purposes of an award of attorney fees under *Lockhart v. Hampshire Ins. Co.*, 1999 MT 205, ¶ 25, 295 Mont. 467, 984 P.2d 744, where the claimant initially failed to submit his claim to the second insurer in a *Belton* situation (*Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405 (1983)), and where once submitted the insurer requested additional information so it could properly evaluate his claim.

Injury and Accident: Subsequent Injury. In light of *Abfalder v. Nationwide Mutual Fire Ins. Co.*, 2003 MT 180, this Court's prior holding in *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund*, 2001 MTWCC 56, ¶ 36, is overruled to the extent it conflicts with *Afbalder* and the decision in this case. Where a claimant arguably aggravates a preexisting injury in a subsequent work-related incident, and there is a dispute between insurers as to whether the subsequent injury is permanent or merely temporary, or whether it or the prior injury is the cause of the claimant's current condition and disability, or whether the claimant had reached maximum medical improvement, the insurer for the subsequent injury is liable for benefits "until it proves, or until another insurance company

agrees, that it [the other company] should pay the benefits." *Belton v. Carlson Transport,* 202 Mont. 384, 658 P.2d 405, 409-10 (1983).

Cases discussed: *Abfalder v. Nationwide Mutual Fire Ins. Co.,* 2003 MT 180. In light of *Abfalder v. Nationwide Mutual Fire Ins. Co.,* 2003 MT 180, this Court's prior holding in *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund*, 2001 MTWCC 56, ¶ 36, is overruled to the extent it conflicts with *Afbalder* and the decision in this case. Where a claimant arguably aggravates a preexisting injury in a subsequent work-related incident, and there is a dispute between insurers as to whether the subsequent injury is permanent or merely temporary, or whether it or the prior injury is the cause of the claimant's current condition and disability, or whether the claimant had reached maximum medical improvement, the insurer for the subsequent injury is liable for benefits "until it proves, or until another insurance company agrees, that it [the other company] should pay the benefits." *Belton v. Carlson Transport,* 202 Mont. 384, 658 P.2d 405, 409-10 (1983).

Cases Discussed: *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund*, 2001 MTWCC 56. In light of *Abfalder v. Nationwide Mutual Fire Ins. Co.,* 2003 MT 180, this Court's prior holding in *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund*, 2001 MTWCC 56, ¶ 36, is overruled to the extent it conflicts with *Afbalder* and the decision in this case. Where a claimant arguably aggravates a preexisting injury in a subsequent work-related incident, and there is a dispute between insurers as to whether the subsequent injury is permanent or merely temporary, or whether it or the prior injury is the cause of the claimant's current condition and disability, or whether the claimant had reached maximum medical improvement, the insurer for the subsequent injury is liable for benefits "until it proves, or until another insurance company agrees, that it [the other company] should pay the benefits." *Belton v. Carlson Transport,* 202 Mont. 384, 658 P.2d 405, 409-10 (1983).

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¶1 On February 19, 2003, this Court entered Summary Judgment finding Liberty liable for the claimant's occupational disease and directing Liberty to reimburse MCCF for benefits paid to the claimant. The judgment was final insofar as the issues decided. These issues

were (1) which of the two insurers is liable for the claimant's back surgery and current back condition and (2) whether MCCF can recover attorney fees from Liberty.

¶2 Following entry of summary judgment, Liberty and claimant settled claimant's request for past temporary total disability (TTD) benefits, attorney fees, and a penalty. Two unrelated issues remain. The first is whether claimant's attorneys are entitled to *Lockhart* fees with respect to claimant's surgery and related medical expenses. In the event that question is answered in the affirmative, the Court must then determine whether MCCF or Liberty should absorb the *Lockhart* fees. This second question arises because MCCF paid medical providers the full amount of their allowable fees without deduction for the claimed lien.

Factual Background

¶3 The question concerning the *Lockhart* lien is complicated and difficult. What occurred in this case should not have occurred.

¶4 As set out in the Summary Judgment decision, claimant suffered an industrial injury of his back on December 8, 1998, while working for D'Agostino Concrete. Liberty was the insurer at risk at that time and accepted liability for the injury. Claimant continued working but continued to have back pain, including a flareup on April 12, 2000. At the time of the April flare-up, his employer had changed ownership and was then owned by JTL Group, Incorporated (JTL). Its insurer was MCCF.

¶5 Claimant reported his April 12, 2000 flareup to JTL the same day. According to a February 15, 2001 letter from JTL, claimant reported that "he was experiencing back pain after hitting a bump while going over a bridge." (Aff. of Charles F. Angel, Ex. 8.) JTL sent claimant to the Emergency Room at Bozeman Deaconess Hospital, where he encountered Dr. Steven R. Speth, who had been treating claimant with respect to his back problems. (*Id*.) According to the employer, Dr. Speth told claimant that "his injury was the same injury he had been treating him for." (*Id*.) On that basis, JTL declined to file an Employer's First Report of Injury. (*Id*.) Claimant did not pursue the matter further with JTL at that time and there is no indication that MCCF was notified of the matter until a year later.

¶6 In September 2000, Dr. Speth recommended back surgery. His office telephoned Liberty for prior approval. (Aff. of Charles F. Angel, Ex. 3.) Liberty denied the request, taking the position that claimant had suffered a new injury. The denial was then communicated directly to claimant in an October 3, 2000 letter from Kerri Wilson, an adjuster for Liberty. The letter read in full:

October 3, 2000

Ronald Rusco
1025 Ketchikan Drive
Belgrade, MT 59714

RE: CLAIM NO WC687-029706
EMPLOYER: D'AGOSTINO CONCRETE
D/INJURY: 12/8/98, LOW BACK

Dear Mr. Rusco:

We received a report and telephone call from Dr. Steven Speth's office requesting surgery of your low back. As you already know, this surgery was denied.

It is our opinion that your current back condition is not related to the industrial accident of December 8, 1998 while employed at D'Agostino Concrete. Further, it is our opinion that you sustained a new incident on April 12, 2000 while driving a truck and hit a bump. Therefore, all treatment and benefits for your low back condition is denied.

Should you disagree with this decision, you may file for mediation by contacting the Employment Relations Division at PO Box 8011, Helena, Montana, 59604, or calling at (406) 444-6530.

Sincerely yours,

/s/

Kerri Wilson
Sr. Case Manager

cc: Employment Relations Division
Steven Speth, MD
D'Agostino Concrete

(Aff. of Charles F. Angel, Ex. 3)

¶7 Prior to receipt of the October 3, 2000 letter, but after having learned that Liberty had denied Dr. Speth's request, on September 21, 2000, claimant hired the Angel Law Firm in Bozeman to represent him with regard to his industrial injuries. (Aff. of Charles F. Angel.) At the time of the law firm's retention, Mr. Charles F. Angel of that firm understood that Dr. Speth had recommended surgery on account of the December 8, 1998 back injury and that Liberty had denied his request for approval of the surgery. Mr. Angel was also informed of the April 12, 2000 incident. He wrote to JTL Group on September 22 and 25, 2000, to request a copy of the Employer's First Report of the incident. (*Id.*, Exs. 1-2) He did not receive a reply so he wrote JTL again on February 2, 2001, to again request the first report. (*Id.*, Ex. 7.) He finally received a reply on February 15, 2001. The content of the letter is discussed in paragraph five.

¶8 A copy of a September 21, 2000 attorney retainer agreement was forwarded to MCCF, which received it on October 3, 2000. (Aff. of Bradley J. Luck, Ex. 2.) That agreement identified both the industrial accident of December 8, 1998 and the incident of April 12, 2000, and identified both the 1998 and the 2000 employers. MCCF had not received a claim for the April 12th incident and did nothing in response.

¶9 Meanwhile, Mr. Charles F. Angel also wrote to Dr. Speth on October 23, 2000, requesting his medical records. (Aff. of Charles F. Angel, Ex. 4.) Upon receiving and reviewing the records, he understood them to indicate that the claimant's need for surgery arose from his 1998 injury. (*Id.*, Ex. 5.)

¶10 There is no record of the Angel Law Firm communicating directly with either Liberty or MCCF until at least March 23, 2001, when it filed a request for mediation with the Montana Department of Labor and Industry (Department). (Aff. of Bradley J. Luck, Ex. 3.) In that request, the claimant stated that "both Liberty Northwest and JTL have been contacted regarding my need for surgery." He identified both the December 1998 injury and the April 2000 incident. A copy of the mediation request found its way to MCCF on April 16, 2001, possibly either through JTL (assuming it received a copy) or from the Department. It is unlikely that claimant's counsel sent it to MCCF since MCCF was not identified in the mediation petition and it took a month for the petition to reach that insurer. Moreover, in his Reply to MCCF's Answer Brief in Opposition to Motion For Fees, Mr. Christopher R. Angel states that the first mediation conference was postponed because "JTL Group was not notified of the Mediation by the Department of Labor." He goes on to say that after the first conference was vacated, JTL was notified and given thirty days to respond. (Reply to MCCF's Answer Brief in Opposition to Motion For Fees at 3.)

¶11 Indeed, no written claim against MCCF was ever filed by or on behalf of claimant. Rather, after filing for mediation and learning that the claim period was running out, claimant's attorneys requested MCCF to treat the mediation request as a claim. (April 8, 2003 Hearing Tr. at 13, 20.) It apparently agreed to do so.

¶12 After receiving a copy of the mediation request, MCCF turned the matter over to Mr. Bradley J. Luck, its present counsel, who reviewed the matter and determined that it was a *Belton* matter, i.e., either MCCF or Liberty was liable. (Aff. of Bradley J. Luck.) However, Mr. Luck felt the information furnished to him at the time was insufficient to determine which carrier was responsible or to determine whether surgery was needed on account of an industrial injury. (*Id*.) On June 21, 2001, he requested further medical records from Mr. Charles F. Angel (*id*., Ex. 4), but ultimately secured them from Liberty rather than Mr. Angel. (Aff. of Bradley J. Luck.) He then opined that additional medical records were needed and suggested taking a sworn statement from Dr. Speth to resolve the issues. (*Id*.) Shortly thereafter, on July 3, 2001, MCCF, through Mr. Luck, began paying TTD benefits retroactive

to June 15, 2000, under a reservation of rights. (*Id.*, Ex. 5.) A decision regarding payment for surgery was deferred until a sworn statement of Dr. Speth could be taken. (*Id.*)

¶13 On July 25, 2001, Mr. Luck notified Mr. Christopher R. Angel, as well as Mr. Larry W. Jones, counsel for Liberty, that Dr. Speth's sworn statement was scheduled for August 30, 2001. (*Id.*, Ex. 9.) Mr. Angel failed to show up at the scheduled time and the statement was postponed. (*Id.*, Ex. 10.) Mr. Luck had difficulty rescheduling the doctor and it was not until November 8, 2001, that his statement was ultimately taken. (*Id.*, Exs. 11- 12.) Based on Dr. Speth's opinion that claimant's proposed surgery was attributable to his 1998 injury, on December 5, 2001, MCCF requested Liberty to assume liability. (*Id.*, Ex. 13.) Liberty refused and on December 11, 2001, MCCF wrote to Mr. Christopher R. Angel and Mr. Jones notifying them that MCCF was agreeing to pay for claimant's surgery pending an ultimate *Belton* determination. (*Id.*, Ex. 14.)

¶14 In his December 11, 2001 letter to Mr. Christopher R. Angel and Mr. Jones, Mr. Luck acknowledged receiving a letter from Mr. Angel asserting a *Lockhart* lien against medical benefits. He responded to that letter as follows:

I received the letter from Chris on fees. It does not appear to me that the payment for the surgery was ever an issue and that fees are not due. Regardless, we have authorized the surgery and will pay the fee under the schedule after being billed by Dr. Speth and others providing medical services. I do not want to have a problem with the fee and lien issue. If you expect us to add your name on the checks to the medical providers, I suggest you advise all of them in advance so that we don't have a problem. I also hope that the fee request will not interfere with the scheduling of the surgery.

Chris, we would appreciate it if you would detail your position on this issue as we want to be sure there are no miscommunications.

(*Id.*, Ex. 14.) Mr. Angel wrote back reasserting the lien and advising "the onus is on the carrier(s) to honor the lien." (Aff. of Christopher R. Angel, Ex. 6.) The surgery took place on January 14, 2002. (Summary Judgment, ¶ 32.) MCCF paid the medical bills for the surgery without withholding any amount for *Lockhart* fees.

Discussion

I.

¶15 In *Lockhart v. Hampshire Ins. Co.*, 1999 MT 205, ¶ 25, 295 Mont. 467, 984 P.2d 744, the Supreme Court held "that an attorney representing an injured claimant is entitled to collect an attorney fee based upon the amount of disputed medical benefits ultimately paid by the insurer." The decision was based on the statutorily authorized fee agreement between claimant and his attorneys wherein the claimant agreed to pay a percentage contingent fee on amounts obtained through the efforts of his attorneys.

¶16 My initial impression during the hearing was that claimant's attorneys were entitled to *Lockhart* fees because claimant was receiving no benefits at the time he hired the Angel Law Firm and the attorneys then set in motion the events that ultimately led to MCCF's agreement to pay for claimant's surgery. (Hearing Tr. at 49-52.) Upon further analysis of the facts of this case, I have concluded my initial impression was erroneous.

¶17 From the get-go, this case presented a *Belton* situation (*Belton v. Carlson Transport*, 202 Mont. 384, 658 P.2d 405 (1983)), meaning that one or the other of the two insurers was liable for claimant's back condition. Under *Belton* whichever insurer was at risk should have immediately stepped up to the plate to pay benefits and then sought indemnification from the other if it felt the liability was misplaced. From the get-go, claimant's physicians were going to ultimately be paid by one or the other of the insurers once claimant's need for surgery and the relationship of the surgery to his industrial condition were established. Liberty simply refused to step up to the plate. When finally dumped in its lap, MCCF sought additional information to determine its potential liability and whether the surgery was necessary and related to an industrial condition. It proceeded diligently to obtain the necessary information. To hold that the physicians who ultimately undertook the surgery on claimant are liable[(1)] for *Lockhart* fees under these circumstances would be a travesty of justice.

¶18 This case is further complicated by the failure of claimant or his attorneys to even file a claim with MCCF. There is no indication the Angel Law Firm ever sought to identify JTL's insurer. It could have done so by contacting the Department and then put both Liberty and MCCF on notice that *Belton* applied and demanded that one or the other commence benefits. Instead, the Angel Law Firm contacted the employer directly to request a first report, then waited six months to file for mediation. Even then it had not identified MCCF or filed a written claim for compensation with respect to the April 2000 incident.[(2)]

¶19 Then, when a sworn statement of Dr. Speth was set up by MCCF to obtain further information which would allow it to determine whether it was liable for the claim and whether surgery was industrially related, claimant's attorneys failed to show up at the scheduled time, causing a two-month delay in obtaining Dr. Speth's opinions.

¶20 In one sense, the surgical benefits were the result of the efforts of claimant's attorneys. The Angel Law Firm did get the ball rolling with the petition for mediation. This in turn eventually led to the identification of MCCF and thereafter its agreement to pay for the surgery pending a final resolution of liability. It was that sense of achievement that led me to indicate during the hearing on the motion for *Lockhart* fees that the attorneys' efforts secured the surgical benefits.

¶21 But, should this situation be treated any differently than one in which a claimant actually submits a claim to the insurer, which then requests additional information necessary to make an informed determination regarding liability; which then diligently

obtains the information and agrees to pay benefits based on that information? Should it make a difference if claimant submits the claim only after securing an attorney? I think not.

¶22 While I wondered at hearing whether JTL's statements might give rise to an estoppel regarding claimant's failure to pursue an earlier claim for the April 12, 2000 injury, thus requiring an attorney, the record in this case indicates that the claimant believed an Employer's First Report had already been filed. He was not misled as to his right to file a claim. While he believed that the employer had filed a first report, there was no evidence that his belief was based on any action or statement of the employer. Claimant was specifically notified of the need to pursue a claim against JTL's insurer when he received the October 3, 2000 letter from Liberty. That letter relayed Liberty's "opinion that you sustained a new incident on April 12, 2000 while driving a truck and hit a bump." (Aff. of Charles F. Angel, Ex. 3.) JTL did not have a duty to solicit a claim; it was claimant's burden to follow through and file the claim. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 484, 512 P.2d 1304, 1312 (1973).

¶23 Moreover, claimant's attorneys surely knew or should have known that the burden was on claimant to file a written claim with JTL's insurance company. They surely knew or should have known of the *Belton* rule. There is no basis for holding MCCF, or its insured, responsible for the claimant's failure to submit a claim to MCCF.

¶24 I am not persuaded that the contribution of the claimant's attorneys was anything more than initiating a process which resulted in notifying MCCF of the alleged April 12, 2000 industrial accident and setting in motion a claim investigation necessary to determine liability and the benefits due claimant. Once a claim is submitted, the insurer is entitled to obtain information sufficient to allow it to make an informed decision. If the additional information demonstrates liability, then acceptance of liability is inevitable unless the insurer acts unreasonably. Benefits obtained as a result of gathering necessary information to evaluate a claim are not the result of the efforts of an attorney who has facilitated the process simply by directing the claimant to the proper insurer, rather they flow from the normal claims process. Both Mr. Luck and Mr. Jones provided affidavits stating that all counsel agreed that Dr. Speth's sworn statement was needed to determine which insurer was liable for claimant's condition and whether there was a connection between the surgery and claimant's industrial injury. (Aff. of Bradley J. Luck, ¶ 5; Aff. of Larry W. Jones, ¶ 4, 6.) Their statements are uncontradicted and I take them at face value. The investigation into liability was then impeded by the failure of claimant's attorneys to attend the first scheduled sworn statement of Dr. Speth, thus delaying the decision to pay for the surgery. Once Dr. Speth's statement was actually taken, Mr. Angel's participation in the questioning was limited to four questions.

¶25 I therefore conclude that claimant's counsel is not entitled to *Lockhart* attorney fees with respect to medical benefits for the claimant's surgery.

II.

¶26 In light of the above conclusion, I need not consider which of the insurers should be responsible for paying *Lockhart* fees in light of MCCF's failure to withhold the claimed fees from the amounts it paid medical providers. I also do not consider whether they should absorb the fees without recourse against the providers in light of the clear *Belton* situation.

III.

¶27 Finally, during oral argument Liberty's attorney requested further clarification of the rule determining which insurer is responsible for paying benefits in a disputed *Belton* situation such as this. *Belton* concerned liability of successive insurers in subsequent injury cases. It put the burden of proof and initial responsibility for benefits upon the "insurer at risk":

We hold that the burden of proof is properly placed on the insurance company which is on risk at the time of the accident in which a compensable injury is claimed. This holding assures that claimant will always know which insurer he can rely on to pay the benefits. It is the duty of the insurance company on risk to pay the benefits until it proves, or until another insurance company agrees, that it should pay the benefits. If it is later determined that the insurance company on risk at the time of the accident should not pay the benefits, this insurance company, of course, has a right to seek indemnity from the insurance company responsible for the benefits already paid out to the claimant.

Belton, 202 Mont. at 392, 658 P.2d at 409-10.

¶28 While the *Belton* rule initially seems straightforward, it is difficult to apply in some situations, for example where it is the initial insurer rather than the claimant who asserts there has been a subsequent accident, or where the claimant alleges a subsequent accident but also alleges that it amounted to only a temporary aggravation of an injury for which a previous insurer is liable. In *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund*, 2001 MTWCC 56, ¶ 36, I surveyed the progeny of *Belton* and noted that under these cases the "insurer at risk may be either the first or the second insurer" depending on whether the claimant was asserting a new material injury or insisting that the first injury is the cause of his or her disability. I therefore determined that the insurer at whom claimant pointed the finger should initially pay benefits.

¶29 That being said, the recent decision in *Abfalder v. Nationwide Mutual Fire Ins. Co.*, 2003 MT 180, brings my prior analysis into question. That decision affirmed this Court's determination that claimant's disability was due to his initial occupational back disease in 1994 and that subsequent injuries, reported to and accepted by a different insurer, were not material aggravations which relieved the initial insurer from liability for the claimant's current condition. In its decision on appeal, the Supreme Court considered the first insurer's argument that,

When a subsequent injury has arguably **aggravated** a preexisitng condition, the second insurer avoids liability for that condition **only** upon proving the claimant had not reached maximum medical healing with respect to his prior workers' compensation injury **or** that the second injury did not in fact permanently aggravate the underlying condition for which the prior insurer was liable.

2003 MT 180, ¶ 15; emphasis in original. The quoted argument was taken verbatim from my decision below, 2001 MTWCC 9, ¶ 108. The Supreme Court held "Nationwide [the first insurer] is correct regarding upon which party the burden of proof is placed" but found that this Court had not shifted that burden. 2003 MT 180, ¶ 16.

¶30 In *Abfalder* the claimant asserted that a 1996 aggravation was the significant injury. 2001 MTWCC 9, ¶ 38. Thus, his target was the second insurer and placing the burden of proof on that second insurer was fully compatible with my analysis in *Liberty Northwest*. On appeal the Supreme Court did not specifically address the specific issue raised in *Liberty Northwest* or survey the cases I reviewed in *Liberty Northwest*.

¶31 Nonetheless, the Supreme Court endorsed the above quoted standard without qualification. That standard unequivocally places the initial responsibility for benefits, and the burden of proving a different insurer is liable, upon the second insurer if there is a subsequent incident which "arguably" aggravates a preexisting condition. The standard does not depend on which insurer the claimant asserts is liable and covers situations where the parties may simply be in doubt as to responsibility. Frankly, it is better and easier to apply the rule, and is consistent with the *Belton* rationale of assuring that claimants will always know which insurer should pay. It also prevents the claimant from determining the burden of proof in a dispute between two insurers. Finally, it makes sense; if there is no incident which arguably aggravated a preexisting injury, then there is no *Belton* issue.

¶32 I therefore overrule my holding in *Liberty Northwest*. Henceforth, in any case where a claimant arguably aggravates a preexisting injury in a subsequent work-related incident, and there is a dispute between insurers as to whether the subsequent injury is permanent or merely temporary, or whether it or the prior injury is the cause of the claimant's current condition and disability, or whether the claimant had reached maximum medical improvement, the insurer for the subsequent injury is liable for benefits "until it proves, or until another insurance company agrees, that it [the other company] should pay the benefits." *Belton,* 202 Mont. at 392, 658 P.2d at 410.

ORDER AND JUDGMENT

¶33 The request of claimant's attorneys made pursuant to *Lockhart v. Hampshire Ins. Co.,* 1999 MT 205, ¶ 25, 295 Mont. 467, 984 P.2d 744, for attorney fees with respect to medical benefits for claimant's surgery is **denied**. Any lien claimed with respect to those medical benefits is **quashed**.

¶34 This Court's holding in *Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund*, 2001 MTWCC 56, ¶ 36, is overruled in light of *Abfalder v. Nationwide Mutual Fire Ins. Co.,* 2003 MT 180, to the extent it is inconsistent with *Abfalder* and this decision.

¶35 This JUDGMENT is certified as final for purposes of appeal.

DATED in Helena, Montana, this 30th day of July, 2003.

(SEAL)

<u>\s\ Mike McCarter</u>
JUDGE

c: Mr. Bradley J. Luck
Mr. Larry W. Jones
Mr. Christopher R. Angel
Submitted: April 25, 2003

1. No matter how you cut it, the fees come out of payments the physicians would otherwise receive, not out of claimant's pocket. It is in that sense that I use the word "liable."

2. The copy of the attorney fee agreement received by MCCF in October 2000, did not constitute a claim or provide it with adequate notice. Neither JTL nor MCCF were required to solicit a claim from the claimant. *Ricks v. Teslow Consolidated,* 162 Mont. 469, 484, 512 P.2d 1304, 1312 (1973).