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

**2020 MTWCC 9**

**WCC No. 2019-4749**

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**MARGIE F. DARGIN**

**Petitioner**

**vs.**

**XL INSURANCE OF AMERICA**

**Respondent/Insurer.**

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# ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

**Summary**: Respondent moves for summary judgment, asserting that Petitioner's alleged injury did not arise out of her employment. Although there is no direct evidence as to what occurred during the work shift in which Petitioner alleges that she suffered an industrial injury, Respondent asserts that Petitioner must have had an idiopathic fall onto a level surface, which does not arise out of employment under Montana law. Petitioner asserts that there is an issue of fact as to whether she suffered an idiopathic fall or an unexplained fall.

**Held**: Respondent is not entitled to summary judgment because it did not meet its burden of establishing that there are no issues of material fact. There is an issue of fact as to whether Petitioner suffered an idiopathic fall onto a level surface.

¶ 1 Respondent XL Insurance of America (XL) moves for summary judgment, asserting that Petitioner Margie F. Dargin must have suffered an idiopathic fall onto a level surface. Dargin asserts that there is an issue of fact as to whether she suffered an idiopathic fall or an unexplained fall. Because XL did not meet its burden of establishing that there are no issues of material fact as to whether Dargin suffered an idiopathic fall onto a level surface, it is not entitled to summary judgment on those grounds.

## FACTS[1]

¶ 2 Dargin worked as a security guard for Allied Universal, a company that provides security services at the Phillips 66 refinery in Billings.

¶ 3 On February 11, 2019, Dargin was scheduled to work from 3:00 p.m. to 11:00 p.m. She started her work, but does not recall anything that happened after 8:30 p.m.

¶ 4 At 10:10 p.m., Dargin backed her pickup truck into the parking space near the dispatch center. She approached Dustin Broste, a co-worker, who observed that Dargin was "distraught," crying, and "a little hysterical." Broste's Incident Report states, Dargin "can't remember incident at this time. She simply stated she fell and hit her head hard. But at this time [she] does not recall even that." Broste did not see any physical sign of injury.

¶ 5 Dargin was transported to St. Vincent's Hospital, where she stayed for a week.

¶ 6 On February 13, 2019, Dargin underwent an electroencephalogram (EEG). James F. Richards, MD, noted: "EEG is abnormal due to the evidence of a recurring potentially epileptogenic discharge maximal in the left temporal region with some reflection over the rest of the left hemisphere."

¶ 7 The next day, Dargin appeared to have a seizure. Tracy Lynn Hylland, NP, noted:

> Paged by nursing that pt appeared to have another seizure. According to her friend that was talking with her, she "got a blank look on her face and then clenched her jaw and neck back". When I see Margie she is very sleepy and her speech is mildly slurred. As I was talking with her friend, she started to wake up a little more and her speech started to clear.

¶ 8 On March 13, 2019, Trenay A. Hart, PA-C, issued a record to "make clarification" of her causation opinion. Hart stated that it was her opinion that Dargin did not fall as a result of a seizure. Hart opined that Dargin "somehow had a head injury" and that she was suffering from post-concussive syndrome.

¶ 9 On May 21, 2019, Jozef A. Ottowicz, MD, conducted an examination of Dargin under § 39-71-605, MCA. Dr. Ottowicz noted, "[h]er history is clearly very incomplete and unfortunately, she has no recollection of the details. It is unclear if she had just a syncope, a true seizure, and/or hit her head." Dr. Ottowicz opined that there was insufficient evidence to render a diagnosis and opined that it "is very likely more than not that she fell and had some form of brain concussion due to syncope or seizure, vaso - vagal syncope,

[1] Because this case is before this Court on XL's summary judgment motion, this Court has interpreted all facts and drawn all inferences in Dargin's favor. *Lunday v. Liberty Nw.*, 2017 MTWCC 20, ¶ 31 (ruling that at the summary judgment stage, this Court makes all reasonable inferences in favor of the party opposing summary judgment).

possible h[e]art arr[h]ythmia etc. leading to her fall . . . ." However, Dr. Ottowicz also stated, "I do not have objective information to support whether her seizure was directly related to her underlying medical event or whether she had seizure which caused her syncope and subsequent event." He also explained, "Speculatively, it is possible that she fell and lost consciousness. Whether she had seizures or not, I cannot answer."

¶ 10 Dargin's co-workers at Allied Universal conducted an investigation to determine what happened, which included watching the surveillance videos of the refinery. They found "nothing."

¶ 11 At her deposition on September 25, 2019, Dargin testified that she has no memory of what occurred on the night of February 11, 2019, after 8:30 p.m. However, Dargin testified that her hard hat was not damaged when she started her shift but, at some point, her hard hat sustained damage. Dargin does not know how her hard hat was damaged.

## LAW AND ANALYSIS

¶ 12 This case is governed by the 2017 version of the Montana Workers' Compensation Act because that was the law in effect at the time of Dargin's alleged industrial accident.[2]

¶ 13 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[3] "Summary judgment is an extreme remedy which should not be a substitute for a trial on the merits if a material factual controversy exists. All reasonable inferences which can be drawn from the evidence presented should be drawn in favor of the nonmoving party."[4]

¶ 14 Section 39-71-407(1), MCA, states, in relevant part: "For workers' compensation injuries, each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer . . . that it insures who receives an injury arising out of and in the course of employment . . . ."

¶ 15 The requirement that an injury arise out of employment is different than the requirement that it arise in the course of employment. The Montana Supreme Court has explained, "The language 'in the course of employment,' generally refers to the time, place, and circumstances of an injury in relation to employment."[5] In contrast, "the words 'out of' '' in the phrase "arising out of employment" "point to the cause of the accident and

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

[3] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285 (citation omitted).

[4] *Nelson v. Mont. Sch. Grp. Ins. Auth.*, 2014 MTWCC 1, ¶ 28 (citation omitted).

[5] *Pinyerd v. State Comp. Ins. Fund*, 271 Mont. 115, 119, 894 P.2d 932, 934 (1995) (citation omitted).

are descriptive of the relationship between the injury and employment."[6] The Montana Supreme Court has also explained, "In general, if the claimant's employment is one of the contributing causes which placed him in the path of harm and without which the injury would not have followed, the claimant is entitled to compensation."[7]

¶ 16 XL cites this Court's decision in *McLeish v. Rochdale Ins. Co.*[8] and argues that Dargin did not suffer an injury "arising out of" her employment because she must have suffered an idiopathic fall onto a level surface. In *McLeish*, during his work shift, McLeish fell to the concrete floor and broke his clavicle.[9] The only physician to give a causation opinion opined that McLeish suffered a seizure, which was unrelated to his work.[10] Relying on *Larson's Workers' Compensation Law*, this Court concluded that an idiopathic fall — i.e., a fall caused by a claimant's underlying condition, such as an epileptic seizure or a fainting spell — onto a level surface is not compensable because it does not arise out of employment.[11] Quoting *Larson's*, this Court explained: " 'The idiopathic-fall cases begin as personal-risk cases. There is therefore ample reason to assign the resulting loss to the employee personally.' "[12] This Court explained, "*Larson's* notes that the idiopathic-fall case may still be compensable in situations where the claimant falls from a height or strikes an object, even if that object may be commonly found outside the workplace."[13] However, because it was undisputed that McLeish fell to a level floor as a result of a non-work related seizure, this Court ruled that McLeish's injury was not compensable under § 39-71-407(1), MCA, because it did not arise out of his employment.[14]

¶ 17 Dargin argues that there is an issue of fact as to whether she suffered an idiopathic fall onto a level surface. She points out that *Larson's* explains that an idiopathic fall should

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[6] *Pinyerd*, 271 Mont. at 120, 894 P.2d at 935 (citing 1 Arthur Larson, *Workmen's Compensation Law*, § 6.10 (1993); *Landeen v. Toole County Ref. Co.*, 85 Mont. 41, 54, 277 P. 615, 620 (1929)).

[7] *Parker v. Glacier Park, Inc*., 249 Mont. 225, 228-229, 815 P.2d 583, 585 (1991) (citing *Rathbun v. Taber Tank Lines Inc*., 129 Mont. 121, 283 P.2d 966 (1955)).

[8] 2011 MTWCC 18.

[9] *McLeish*, ¶¶ 4, 7.

[10] *McLeish*, ¶¶ 10-14, 33.

[11] *McLeish*, ¶ 27 (citing Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, vol. 1, § 9.01 [4][b] at 9-8 (Matthew Bender 2006)).

[12] *Id. Larson's Worker' Compensation Law*, §§ 4.01 through 4.04, explains that risks that cause injury to employees are placed into one of four categories: (1) employment risks, which are directly tied to the employment itself; (2) personal risks, which are personal or private to the particular employee; (3) neutral risks, which are neither employment related nor personal; and (4) mixed risks, "in which a personal cause and an employment cause combine to produce the harm."

[13] *McLeish*, ¶ 27.

[14] *McLeish*, ¶¶ 32-33.

not be confused with an unexplained fall,[15] which is defined as a fall "for no discoverable reason."[16] She asserts that because there is no direct evidence of what occurred, she must have suffered an unexplained fall. Dargin asserts that the majority rule is that unexplained falls are compensable and urges this Court to follow the Supreme Court of Colorado and the Supreme Court of Oregon, which have recently held that unexplained falls arise out of employment.[17]

¶ 18 When reasonable inferences are drawn in Dargin's favor, XL has not met its burden of establishing that there are no issues of material fact on the issue of whether Dargin suffered an idiopathic fall onto a level surface, which is the only issue currently before this Court. Unlike the insurer in *McLeish*, XL has not presented undisputed evidence that Dargin had an idiopathic fall onto a level surface. Neither Dr. Ottowicz nor Hart have opined, on a more probable than not basis,[18] that Dargin suffered a seizure that caused her to fall. Moreover, because there is no direct evidence that Dargin fell, or any evidence as to where a fall occurred, the evidence does not conclusively establish that Dargin fell onto a level surface.

¶ 19 There is no merit to XL's argument that this Court should grant it summary judgment because Dargin presented "no credible evidence" that her helmet was damaged in her alleged fall or because Hart's opinion is not entitled to weight because she did not consider all of Dargin's medical records. It is well-established that, "[a]t the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses."[19]

¶ 20 Finally, for the first time in its reply brief, XL argues that Dargin cannot meet her burden of proving by a preponderance of the evidence that she suffered an "injury" or an "accident" under § 39-71-119(1)(a) and (2), MCA. However, this issue is different from whether Dargin's alleged injury arose out of her employment under § 39-71-407(1), MCA, and a party may not raise an entirely new issue or theory for the first time in a reply brief.[20]

¶ 21 For the foregoing reasons, XL's Motion for Summary Judgment is **denied**.

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[15] *Larson's Workers' Compensation Law*, § 7.04[1][a] (2019).

[16] *Larson's Workers' Compensation Law*, § 7.04[1][b] (2019).

[17] *City of Brighton v. Rodriguez*, 318 P.3d 496, ¶¶ 1, 24-25 (Colo. 2014) (ruling that an unexplained fall, i.e., "a fall with a truly unknown cause or mechanism," arises out of employment because it is a "neutral risk" and would not occur but for the employment because the "employment causally contributed to the injury because it obligated the employee to engage in employment-related functions, errands, or duties at the time of injury."); *Matter of Comp. of Sheldon v. U.S. Bank,* 441 P.3d 210, 216-17, 220 (Or. 2019) (explaining that idiopathic falls are not compensable under Oregon law but that unexplained falls are compensable and that "to prove that a fall is unexplained, the claimant must prove that there is no nonspeculative explanation for the fall.").

[18] *Ford*, ¶ 43 (holding that claimant has burden of proving that she suffered an injury, an accident, and a causal connection between the accident and the injury on the "more probable than not" standard).

[19] *See, e.g., Kirk v. Mont. Contractor Comp. Fund*, 2016 MTWCC 9, ¶ 21 (citation omitted).

[20] *See EBI/Orion Grp. v. Blythe*, 281 Mont. 50, 56-57, 931 P.2d 38, 42 (1997) (citation omitted).

DATED this 26th day of May, 2020.

(SEAL)

/s/ David M. Sandler
JUDGE

c: Melinda A. Driscoll
Leo S. Ward

Submitted: March 3, 2020