IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 7

WCC No. 2013-3216R1

CRISTITA MOREAU, Individually and as Personal Representative of the Estate of Edwin Moreau

Petitioner

vs.

TRANSPORTATION INSURANCE CO.

Respondent/Insurer.

APPEALED TO MONTANA SUPREME COUNT – 05/30/17
AFFIRMED ON APPEAL – 01/02/18

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT

Summary: Respondent accepted liability for the decedent's occupational disease, and paid certain medical benefits. However, another entity had already paid some of the medical bills for which Respondent would have been liable under § 39-71-704, MCA. Petitioner contends that since that entity does not want to be reimbursed, Respondent should pay the amount of those medical bills to Petitioner. Respondent moved for summary judgment, contending that it is not liable to Petitioner since the decedent received the medical services to which he was entitled. Petitioner cross-moved for summary judgment.

Held: Under controlling case law, Respondent is entitled to summary judgment. It is not liable to pay Petitioner the value of the decedent's medical bills which were paid by an entity that is not seeking reimbursement from Petitioner. Furthermore, this Court does not have jurisdiction to decide whether Respondent must reimburse another entity that is not a party to this case for paying the decedent's medical bills.

¶ 1 In *Moreau v. Transportation Ins. Co.*,[1] the Montana Supreme Court held that Petitioner Christita Moreau, Individually and as Personal Representative of the Estate of Edwin Moreau (Moreau), had standing and that this Court had jurisdiction to decide this

[1] 2015 MT 5, ¶ 14, 378 Mont. 10, 342 P.3d 3.

case on its merits. After remand, Respondent Transportation Insurance Co. (Transportation) moved for summary judgment, arguing that it is not liable for the compensation Moreau seeks. Moreau objects to Transportation's motion and has cross-moved for summary judgment.

ISSUES

¶ 2 The following issues are before this Court:

> Issue One: Is Transportation liable to Moreau for $95,846, which Transportation would have owed for certain medical bills had another entity not paid them?
>
> Issue Two: Is Transportation liable for Moreau's costs and attorney fees, plus a 20% penalty?

¶ 3 Since Moreau is not the prevailing party, Transportation is not liable for her costs, attorney fees, or a penalty, and Issue Two is therefore resolved.[2]

FACTS

¶ 4 Edwin Moreau (Edwin) contracted an asbestos-related occupational disease which arose out of his employment with W.R. Grace and ultimately caused his death.

¶ 5 In 2001, W.R. Grace created and funded the Libby Medical Plan (LMP) to assist Libby residents in paying for medical costs resulting from asbestos exposure from vermiculite mining in Lincoln County.

¶ 6 During Edwin's illness, the LMP paid $95,846 of his medical bills.

¶ 7 As part of the resolution of W.R. Grace's bankruptcy case, on September 21, 2012, certain rights and duties of the LMP were transferred into the Libby Medical Plan Trust (Libby Trust), with W.R. Grace remaining responsible for the LMP's ongoing payment obligations incurred prior to that date. The LMP ceased to offer benefits on that date, but medical providers had until September 21, 2014, to submit claims for services already rendered to the LMP for reimbursement.

¶ 8 Transportation initially denied liability for Edwin's occupational disease. During subsequent litigation, it accepted liability for Edwin's occupational disease, and the parties

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[2] §§ 39-71-611, -2907, MCA.

stipulated to a satisfaction of judgment.[3] Thereafter, Transportation reimbursed Moreau for out-of-pocket medical expenses and paid medical bills which had been paid by other insurers and Medicaid.

¶ 9 Jay Flynn, MD, medical director of the LMP, agreed in his deposition that the bills the LMP paid on Edwin's behalf were for reasonable and necessary medical care related to Edwin's occupational disease. He testified that the LMP paid these bills with no strings attached and that the LMP never made any demand for reimbursement nor did it expect reimbursement.

¶ 10 William M. Corcoran, an executive from W.R. Grace, also testified in his deposition that W.R. Grace is not making any claim for reimbursement of Edwin's medical bills paid by the LMP. Corcoran stated that the amounts W.R. Grace deposited into the LMP were voluntary with no conditions. Corcoran further testified that, regardless of the source of the funds, W.R. Grace would not accept reimbursement for bills paid by the LMP. Likewise, Adam Paul, an attorney who represented W.R. Grace in connection with its bankruptcy, informed the parties that W.R. Grace would not seek reimbursement.

¶ 11 Moreau's attorneys advised Transportation's counsel that if W.R. Grace did not want to be reimbursed for the funds the LMP paid for Edwin's treatment, "then the amount should be paid to [Moreau]." Because neither the LMP nor W.R. Grace sought reimbursement from Transportation or Moreau for the medical bills the LMP paid, Transportation refused to pay the $95,846 to Moreau.

¶ 12 Moreau subsequently brought this case, contending that Transportation must pay the $95,846 to her because it is a primary payor with an absolute duty to pay benefits.

¶ 13 In addition to representing Moreau, her attorneys also represent the Libby Trust for purposes of recovering the disputed $95,846. The Libby Trust is not a party to this case. The attorneys informed this Court, via affidavit, that they "have been authorized by Francis McGovern, Trustee of the Libby Trust, to recover, on behalf of the Trust, the medical payments made by the Libby Medical Plan to treat Edwin Moreau's occupational disease."[4]

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[3] *Moreau v. Transp. Ins. Co.*, Cause No. 2012-3058, Docket Item No. 35.

[4] Moreau's counsel has resolved the potential conflict of interest between Moreau and the Libby Trust.

¶ 14 On October 23, 2014, Moreau's and the Libby Trust's attorneys sent a letter to Transportation demanding that Transportation reimburse the Libby Trust. The letter states, in relevant part:

> Demand is hereby made for immediate repayment to the Trust of the $95,846 in medical benefits paid by the Libby Medical Plan on behalf of Edwin Moreau. . . . If the funds are not reimbursed, we will initiate a proceeding in the Workers' Compensation Court to enforce the Trust's rights to reimbursement and for a penalty for the denial of benefits and misrepresentation to the WCC. We will then seek a remand of the Moreau case on the grounds that the basis for Transportation's argument has been rendered moot.

¶ 15 Transportation did not reimburse the Libby Trust and it asserts it does not have a legal duty or obligation to do so. Transportation also argues that the Libby Trust's right of reimbursement, if any, is irrelevant to the present matter since the Libby Trust is not a party to this case. As of the date of this Order, the Libby Trust has not brought a claim in this Court against Transportation for reimbursement.

LAW AND ANALYSIS

¶ 16 This case is governed by the 1991 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect on Edwin's last day of work for his time-of-injury employer.[5]

¶ 17 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[6] The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 18 Transportation argues that under § 39-71-704, MCA, and *Shepard v. Midland Foods, Inc.*,[7] it is not liable to Moreau for the amount she now seeks since the LMP paid Edwin's medical bills and neither the LMP, the Libby Trust, nor W.R. Grace has asked Moreau for reimbursement.

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[5] *Hardgrove v. Transp. Ins. Co*., 2004 MT 340, ¶ 2, 324 Mont. 238, 103 P.3d 999 (citation omitted); *Nelson v. Cenex, Inc.*, 2008 MT 108, ¶ 33, 342 Mont. 371, 181 P.3d 619.

[6] ARM 24.5.329(2); *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285 (citation omitted).

[7] 219 Mont. 124, 710 P.2d 1355 (1985).

¶ 19 Moreau contends that since Transportation did not reimburse the $95,846 in medical bills paid by the LMP, it owes $95,846 worth of medical benefits and that she is legally entitled to these funds.

¶ 20 Section 39-71-704, MCA, states, in relevant part:

> **Payment of medical, hospital, and related services — fee schedules and hospital rates — fee limitation.** (1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished**:**
>
> (a) After the happening of the injury and subject to the provisions of subsection (1)(d), the insurer shall furnish, without limitation as to length of time or dollar amount, reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment as my be approved by the department for the injuries sustained, subject to the requirements of 39-71-727.

¶ 21 The Montana Supreme Court interpreted this statute in *Shepard*, a case with facts similar to the case at bar.[8] Shepard injured his knee in an industrial accident and incurred medical bills.[9] Because the insurer initially denied liability for the claim, Medicare and private health insurance paid some of Shepard's bills.[10] This Court ruled that the workers' compensation insurer was not required to pay the value of these medical bills to Shepard, explaining: "If, at a future date, claimant is sued for medical costs which should have been paid by defendant, claimant may file a Petition asking for a ruling on the matter … If the claimant is held responsible, it is clearly the insurer's obligation to pay medical benefits; thus, litigation of that issue seems unlikely."[11]

¶ 22 On appeal, Shepard argued that the workers' compensation insurer was liable either to reimburse Medicare and his private health insurer for the amounts each had paid, or to pay those amounts to him.[12] The Supreme Court rejected both arguments.[13]

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[8] *Id*.

[9] *Shepard*, 219 Mont. at 125, 710 P.2d at 1356.

[10] *Shepard*, 219 Mont. at 126, 710 P.2d at 1356.

[11] *Shepard*, 219 Mont. at 127, 710 P.2d at 1357.

[12] *Shepard*, 219 Mont. at 128, 710 P.2d at 1358.

[13] *Shepard*, 219 Mont. at 128-29, 710 P.2d at 1358.

First, the court held that since neither Medicare nor the health insurer was a party to the case, this Court did not have jurisdiction to "adjudicate any right to reimbursement which those entities had."[14] Second, the court rejected Shepard's argument that the workers' compensation insurer was liable to pay him the medical benefits under § 39-71-704, MCA.[15] The court explained:

> Contrary to appellant's assertion, this statute is not authority for ordering respondent to pay appellant for medical expenses already paid by other health care providers. **The statute requires the insurer to furnish *reasonable* services, medicine and treatment. To order the insurer to pay appellant for medical expenses already paid is not furnishing services nor is it reasonable.** . . .
>
> Appellant Shepard is here asking for a windfall. The lower court ruled that if Shepard were sued for medical expenses, he could petition the Workers' Compensation Court for relief. That ruling is logical, equitable and can provide Shepard with prompt relief. We hold that the lower court did not err in its ruling on this issue.[16]

¶ 23 Moreau's case falls under *Shepard*. As interpreted in *Shepard*, § 39-71-704, MCA, requires the insurer to furnish reasonable medical services. Although Moreau argues that this Court should order Transportation to pay the amount of Edwin's medical bills to her since neither W.R. Grace nor the LMP has sought reimbursement, under *Shepard*, Transportation is required only to furnish reasonable medical services, and paying Moreau the value of medical expenses already paid by another entity is not furnishing medical services. Moreau has no exposure for Edwin's medical bills since no entity has sought reimbursement from her. Accordingly, pursuant to *Shepard* and its interpretation of § 39-71-704, MCA, Transportation is not liable to Moreau for the $95,846 in medical services which Edwin received and which were paid for by the LMP.

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[14] *Shepard*, 219 Mont. at 128, 710 P.2d at 1358.

[15] *Shepard*, 219 Mont. at 128-29, 710 P.2d at 1358.

[16] *Shepard*, 219 Mont. at 128-29, 710 P.2d at 1358 (italics in original; bold added). *See also Newbury v. State Farm Fire & Cas. Ins. Co.*, 2008 MT 156, 343 Mont. 279, 184 P.3d 1021 (holding that where the plaintiff's workers' compensation insurer paid his medical bills up to its fee schedule, his automobile insurer paid the full balance remaining, and no health care providers were seeking additional payments, the plaintiff was not entitled to receive funds comprised of his automobile policy's remaining medical benefits coverage limits); *Conway v. Benefis Health System, Inc.*, 2013 MT 73, 369 Mont. 309, 297 P.3d 1200 (holding that where an insurer negotiated a reduced amount which a health care provider accepted in full satisfaction of the plaintiff's medical bill, the plaintiff was not entitled to "pocket the difference" between the reimbursement rate and the billed amount).

Shepard remains good law

¶ 24 Moreau argues that this Court need not follow *Shepard* because it is no longer good law. However, this Court is not persuaded by either of her arguments.

¶ 25 First, Moreau argues that Transportation is statutorily required to pay her the value of Edwin's medical services regardless of *Shepard's* holding. She contends that § 39-71-2203, MCA, mandates that Transportation, as a Plan 2 insurer, is the sole and direct obligor for benefits under the WCA or Occupational Disease Act and cannot delegate its duty to pay benefits to another entity,[17] such as the LMP. Moreau argues that Transportation must therefore provide complete coverage and immediate payment of workers' compensation benefits, and that § 39-71-2203(3), MCA — which states, in pertinent part, "that the insurer . . . will pay directly to the employee . . . the compensation, if any, for which the employer is liable" — requires Transportation to pay directly to her $95,846 for the medical services Edwin received. Moreau further maintains, "once the duty to furnish reasonable medical services has arisen, the only way the insurer can discharge that duty is to pay the medical benefits owed." However, on accepted claims, the insurer becomes directly liable to the medical providers for the amounts owed for reasonable medical services furnished.[18] Therefore, Transportation is liable to the medical providers — not Moreau — for medical benefits. At present, there are no medical benefits to be furnished and therefore nothing for Transportation to pay to a medical provider under § 39-71-704, MCA.

¶ 26 Furthermore, although § 39-71-2203, MCA, speaks to the provisions an insurance policy must contain under Plan 2, § 39-71-704, MCA, controls the payment of medical benefits. "It is a well-settled rule of statutory construction that the specific prevails over the general. When two provisions deal with a subject, one in general and comprehensive terms and the other in minute and more definite terms, the more definite provision will prevail to the extent of any opposition between them."[19] Under this rule, the general

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[17] *Moreau v. Transp. Ins. Co.*, 2015 MTWCC 17, ¶ 15 (citing *Am. Zurich Ins. Co. v. District Court*, 2012 MT 61, ¶¶ 12-13, 364 Mont. 299, 280 P.3d 240).

[18] *Householder v. Republic Indem. Co. of Cal.*, 2001 MTWCC 41, ¶ 10.

[19] *Ditton v. Dep't of Justice Motor Vehicle Div.*, 2014 MT 54, ¶ 22, 374 Mont. 122, 319 P.3d 1268 (citations omitted). *See also* § 1-2-102, MCA ("In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it."); *Hopkins v. Uninsured Employers' Fund*, 2009 MTWCC 12, ¶ 11 ("If the specific statute conflicts with the general statute and cannot be harmonized to give effect to both, the specific statute controls over the general statute 'to the extent of the inconsistency.' ") (citation omitted).

provision of § 39-71-2203(3), MCA, yields to the specific terms of § 39-71-704, MCA. Thus, Moreau's argument under § 39-71-2203, MCA, fails.

¶ 27 Second, Moreau argues that this Court need not follow *Shepard* because it is an "outlier" and the Montana Supreme Court impliedly overruled it in *Lockhart v. New Hampshire Ins. Co*.[20] In *Lockhart*, the Montana Supreme Court held that even though a claimant's medical providers are the actual recipients of the money, the medical benefits are nonetheless the property of the claimant, and thus a claimant should be allowed to pay his or her attorney fees out of those funds.[21] Moreau argues that *Lockhart* supersedes *Shepard*, and since the medical benefits are her property, Transportation must pay the $95,846 to her. However, *Lockhart* did not impliedly overrule *Shepard* because the legal issues were not the same and their respective holdings do not conflict with each other.[22] The issue in *Lockhart* was whether attorneys' fee liens applied to medical benefits.[23] The issue here is whether Moreau is entitled to the monetary value of the medical benefits received in addition to the services themselves. *Lockhart* applies after it has been determined that an insurer has to pay medical benefits under § 39-71-704, MCA. Here, there are no medical benefits remaining for Transportation to pay under § 39-71-704, MCA, as interpreted in *Shepard*, and therefore *Lockhart* is inapplicable.

<u>*Shepard* is not factually distinguishable</u>

¶ 28 In addition to her arguments that *Shepard* is no longer good law, Moreau argues that this Court need not follow *Shepard* because it is factually distinguishable. However, none of the three factual differences between this case and *Shepard* negate *Shepard's* applicability here.

¶ 29 First, Moreau contends that this case is distinguishable because, unlike the payors in *Shepard*, the Libby Trust has sought reimbursement from Transportation. However, in *Shepard*, the court emphasized that it would not provide a remedy unless either or both of the payors sought reimbursement from Shepard; the court stated that the issue was "whether the lower court erred in holding respondent not liable for medical expenses paid

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[20] 1999 MT 205, 295 Mont. 467, 984 P.2d 744.

[21] *Lockhart*, ¶ 24.

[22] *See Henry v. State Comp. Ins. Fund*, 1998 MTWCC 42 (ruling that *Heisler v. Hines Motor Co.*, 282 Mont. 270, 937 P.2d 45 (1997), did not impliedly overrule *Eastman v. Atlantic Richfield Co.*, 237 Mont. 332, 777 P.2d 862 (1989), where the basis underlying the holding of *Eastman* did not conflict with the holding of *Heisler*).

[23] *Lockhart*, ¶ 26.

for by other health care providers who have not sought reimbursement ***from appellant***."[24] Here, the Libby Trust has not sought reimbursement from Moreau. In *Shepard*, the court held that if the payors sued Shepard for medical expenses, he could petition this Court for relief.[25] Likewise, if the Libby Trust seeks reimbursement from Moreau, she could then petition this Court for relief.

¶ 30 Indeed, the Libby Trust's demand for reimbursement from Transportation is a reason why Transportation has no duty to pay the $95,846 to Moreau, as this Court cannot order an insurer to pay a claimant the value of medical services when the putative successor in interest to the entity that paid for the services is also demanding reimbursement from the insurer. At oral argument, Moreau's attorneys maintained that the Libby Trust was not a necessary party to this case, but further argued that this Court could order Transportation to reimburse the Libby Trust or, alternatively, issue a decision that the $95,846 is "payable" without specifying the person or entity to which Transportation should pay this amount. However, as *Shepard* held, this Court has no jurisdiction to order Transportation to reimburse the Libby Trust because the Libby Trust is not a party to this case.[26] Moreover, Transportation contends that it has no duty or obligation to reimburse the Libby Trust, and this Court has no authority to issue an advisory opinion as to whether Transportation must reimburse the Libby Trust if the Libby Trust brings a claim.[27] The only dispute properly before this Court is the claim Moreau made in her Petition for Hearing: whether Transportation must pay the $95,846 to ***Moreau*** for medical benefits which Edwin received but which were paid for by the LMP. Therefore, this Court cannot order Transportation to pay the Libby Trust, or just declare the amount "payable."

¶ 31 Second, Moreau contends that this case is factually distinguishable from *Shepard* because Transportation reimbursed other entities for Edwin's medical bills without demand and it therefore cannot now deny payment on the grounds that no demand for payment has been made. However, Transportation is not arguing that it does not have to pay the medical benefits because no demand has been made; rather, Transportation

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[24] *Shepard*, 219 Mont. at 128, 710 P.2d at 1358 (emphasis added).

[25] *Shepard*, 219 Mont. at 129, 710 P.2d at 1358.

[26] *Shepard*, 219 Mont. at 128, 710 P.2d at 1358. *See also Montana State Fund v. Zurich Am. Ins. Co*., 2009 MTWCC 3, ¶¶ 89-93 (ruling that under principles of due process, this Court could not order claimant, who had not been joined as a party, to reimburse an insurer even though she participated in the trial and this Court found her condition not compensable); *Hartford Ins. Co. of the Midwest v. Montana State Fund*, 2012 MTWCC 28 (ruling that this Court could not consider insurer's affirmative defense that claimant failed to timely notify it of his claim because claimant was not a party to the case).

[27] *Hernandez v. Ace USA*, 2003 MTWCC 47, ¶ 4 (citing *Marbut v. Sec'y of State*, 231 Mont. 131, 135, 752 P.2d 148, 150 (1988)).

argues that it does not have to pay Moreau because the Montana Supreme Court ruled in *Shepard* that, in these circumstances, the monetary value of the medical benefits are not payable to the claimant under § 39-71-704, MCA.

¶ 32 Third, Moreau argues that *Shepard* is distinguishable because a tortfeasor — Edwin's employer, W.R. Grace — caused Edwin's occupational disease. Moreau argues that allowing Transportation to retain the $95,846 would allow it to subrogate in violation of the made whole doctrine. In support of her position, Moreau relies on *Blue Cross and Blue Shield of Montana, Inc. v. Montana State Auditor (BCBS)*,[28] *Diaz v. State of Montana,*[29] and *State Compensation Ins. Fund v. McMillan.*[30]

¶ 33 In *BCBS*, the court addressed proposed exclusions in a health insurance policy which stated that BCBS would not pay health care benefits to treat its insured's injuries if its insured received or was entitled to receive payments from a third party's automobile or premises liability policy.[31] Because §§ 33-30-1101 and -1102, MCA, allow a health insurer to subrogate against "a judgment or recovery received by the insured from a third party" only when its insured is made whole, the court held that the proposed exclusions violated subrogation law, explaining:

> The BCBS exclusions effectively allow it to exercise subrogation before paying anything to its insured, contrary to § 33-30-1101, MCA, which allows reimbursement "for benefits paid." The exclusions allow BCBS to avoid any payment of benefits to its insured if the insured is "entitled to receive" benefits from any other auto or premises liability policy, whether or not the insured actually receives any of those benefits, and whether or not the insured has been made whole. Only when the insured is made whole as defined in Montana law, and then only after BCBS has paid out benefits to its insured, could BCBS be entitled to claim subrogation. It is contrary to Montana law for BCBS to enjoy the benefits of subrogation in the circumstances allowed by the disputed exclusions. . . .[32]

¶ 34 In *Diaz*, the Court addressed whether the State's employee health care plan could accept refunds from medical providers, who refunded payments after receiving duplicate

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[28] 2009 MT 318, 352 Mont. 423, 218 P.3d 475.

[29] 2013 MT 331, 372 Mont. 393, 313 P.3d 124.

[30] 2001 MT 168, 306 Mont. 155, 31 P.3d 347.

[31] *BCBS*, ¶ 8.

[32] *BCBS*, ¶ 19.

payments from third-party automobile liability insurers.[33] The State argued that the plan could retain the refunds under its "coordination of benefits" provision, which stated that the plan did not cover expenses that a member was entitled to have covered under a liability policy.[34] The State argued that the coordination of benefits provision determined which insurer was the primary payor, and was intended "to have only one insurer pay any given claim such as a medical expense, so as to 'exclude double payment.' "[35] The plaintiffs argued allowing the plan to retain the refunds amounted to subrogation and that the plan had no right of subrogation until they had been made whole.[36]

¶ 35 Citing §§ 2-18-901 and -902, MCA, the *Diaz* court stated that an insurer can exercise its right of subrogation by either (1) making a claim "against a judgment or recovery received by the insured from a third party found liable for a wrongful act or omission that caused the injury necessitating benefit payments," or (2) paying the loss incurred by the insured and pursing a claim against the third party responsible for the loss.[37] The court emphasized that, under either scenario, "the party in the insurer's position may not seek subrogation based upon loss paid to an insured unless the insured has been 'made whole' or fully compensated for all loss suffered."[38] Relying on *BCBS*, the court held that the coordination of benefits provision violated subrogation law because it "allows the Plan to exercise de facto subrogation by allowing the Plan to avoid payment for covered medical expenses without making any determination as to whether the beneficiaries have been made whole for their loss."[39]

¶ 36 In *McMillan*, the court addressed the issue of how to determine if a claimant had been made whole where the claimant was comparatively negligent. McMillan filed a workers' compensation claim and also pursued a tort claim against the Unites States after he was injured on a logging job.[40] McMillan sustained approximately $4.7 million in damages, but the United States District Court reduced his judgment to approximately $2.6

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[33] *Diaz*, ¶¶ 5, 6.

[34] *Diaz*, ¶¶ 4–6.

[35] Diaz, ¶ 4.

[36] Diaz, ¶ 6.

[37] *Diaz*, ¶ 9.

[38] Diaz, ¶ 11.

[39] *Diaz*, ¶¶ 14–17 (relying on *BCBS*, ¶ 19).

[40] *McMillan*, ¶ 3.

million because of his comparative negligence.[41] State Fund argued that the $2.6 million, plus his attorney fees and costs, would make McMillan whole.[42] State Fund argued that payments it had already made, plus funds McMillan recovered in the federal suit, had already exceeded $2.6 million, and that State Fund was "relieved from making further payments, including medical expenses, domiciliary care, and total disability benefits."[43] Although State Fund then attempted to assert a subrogation claim against the funds McMillan received in the federal suit, this Court held that McMillan would not be made whole until he received an amount equivalent to 100% of the federal judgment, plus the costs of recovery.[44] The Montana Supreme Court agreed, holding that the amount deducted from a judgment for McMillan's comparative negligence could not be considered when determining whether he had been made whole.[45] Thus, the Court held that State Fund remained liable for benefits under the WCA.[46]

¶ 37 Against the backdrop of *BCBS*, *Diaz*, and *McMillan*, Moreau argues that her case is factually distinguishable from *Shepard* because here, Transportation claims the right to retain the benefit of payments, which Moreau contends W.R. Grace made "as a tortfeasor with intentional tort liability and distinct liability for community exposure to [Edwin]." Although Moreau offers no evidence of damages or of the amounts she received from third-party claims, she argues that the made whole doctrine has not been satisfied and, therefore, that Transportation may not engage in *de facto* subrogation by refusing to pay the value of Edwin's medical benefits to her.

¶ 38 Transportation counters that there is no tort judgment in this case and argues this is not a subrogation case because W.R. Grace did not fund the LMP, and consequently pay Edwin's medical bills, because of a tort liability. Rather, pointing to Corcoran's unrebutted testimony that W.R. Grace deposited funds into the LMP voluntarily and with no conditions, Transportation argues that W.R. Grace voluntarily created and funded the LMP and that the medical benefits the LMP paid were not paid as tort damages. Transportation thus argues that *BCBS*, *Diaz*, and *McMillan* are inapplicable.

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[41] *Id*.

[42] *McMillan*, ¶ 10.

[43] *Id*.

[44] *McMillan*, ¶ 4.

[45] *McMillan*, ¶ 17.

[46] *McMillan*, ¶ 15.

¶ 39 Because W.R. Grace had no legal obligation to fund the LMP, and the LMP had no legal obligation to pay Edwin's medical bills at the time it paid them, this is not a subrogation case. Section 39-71-414, MCA — the statute that gives workers' compensation insurers the right of subrogation — states that a workers' compensation insurer may subrogate against the claimant's "claim, judgment, or recovery" from a third-party tort claim made under § 39-71-412, MCA, or from an intentional tort claim made under § 39-71-413, MCA. The Montana Supreme Court has held that a workers' compensation insurer does not have a right of subrogation unless the claimant recovered from a tort claim made under either § 39-71-412 or -413, MCA.[47] Although subrogation is allowed once a claimant is made whole,[48] recovery from a tort claim did not occur here. While this Court knows of tort claims against W.R. Grace,[49] there is nothing indicating that W.R. Grace created or funded the LMP pursuant to a court order directing it to do so in a tort case, a settlement of a tort claim under which it was required to do so, or a judgment in a tort case. Thus, contrary to Moreau's position, W.R. Grace did not fund the LMP nor did the LMP pay Edwin's medical bills as a direct consequence of W.R. Grace being an adjudged tortfeasor. Therefore, by refusing to pay Moreau the value of the medical bills at issue here, Transportation is not exercising a right of subrogation under § 39-71-414, MCA;[50] rather, no medical services remain for it to furnish under § 39-71-704, MCA, and, as the Montana Supreme Court interpreted the statute in *Shepard*, Transportation does not have a legal obligation to pay Moreau the value of medical expenses already paid.[51] Since Transportation is not exercising its right of subrogation, neither *BCBS*, *Diaz*, nor

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[47] *Haman v. MACO Ins. Co.*, 2004 MT 44, ¶¶ 10, 11, 16, 320 Mont. 108, 86 P.3d 34. *See also Hall v. State Comp. Ins. Fund*, 218 Mont. 180, 708 P.2d 234 (1985); *Zacher v. Am. Ins. Co.*, 243 Mont. 226, 794 P.2d 335 (1990); *Francetich v. State Comp. Mut. Ins. Fund*, 252 Mont. 215, 827 P.2d 1279 (1992) — in which each workers' compensation claimant also received a settlement against a third-party tortfeasor in a separate suit.

[48] *See Francetich*, 252 Mont. at 224, 827 P.2d at 1285 (holding that Article II, Section 16 of the Montana Constitution restricts a workers' compensation insurer from subrogating until the claimant has been made whole); *Hall*, 218 Mont. at 183, 708 P.2d at 237 ("When claimant is made whole, subrogation begins."); *Connery v. Liberty Northwest Ins. Corp.*, 1998 MT 125, ¶¶ 12, 14, 289 Mont. 94, 960 P.2d 288 (noting that a workers' compensation insurer may subrogate only if the injured worker has been "made whole" by a third-party recovery, the court held that the third-party recovery is the event which triggers an insurer's right to reduce a claimant's benefits and concluded that a statute which attempted to allow subrogation prior to the claimant being made whole violated Article II, Section 16 of the Montana Constitution).

[49] *See In re W.R. Grace*, 475 B.R. 34, 65 (D. Del. 2012) (noting that as a result of Libby asbestos, "By 2001, Grace was involved in over 65,000 asbestos-related personal injury lawsuits involving over 129,000 claims.").

[50] *See Haman*, ¶ 11 (no right of subrogation exists unless the claimant brought an action under § 39-71-412 or -413, MCA).

[51] *See Shepard*, 219 Mont. at 128-29, 710 P.2d at 1358.

McMillan — each of which concerned whether an insurer could subrogate against a recovery in a tort claim[52] — is applicable.

¶ 40 At the hearing, Moreau argued that this is a subrogation case because W.R. Grace had clear tort liability to Edwin and that it therefore had a legal obligation to advance pay his medical expenses under *Ridley v. Guaranty National Ins. Co*.[53] There, the Montana Supreme Court held that § 33-18-201(6) and (13), MCA — requiring insurers to promptly settle claims when liability is reasonably clear and prohibiting insurers from leveraging undisputed claims to settle disputed claims — impose upon liability insurers an obligation to pay medical expenses as incurred by an injured third-party tort victim.[54] The court explained that the purpose of § 39-18-201, MCA, "is to assure prompt payment of damages for which an insurer is clearly obligated."[55] The court also explained that its holding was consistent with the laws making automobile liability insurance mandatory, which "seeks to protect members of the general public who are innocent victims of automobile accidents."[56]

¶ 41 However, *Ridley* is inapplicable here because it applies only to liability insurers and neither W.R. Grace nor the LMP is an insurer. And, *Ridley* held that § 39-18-201(6) and (13), MCA, imposed a legal duty upon insurers to advance pay the victim's medical expenses. Moreau cites no law which obligated W.R. Grace to fund the LMP or obligated the LMP to advance pay Edwin's medical bills either at the time W.R. Grace funded the LMP or when the LMP paid Edwin's medical bills. Thus, neither W.R. Grace's funding of the LMP nor LMP's payment of Edwin's medical bills can be properly classified as *Ridley* payments.

¶ 42 Despite Moreau's claim, none of the factual distinctions she would have this Court make between *Shepard* and this case change the outcome. Under § 39-71-704, MCA, as interpreted in *Shepard*, Transportation has a legal duty to provide reasonable medical services. Since there are no services to furnish, Transportation has no obligation to pay Moreau beyond the reimbursement of the medical bills she paid out-of-pocket.

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[52] *BCBS*, ¶¶ 17, 19; *Diaz*, ¶ 11; *McMillan*, ¶ 17.

[53] 286 Mont. 325, 951 P.2d 987 (1997).

[54] *Ridley*, 286 Mont. at 334-35, 951 P.2d at 992-93. *See also DuBray v. Farmers Ins. Exchange*, 2001 MT 251, 307 Mont. 134, 36 P.3d 897 (extending *Ridley* to lost wages).

[55] *Ridley*, 286 Mont. at 335, 951 P.2d at 993.

[56] *Id*. (citation omitted).

¶ 43 In sum, while many of Moreau's arguments are well-reasoned, *Shepard* continues to be good law and this Court is bound to follow it.[57] Accordingly, this Court concludes that, as a matter of law, Moreau is not entitled to the funds she seeks from Transportation for the medical bills which were paid by the LMP and Transportation is therefore entitled to judgment as a matter of law.

ORDER

¶ 44 Respondent's motion for summary judgment is **GRANTED**.

¶ 45 Petitioner's cross-motion for summary judgment is **DENIED**.

¶ 46 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 12th day of May, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

[57] *Fellenberg v. Transp. Ins. Co*., 2004 MTWCC 29, ¶ 57. *See also Stavenjord v. Montana State Fund*, 2004 MTWCC 62, ¶ 17, n.6; *Olson v. Montana State Fund*, 2015 MTWCC 2, ¶ 23 (noting that a Montana Supreme Court case which controlled this Court's decision was still good law, although other cases may have arguably called part of the analysis into doubt); *Hardgrove v. Transp. Ins. Co*., 2003 MTWCC 57, ¶ 22 (ruling that this Court was bound to follow binding precedent even though more recent cases undermined it).

c: Jon L. Heberling
Dustin Leftridge
Allan M. McGarvey
Laurie Wallace
Ethan Welder
Todd A. Hammer

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