

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2025 MTWCC 3

WCC No. 2025-00776

SCOTT C. SIMONE

Petitioner

vs.

OLD REPUBLIC INSURANCE COMPANY

Respondent/Insurer.

**ORDER DENYING PETITIONER'S MOTION TO ENFORCE STIPULATED
JUDGMENT AS MOOT, DENYING PETITIONER'S REQUEST FOR A PENALTY,
AND DENYING RESPONDENT'S REQUEST FOR ATTORNEY FEES**

Summary: The Respondent agreed to make payment of settlement proceeds to the Petitioner within a 30-day period. Despite the Respondent's assurance that the check had been mailed, the Petitioner still did not have it two days after it was due. The Petitioner filed a motion to enforce this Court's stipulated judgment and requested a penalty. When the Petitioner received the settlement check three days later, a total of five days late, yet refused to withdraw his motion to enforce the stipulated judgment, the Respondent filed an opposition to the Petitioner's motion and requested attorney fees under an equitable exception to the American Rule.

Held: The Petitioner's motion to enforce the stipulated judgment is denied as moot since the Petitioner has received the settlement check. The Petitioner's request for a penalty under § 39-71-2907, MCA, is denied because: § 39-71-107(7)(b), MCA, does not apply to this Court; the check's lateness in and of itself does not prove the Respondent's unreasonableness; and the reasonableness of the conduct at issue is not within common knowledge, and the Petitioner failed to introduce any evidence or authority on the standard of care under which this Court could make a finding on the issue of the Respondent's reasonableness. Respondent's request for attorney fees is also denied because this Court's authority to award attorney fees is limited to §§ 39-71-611, and -612, MCA, neither of which provide for the award of attorney fees in favor of an insurer.

¶ 1 On May 30, 2025, the Petitioner Scott C. Simone filed a motion to enforce the stipulated judgment filed in this matter on April 28, 2025. The brief in support of Simone's motion requests an order compelling the Respondent Old Republic Insurance Company (Old Republic) "to remit settlement proceeds to him care of his attorney via express mail," as well as an award of attorney's fees under §§ 39-71-611 and -612, MCA, and costs, plus the imposition of a statutory penalty of 20%, under § 39-71-2907, MCA.

¶ 2 On June 4, 2025, Old Republic filed a motion requesting reasonable attorney fees incurred in responding to Simone's motion to enforce the stipulated judgment. The brief in opposition to Simone's motion and in support of Old Republic's motion requests that this Court deny Simone's motion and award Old Republic reasonable attorney fees, and requests oral argument on the pending motions.

¶ 3 On June 26, 2025, this Court held a hearing pursuant to the request of Old Republic. During oral argument, Simone withdrew his requests for attorney fees under §§ 39-71-611 and -612, MCA.

FACTS

¶ 4 On December 14, 2022, Simone was injured in the course and scope of his employment.

¶ 5 On April 24, 2025, the parties filed a Joint Petition for Approval of Settlement and Stipulation (Joint Petition).

¶ 5a In paragraph 1. of the Joint Petition, the parties stipulated that "Respondent shall pay Petitioner the sum of FORTY-TWO THOUSAND FOURTEEN AND 91/100 DOLLARS (\$42,014.91) new money on a disputed liability basis."

¶ 5b In paragraph 12. of the Joint Petition, the parties also stipulated that "Respondent shall pay the settlement amount in a lump sum by check to Petitioner and Petitioner's counsel within thirty days of the Court's approval of this *Joint Petition for Approval of Settlement and Stipulation*."

¶ 6 On April 28, 2025, this Court issued a Stipulated Judgment, ordering the parties to comply with all terms of the Joint Petition.

¶ 7 On May 16, 2025, the adjuster¹ requested the check from Old Republic.

¶ 8 On May 20, 2025, Old Republic placed the check in the mail.

¹ Simone's claim was adjusted by Sedgwick Claims Management Services, Inc., a third-party adjuster for Old Republic.

¶ 9 Pursuant to the Joint Petition, the check was due to be paid to Simone and his counsel within 30 days of this Court's approval of the Joint Petition on Monday, April 28, 2025, i.e., by Wednesday, May 28, 2025.

¶ 10 The settlement check arrived five days late, on Monday, June 2, 2025.

¶ 11 The settlement check was 13 days in transit through the mail.

ISSUES

¶ 12 This Court states the issues before it as follows:

Issue One: Is Simone's motion to enforce this Court's stipulated judgment moot?

Issue Two: Has Simone met his burden of proving that he is entitled to a penalty under § 39-71-2907, MCA, because Old Republic unreasonably delayed making the agreed-upon payment by May 28, 2025, to Simone and his counsel?

Issue Three: Has Old Republic met its burden of proving that it is entitled to attorney fees?

LAW AND ANALYSIS

Issue One: Is Simone's motion to enforce this Court's stipulated judgment moot?

¶ 13 When Simone asks this Court to enforce this Court's stipulated judgment, he is asking for this Court to compel Old Republic to remit the settlement check using express mail. Because the check has already been received, there is nothing an order from this Court could accomplish as to that issue. Therefore, Simone's motion is moot.

Issue Two: Has Simone met his burden of proving that he is entitled to a penalty under § 39-71-2907, MCA, because Old Republic unreasonably delayed making the agreed-upon payment, to Simone and his counsel?

¶ 14 Section 39-71-2907, MCA, provides, in pertinent part, that:

(1) The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant

¶ 15 The question of whether an insurer has unreasonably delayed or refused to provide workers' compensation benefits is a question of fact for the Workers'

Compensation Court.² The burden is on the party seeking the penalty to prove that the facts support a finding of unreasonableness.³

¶ 16 Here, to recap, Old Republic agreed to pay the settlement check to Simone and his counsel within 30 days, or by May 28, 2025. Old Republic placed the check in the mail on May 20, 2025. Simone and his counsel received the check on June 2, 2025, which was five days after the 30-day payment period had ended.

¶ 17 Notwithstanding that the basis of Simone's motion to enforce is language in the parties' Joint Petition, Simone argues that Old Republic also has a statutory duty, under § 39-71-107(7)(b), MCA, to pay the settlement within 30 days of the court's order approving the settlement. In pertinent part, § 39-71-107(7), MCA, provides: "An insurer shall . . . (b) pay settlements within 30 days of the date the **department** issues an order approving the settlement."⁴

¶ 18 Simone contends that Old Republic failed to comply with the statute and was, thus, unreasonable per se. However, by its terms, § -107(7)(b), MCA, applies to the "department" not this Court. Simone argues that the word "department" in § -107(7)(b), MCA, could also mean "court" because § -107(10)(a), MCA, defines "settled claim" for purposes of the section as "a **department-approved or court-ordered** compromise of benefits"⁵

¶ 19 Regardless of how § -107(10)(a), MCA, defines "settled claim," § 39-71-116(11), MCA, defines the word at issue, "Department," for all of Chapter 71, to mean "the department of labor and industry." And, "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."⁶ Thus, § -107(7)(b), MCA, does not apply to this Court.

¶ 20 Simone also argues that because the settlement check arrived late, it is obvious that Old Republic waited too long to send it. There is no dispute that the check arrived late. However, this Court disagrees that the check's lateness speaks for itself on the issue of Old Republic's reasonableness. Because a party can act reasonably and still end up with an unfavorable result, this Court cannot infer that if there is an unfavorable result, it must have been preceded by unreasonable action.

¶ 21 This Court declines to find that the reasonableness of Old Republic's actions –

² *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, 303 Mont. 364, ¶ 50, 15 P.3d 948 (citation omitted); *Jaenish v. Super 8 Motel*, 248 Mont. 383, 389, 812 P.2d 1241, 1245 (1991).

³ See *Wommack v. Nat'l Farmers Union Prop. & Cas. Co.*, 2017 MTWCC 8, ¶¶ 90-91.

⁴ Emphases added.

⁵ Emphases added.

⁶ § 1-2-101, MCA.

e.g.: waiting until May 16, 2025, to request the check, and until May 20, 2025, to issue and mail the check, and sending the check by regular First-Class mail – is within common knowledge. And, in the absence of an offer of evidence or authority on the standard of care under which this Court could make a finding of Old Republic’s reasonableness, Simone has not met his burden of proving that he is entitled to a penalty under § 39-71-2907, MCA.

Issue Three: Has Old Republic met its burden of proving that it is entitled to attorney fees?

A. The American Rule

¶ 22 Generally, the courts of the state of Montana follow the American Rule, which provides that each party is to pay its own attorney fees, “absent a contractual or statutory provision to the contrary.”⁷

1. Contract Provision

¶ 23 In this case, as discussed above, this Court previously issued a Stipulated Judgment, ordering the parties to comply with all terms of the Joint Petition, i.e., their contract. Paragraph 9. of the contract states that, “Both parties shall bear their own attorney’s fees and costs of these proceedings.” If the contract governs, despite any performance issues and during any enforcement actions, Old Republic has no claim for fees because, as to that issue, the contract is the same as, rather than contrary to, the American Rule.

2. Statutory Provision

¶ 24 As a court of limited jurisdiction, this Court only has the power to award attorney fees as is expressly conferred by statute⁸ – here, §§ 39-71-611, and -612, MCA, of the Workers’ Compensation Act.

¶ 25 In pertinent part, § -611, MCA, provides:

(1) The insurer shall pay reasonable costs and attorney fees as established by the workers’ compensation court if:

(a) The insurer denies liability for a claim for compensation or terminates compensation benefits;

(b) The claim is later adjudged compensable by the workers’ compensation court; and

⁷ *King v. State Farm Mut. Auto. Ins. Co.*, 2019 MT 208, ¶ 11, 397 Mont. 126, 447 P.3d 1043 (internal citations and quotation marks omitted).

⁸ See *Thompson v. State*, 2007 MT 185, ¶ 24, 338 Mont. 511, 167 P.3d 867.

(c) In the case of attorney fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

¶ 26 In pertinent part, § -612, MCA, provides:

(1) If an insurer pays or submits a written offer of payment of compensation under this chapter but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, reasonable attorney fees and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

(2) An award of attorney fees under subsection (1) may be made only if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

¶ 27 By its plain language, neither section authorizes this Court to award attorney fees in favor of an insurer.⁹

¶ 28 Moreover, as the Montana Supreme Court held in *North American Van Lines v. Evans Transfer and Storage*, "Attorney fees are not granted to the insurance companies. The purpose of statutorily providing attorney fees in claims of injured workers is to provide the injured claimant with the fullest recovery possible."¹⁰ Thus, even if the statutes control, Old Republic has no claim for fees thereunder.

B. Equitable Exception

¶ 29 Old Republic asserts that this Court can award it attorney fees under an equitable exception to the American Rule known as the *Foy* exception.¹¹ However, both provisions § -611 and § -612, MCA, explicitly prohibit the award of attorney fees "under the common

⁹ §§ 39-71-611, -612, MCA.

¹⁰ *N. Am. Van Lines v. Evans Transfer & Storage*, 234 Mont. 209, 212–13, 766 P.2d 220, 223 (1988) (explaining purpose of attorney fee awards in claims of injured workers and, although discussing facts involving § -611, MCA, only, providing an explanation that would apply to facts involving § -612, MCA, as well).

¹¹ In *Foy v. Anderson*, 176 Mont. 507, 511, 580 P.2d 114, 116 (1978), the Montana Supreme Court held that the district court had the power to make an award of attorney fees to a party forced to defend against a frivolous action under its "power to grant complete relief under its equity power."

fund doctrine or any other action or doctrine in law or equity.”¹² Thus, this Court discounts the applicability of the *Foy* exception without further analysis.

¶ 30 Based on the foregoing, this Court enters the following:

ORDER

¶ 31 Simone’s motion to enforce this Court’s stipulated judgment is **denied as moot**.

¶ 32 Simone’s request for a penalty under § 39-71-2907, MCA, is **denied**.

¶ 33 Old Republic’s request for attorney fees is **denied**.

DATED this 22nd day of July, 2025.

(SEAL)

/s/ Lee Bruner
Judge Lee Bruner

c: Eric Rasmusson
Steve W. Jennings

Submitted: June 26, 2025

¹² §§ 39-71-611(3), -612(4), MCA. See *Winslow v. N.H. Ins. Co.*, 2020 MTWCC 8, ¶ 80 (“[T]his Court does not have the authority to award attorney fees . . . outside of the boundaries set by § 39-71-611, MCA, because a specific statute controls over other statutes and over common law. Section 39-71-611, MCA, specifically sets forth the law regarding the award of attorney fees and costs in disputes over the denial of workers’ compensation benefits; therefore, the cases on which [Petitioner] relies [regarding a handful of exceptions to the American Rule] are inapplicable.”) (Internal citations omitted).