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IN THE WORKERS' COMPENSATION COURT
FOR THE STATE OF MONTANA

CATHERINE E. SATTERLEE, Petitioner, v. LUMBERMAN'S MUTUAL CASUALTY COMPANY, Respondent/Insurer	)	WCC No. 2003-0840
JAMES ZENAHLIK, Petitioner, v. MONTANA STATE FUND, Respondent/Insurer	)	WCC No. 2003-0840
JOSEPH FOSTER, Petitioner, v. MONTANA STATE FUND, Respondent/Insurer	)	WCC No. 2003-0840
DORIS BOWERS, Petitioner, v. PUTMAN & ASSOCIATES, Respondent/Insurer	)	WCC No. 2003-0840

LUMBERMAN'S MUTUAL CASUALTY COMPANY'S REPLY TO PETITIONERS' MOTION FOR RECONSIDERATION

On December 12, 2005, this Court properly denied Satterlee's Motion for Partial Summary Judgment, holding that § 39-71-710, MCA, did not violate Petitioners' right to equal protection, nor was it an impermissible delegation of authority to the Federal Government.

On January 3, 2006, Satterlee asked this Court to "remove certification for appeal" because Satterlee believes discovery is necessary to show the Court that the financial viability of the Workers' Compensation system is not at stake. Unhappy with the Court's decision, Petitioners have requested that the Court reverse its decision and allow them the opportunity to complete discovery because they believe the Court's ruling demonstrates "some contentious factual issues." (Petitioners' Brief, ¶ 1).

As will be shown herein, Petitioners' Motion to Reconsider should be denied. Until this Court reached its decision, all parties, including Petitioners, agreed that there were no genuine issues of material fact that precluded this Court from making a decision as a matter of law. In Petitioners' Motion for Partial Summary Judgment, they asserted there were no issues of material fact. On August 8, 2005, Respondents filed their response in which each agreed there were no issues of material fact. Respondents asserted that, as a matter of law, § 39-71-710, MCA, was constitutionally sound and it was not an impermissible delegation of legislative authority.

Even though the affidavits were served on all parties on August 8, 2005, Petitioners never objected to the affidavits nor offered any evidence or contrary factual contentions to contend that there were questions of material fact. In fact, Petitioners offered their own affidavits of their own expert. Petitioners could have brought forth affidavits through the date of the hearing or completed discovery if they felt the need. The hearing on Petitioners' motion did not occur until almost two months after Respondents filed their briefs and affidavits. Even in light of Respondents' pleadings and affidavits on record, and after Respondents had filed their response, Petitioners at hearing continued to maintain that there were no genuine issues of material fact and they were entitled to judgment as a matter of law.

A motion for summary judgment is authorized by Rule 24.5.329 A.R.M. of the Workers' Compensation Rules. The Workers' Compensation Court can seek guidance from the Montana Rules of Civil Procedure. *Murer v. Montana State Comp. Mut. Ins. Fund* (1993) 257 Mont. 434, 849 P.d 1036, 1037.

Under the Montana Rules of Civil Procedure, a Court is to look at the pleadings, depositions, answers to interrogatories, admissions on file and affidavits to determine the existence or non-existence of a genuine issue of material fact. *Lee v. USAA Casualty Ins. Co.*, 304 Mont. 356, 222 P.2d 631, 201 ¶ 24. Summary judgment should only be granted

when there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Rule 56(c), M.R.Civ.P. *Lee* at ¶ 25. The party seeking summary judgment, in this case Petitioner, had the burden of demonstrating a complete absence of any genuine factual issues. *Lee* at ¶ 25. Where the moving party is able to demonstrate that no genuine issue as to any material fact remains in dispute, the burden shifts to the party opposing the motion. *Lee* at ¶ 26. Here, all Respondents agreed that there were no genuine issues of material fact, but asserted that Petitioners' motion should be denied. Petitioners agreed there were no genuine issues of material fact. This Court reviewed the record and denied Petitioners' motion as a matter of law.

In a similar setting, the Montana Supreme Court has held on numerous occasions that following a ruling on a motion for summary judgment, a litigant may not move to alter or amend an order, to re-litigate old matters, present the case under new theories, raise arguments which could have been raised prior to judgment, or to give a litigant a second bite at the apple." *High Tech Motors, Inc. v. Bombardier Motor Co.*, 328 Mont. 66, 117 P.3d 159; *Lee v. USAA Casualty Ins. Co.*, 304 Mont. 356, 222 P.3d 631 (2001); *Cook v. Hartman*, 317 Mont. 343, 77 P.3d 231 (2003). In *High Tech*, the Court held that a litigant may raise newly-discovered or previously unavailable evidence as the basis for requesting a new trial. Consistent with the prior described decisions, however, the Court has disallowed or not considered affidavits offered by a party following a ruling on summary judgment where the party who has an adverse ruling is attempting to re-litigate old matters.

Petitioners, in their Motion for Reconsideration, are simply asking for a second bite at the apple. Petitioners had every opportunity prior to hearing to assert that given the affidavits filed by Respondents, there were issues of material fact which prevented the Court from ruling on its Motion for Partial Summary Judgment. Petitioners are not asserting that the facts were unavailable to them or that there is newly-discovered evidence. Rather, they are attempting to re-litigate old matters and raise arguments which could have been raised prior to judgment. Petitioners who completed no discovery, now after an adverse ruling, want to reopen discovery. In essence, they are asking for a second bite at the apple which is strictly prohibited by well-established case law.

For these reasons, Respondent Lumberman's Mutual Casualty Company respectfully requests that Petitioners' Motion for Reconsideration be denied.

DATED this _____ day of January, 2006.

BROWN LAW FIRM, P.C.

BY_____

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was duly served on counsel of record by U.S. mail, postage prepaid, and addressed as follows this _____ day of January, 2006:

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BY_____
Michael P. Heringer

via email to:
Judge Shea and Clerk of Workers' Compensation Court jbockman@mt.gov
cc: Sandy Mayernik

Bockman, Jacqueline

From: Ganel Given [GGiven@brownfirm.com]
Sent: Tuesday, January 17, 2006 2:06 PM
To: Bockman, Jacqueline
Subject: Satterlee v. Lumberman's, et al. WCC No. 2003-0840
Attachments: replytoP'smotion.reconsideration.wpd

Dear Jackie:

Per instructions from your office this afternoon, attached please find Lumberman's Mutual Casualty Company's Reply to Petitioners' Motion for Reconsideration. The original document is being mailed to your office today and copies are being sent to counsel. If possible, please confirm your receipt of this message.

If you have questions, do not hesitate to give me a call. I can be reached via email or at 406-248-2611. Thank you.

Ganel G. Given
Legal Secretary to Michael P. Heringer