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

**2006 MTWCC 19**

**WCC No. 2004-1089**

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**LEE N. THOMPSON, DARIN SHARP, and SCOTT BAILEY**

**Petitioners**

**vs.**

**STATE OF MONTANA**

**Respondent**

**LIBERTY NORTHWEST INSURANCE CORPORATION and MONTANA STATE FUND**

**Intervenors.**

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ORDER DENYING INTERVENOR'S MOTION FOR RECONSIDERATION

*Appealed to Supreme Court 05/15/06*
*Reversed 08/17/07*

**Summary:** Intervenor Liberty Northwest Insurance Corporation moved for reconsideration of this Court's Order Granting Motions for Summary Judgment and Order Amending Order Granting Motions for Summary Judgment on various issues.

**Held:** Liberty's motion for reconsideration is denied.

**Topics:**

**Attorney Fees: Private Attorney General Theory.** While denying motion for reconsideration, WCC confirmed that as this Court had issued a declaratory judgment as permitted by the UDJA, the Court could likewise award attorney fees as permitted by the PAG doctrine under the UDJA.

**Attorney Fees: Declaratory Judgment.** While denying motion for reconsideration, WCC confirmed that as this Court had issued a declaratory

judgment as permitted by the UDJA, the Court could likewise award attorney fees as permitted by the PAG doctrine under the UDJA.

**Attorney Fees: Declaratory Judgment.** Although § 39-71-2905, MCA, states that the penalties and assessments allowed against an insurer under chapter 71 are the exclusive penalties and assessments that can be assessed by the WCC against an insurer for disputes arising under chapter 71, when the respondent in a declaratory judgment action is not an insurer, the WCC is not constrained to the penalties and assessments allowed against insurers under chapter 71.

**Remedies.** Although § 39-71-2905, MCA, states that the penalties and assessments allowed against an insurer under chapter 71 are the exclusive penalties and assessments that can be assessed by the WCC against an insurer for disputes arising under chapter 71, when the respondent in a declaratory judgment action is not an insurer, the WCC is not constrained to the penalties and assessments allowed against insurers under chapter 71.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2905.** Although § 39-71-2905, MCA, states that the penalties and assessments allowed against an insurer under chapter 71 are the exclusive penalties and assessments that can be assessed by the WCC against an insurer for disputes arising under chapter 71, when the Respondent in a declaratory judgment action is not an insurer, the WCC is not constrained to the penalties and assessments allowed against insurers under chapter 71.

**Statutes and Statutory Interpretation: Absurd Results.** A reasonable interpretation of §§ 39-71-611, -612, and -2905, MCA, would not prohibit the awarding of attorney fees by the WCC in a declaratory judgment under the UDJA.

**Constitutions, Statutes, Regulations, and Rules: Montana State Constitution: Article II, § 10.** Intervenor's argument that if a remedy does not appear in the annotations, it must not be a permissible remedy, is not only a questionable conclusion, it is also an erroneous statement of fact. Remedies aside from "nondisclosure" are included in the annotations to Mont. Const., Art. II, § 10.

**Remedies.** Intervenor's argument that if a remedy does not appear in the annotations, it must not be a permissible remedy, is not only a questionable

conclusion, it is also an erroneous statement of fact. Remedies aside from "nondisclosure" are included in the annotations to Mont. Const., Art. II, § 10.

**Pleading: Counter-claims.** Intervenor intervened in this action, but did not file a cross-petition for declaratory judgment. Having not filed a cross-petition, Intervenor cannot demand a declaration upon a motion for reconsideration.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 3-1-102.** Although Respondent bases its claim that the WCC is not a court of record upon the WCC's lack of mention in § 3-1-102, MCA, the clear weight of authority, including other statutes and case law, tend toward a contrary conclusion. In 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. *Section 1-2-101, MCA.* In this situation, Respondent asks this Court to insert language into § 3-1-105, MCA, so that it reads ". . . and the municipal courts *and no others* are courts of record." Although § 3-1-102, MCA enumerates several courts as courts of record, it contains no limiting language to indicate that only those courts mentioned qualify as courts of record in this State.

**Statutes and Statutory Interpretation: Inserting or Removing Items.** Although Respondent bases its claim that the WCC is not a court of record upon the WCC's lack of mention in § 3-1-102, MCA, the clear weight of authority, including other statutes and case law, tend toward a contrary conclusion. In 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. *Section 1-2-101, MCA.* In this situation, Respondent asks this Court to insert language into § 3-1-105, MCA, so that it reads ". . . and the municipal courts *and no others* are courts of record." Although § 3-1-102, MCA enumerates several courts as courts of record, it contains no limiting language to indicate that only those courts mentioned qualify as courts of record in this State.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 2-4-501.** While Respondent urges this Court to interpret § 2-4-501, MCA, to mean that the WCC's only authority to issue declaratory rulings is via MAPA, ARM 24.5.351 – the rule provided for under § 2-4-501, MCA – does not specifically limit the WCC to MAPA. Section 2-4-501, MCA, does not state that the WCC may not issue declaratory judgments under the auspices of the UDJA; it merely commands the WCC to promulgate a rule

setting forth a procedure to dispose of those actions for declaratory judgment concerning the applicability of statutory provisions, rules, or orders of the WCC. Respondent asks the Court to read limiting language into a statute that is not there.

**Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.351.** While Respondent urges this Court to interpret § 2-4-501, MCA, to mean that the WCC's only authority to issue declaratory rulings is via MAPA, ARM 24.5.351 – the rule provided for under § 2-4-501, MCA – does not specifically limit the WCC to MAPA. Section 2-4-501, MCA, does not state that the WCC may not issue declaratory judgments under the auspices of the UDJA; it merely commands the WCC to promulgate a rule setting forth a procedure to dispose of those actions for declaratory judgment concerning the applicability of statutory provisions, rules, or orders of the WCC. Respondent asks the Court to read limiting language into a statute that is not there.

**Statutes and Statutory Interpretation: Inserting or Removing Items.** While Respondent urges this Court to interpret § 2-4-501, MCA, to mean that the WCC's only authority to issue declaratory rulings is via MAPA, ARM 24.5.351 – the rule provided for under § 2-4-501, MCA – does not specifically limit the WCC to MAPA. Section 2-4-501, MCA, does not state that the WCC may not issue declaratory judgments under the auspices of the UDJA; it merely commands the WCC to promulgate a rule setting forth a procedure to dispose of those actions for declaratory judgment concerning the applicability of statutory provisions, rules, or orders of the WCC. Respondent asks the Court to read limiting language into a statute that is not there.

**Declaratory Judgment: Uniform Declaratory Judgment Act.** While Respondent urges this Court to interpret § 2-4-501, MCA, to mean that the WCC's only authority to issue declaratory rulings is via MAPA, ARM 24.5.351 – the rule provided for under § 2-4-501, MCA – does not specifically limit the WCC to MAPA. Section 2-4-501, MCA, does not state that the WCC may not issue declaratory judgments under the auspices of the UDJA; it merely commands the WCC to promulgate a rule setting forth a procedure to dispose of those actions for declaratory judgment concerning the applicability of statutory provisions, rules, or orders of the WCC. Respondent asks the Court to read limiting language into a statute that is not there.

**Jurisdiction: Subject Matter Jurisdiction.** Respondent argues that the WCC lacks jurisdiction to determine a constitutional issue because the WCC is a court of limited jurisdiction and specifically lacks jurisdiction to decide tort

cases. Respondent, however, mischaracterizes Petitioners' declaratory judgment action as a "constitutional invasion of privacy tort action." No tortious conduct has been alleged. An action to declare a statute unconstitutional is a declaratory judgment action – not a tort action. Therefore, Respondent's argument that the WCC does not have jurisdiction in a tort action, while apparently true, is nonetheless irrelevant.

**Jurisdiction: Workers' Compensation Court.** Respondent argues that the WCC lacks jurisdiction to determine a constitutional issue because the WCC is a court of limited jurisdiction and specifically lacks jurisdiction to decide tort cases. Respondent, however, mischaracterizes Petitioners' declaratory judgment action as a "constitutional invasion of privacy tort action." No tortious conduct has been alleged. An action to declare a statute unconstitutional is a declaratory judgment action – not a tort action. Therefore, Respondent's argument that the WCC does not have jurisdiction in a tort action, while apparently true, is nonetheless irrelevant.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-203.** The WCC has the full power, authority, and jurisdiction to perform all things necessary in the exercise of any power, authority, or jurisdiction conferred upon it under Title 39, chapter 71. The constitutionality of a statute found within Title 39, chapter 71, must be part of the power, authority, and jurisdiction granted to the WCC under this statute.

**Jurisdiction: Workers' Compensation Court.** The WCC has the full power, authority, and jurisdiction to perform all things necessary in the exercise of any power, authority, or jurisdiction conferred upon it under Title 39, chapter 71. The constitutionality of a statute found within Title 39, chapter 71, must be part of the power, authority, and jurisdiction granted to the WCC under this statute.

¶1 Intervenor Liberty Northwest Insurance Corporation (Liberty or Intervenor) moves the Court to reconsider and amend its Order Granting Motions for Summary Judgment ("Order") and Order Amending Order Granting Motions for Summary Judgment ("Amended Order"), filed October 18, 2005, and October 19, 2005, respectively.

¶2 Intervenor raises several arguments which the Court restates as follows:

¶2a In holding §§ 39-71-604(3) and 50-16-527(5), MCA (2003),[1] unconstitutional, the Workers' Compensation Court (WCC) also held §§ 39-71-604(2) and 50-16-527(4), MCA (2003),[2] unconstitutional.

¶2b By holding § 39-71-604(3), MCA (2003), unconstitutional, the WCC has apparently caused insurers to revert to the *Kline*[3] procedure for communicating with health care providers for the purpose of obtaining health care information about claimants.

¶2c If § 39-71-604(2), MCA (2003), has been ruled unconstitutional, the problems created are myriad.

¶2d The WCC does not have jurisdiction to award Private Attorney General (PAG) attorney fees under the Uniform Declaratory Judgment Act (UDJA), because the WCC is statutorily constrained to awarding attorney fees only as described in §§ 39-71-611, -612, MCA.

¶2e Petitioners have failed to satisfy the first prong of the PAG, namely "the strength or societal importance of the public policy vindicated by the legislation."[4]

¶2f The only remedy for a violation of Mont. Const., Art. II, § 10, is nondisclosure, and thus the WCC's remedy of declaring § 39-71-604(3), MCA (2003), unconstitutional – in turn forcing insurers to follow a procedure in order to obtain medical information – is not a permissible remedy because it still allows disclosure of the information.

¶2g By holding that § 39-71-604(3), MCA (2003), violates the due process rights of claimants, the WCC has violated the equal protection rights of insurers by not also holding that *ex parte* communications between claimants, their attorneys, and their health care providers violate the due process rights of insurers.

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[1] Hereinafter collectively referred to as § 39-71-604(3), MCA (2003).

[2] Hereinafter collectively referred to as § 39-71-604(2), MCA (2003).

[3] *Kline v. Farmers Ins. Group*, 2000 MTWCC 4.

[4] Motion to Reconsider and Supporting Brief and Request for Hearing (Intervenor's Brief) at 12.

¶3 Respondent supports the arguments of Intervenor, and adds arguments which this Court restates as follows:

> ¶3a The WCC does not have subject matter jurisdiction to issue declaratory judgments under the UDJA.
>
> ¶3b The WCC has not been legislatively granted the authority to declare statutes unconstitutional, and therefore does not have subject matter jurisdiction to do so.

¶4 Petitioners respond to the arguments raised by Intervenor and Respondent, summarized as follows:

> ¶4a The WCC has the authority to issue a declaratory judgment concerning the constitutionality of § 39-71-604(3), MCA (2003), pursuant to the power vested in the WCC by § 39-71-203, MCA, and supporting case law.
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> ¶4b The WCC is a "court of record," as demonstrated by § 2-4-614, MCA, the standard of review used by the Montana Supreme Court when it hears cases from the WCC on appeal, and the fact that appeals from the WCC go to the Montana Supreme Court and not to a district court.
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> ¶4c Montana Supreme Court decisions have expressly rejected the narrow construction of the WCC's jurisdiction that is argued by Respondent.
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> ¶4d Respondent and Intervenor cite no authority for their argument that only district courts may declare statutes unconstitutional.
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> ¶4e Case law supports the proposition that the exclusive jurisdiction of the WCC in matters relating to workers' compensation issues encompass constitutional and declaratory judgment issues.
>
> ¶4f Intervenor's argument that the WCC effectively has held § 39-71-604(2), MCA (2003), to be unconstitutional is incorrect, and Petitioners concede that § 39-71-604(2), MCA (2003), is not unconstitutional.
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> ¶4g Intervenor's argument that insurance companies cannot obtain due process without § 39-71-604(3), MCA (2003), is incorrect, because there were no due process problems in the 75 years prior to the enactment of this statute, and insurance companies obtain due process by having the ability to withhold payment of claims prior to adjudication by the WCC, using the

*Kline*[5] process for obtaining information from a claimant's treating physician, or by obtaining an independent medical evaluation.

¶4h Neither Intervenor nor Respondent set forth any arguments in the motion for reconsideration or Respondent's response which argue that the WCC made an error of law in holding § 39-71-604(3), MCA (2003), unconstitutional.

¶4i Section 39-71-2905(1), MCA, applies only to a dispute concerning benefits and thus does not apply to limit Petitioners receiving attorney fees under the PAG doctrine.

¶4j Section 39-71-2905(1), MCA, does not prohibit an award of fees against the State because the State concedes in its brief that it is not an "insurer" within the meaning of the statute.

¶4k The limitation of attorney fees, pursuant to § 39-71-611, MCA, does not apply to this case because that statute only applies to cases involving denial of claims or termination of benefits later found compensable.

¶4l The WCC is a "court of record" and as a court of record within its respective jurisdiction, it may award attorney fees under the UDJA as provided for in § 27-8-313, MCA.

¶4m Petitioners met the requirements of the three-part test to receive attorney fees via the PAG doctrine.

¶5 This Order will address each argument in turn.

**Intervenor's Argument I.**

**In holding § 39-71-604(3), MCA (2003), unconstitutional, the WCC also held § 39-71-604(2), MCA (2003), unconstitutional.**

¶6 Intervenor claims that, while the Order expressly holds § 39-71-604(3), MCA (2003), to be unconstitutional, the WCC's discussion[6] of the broad definition of "relevant health care information" in § 39-71-604(2), MCA (2003), has caused Intervenor to reach the conclusion that the WCC has held § 39-71-604(2), MCA (2003), unconstitutional as well. Intervenor

[5] *Supra.*

[6] *See* Order, ¶ 9.

further asserts that by referring to "statutes" instead of "sub-parts,"[7] the WCC indicates an intention to hold § 39-71-604(2), MCA (2003), unconstitutional. Intervenor also claims that the phrase, "the definition of relevance in the subject statutes is so broad and sweeping as to conceivably allow inquiry into areas wholly *irrelevant*,"[8] also demonstrates that the WCC has held § 39-71-604(2), MCA (2003), unconstitutional. Intervenor then devotes the majority of its brief to discussing dire scenarios which could occur and chaos that may ensue if § 39-71-604(2), MCA (2003), has been held unconstitutional.

¶7 In their response brief, Petitioners concede that § 39-71-604(2), MCA (2003), is not unconstitutional, and argue that Intervenor's assertion that the Order declares § 39-71-604(2), MCA (2003), unconstitutional is incorrect.

¶8 Even a cursory review of the Order reveals that this Court did not determine § 39-71-604(2), MCA (2003), to be unconstitutional. The language which Intervenor finds so vexing in ¶ 9 of the Order was a response by the Court to an argument raised by Respondent and Intervenor that § 39-71-604(3), MCA (2003), passes constitutional muster because it only allows the insurer to discuss "relevant" health care information. The WCC pointed out that because the definition of "relevant," found elsewhere in the statute, is so broad, this argument must fail. This Court passed no judgment upon the constitutionality of § 39-71-604(2), MCA (2003).

¶9 In fact, nowhere in the Order does this Court make a statement that could be reasonably construed to indicate that § 39-71-604(2), MCA (2003), was somehow included with § 39-71-604(3), MCA (2003), in the Court's determination of unconstitutionality. The first sentence of the Order sets forth the subsections in question.[9] The first two paragraphs of the discussion set forth the same subsections again. Indeed, ¶ 9, the apparent source of the confusion, explicitly cites yet again to the same subsections that were held unconstitutional. The Court then begins its discussion of Petitioners' due process claim with the language, "[h]aving found sections 39-71-604(3) and 50-16-527(5), MCA (2003), unconstitutional . . . ."[10] The Court concludes that discussion with the determination, "a claimant's due process rights are not satisfied by the procedures allowed pursuant to sections 39-71-604(3) and 50-16-527(5), MCA (2003)."[11] Finally, in ¶ 34, the Court

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[7] *See* Order, ¶¶ 13, 15.

[8] *See* Order, ¶ 15 (emphasis in original).

[9] § 39-71-604(3), MCA (2003), and the virtually identical language found at § 50-16-527(5), MCA (2003).

[10] *See* Order, ¶ 18.

[11] *See* Order, ¶ 29.

declares, “the Court finds that sections 39-71-604(3) and 50-16-527(5), MCA (2003), are violative of Article II, Sections 10 and 17 of the Montana Constitution.”

¶10 The Court fails to appreciate the source of the confusion as to which statutes the Court found unconstitutional. Intervenor’s argument is without merit and this Court determines no further clarification is warranted or necessary.

**Intervenor’s Argument II.**

**By holding § 39-71-604(3), MCA (2003), unconstitutional, the WCC has apparently caused insurers to revert to using the *Kline* procedure for communicating with health care providers for the purpose of obtaining health care information about claimants.**

¶11 In its brief, Intervenor asserts that the practical result of the Order is that insurers must now use the *Kline* process for communicating with health care providers for the purpose of obtaining health care information about claimants. Intervenor summarizes its interpretation of the *Kline* process, which it apparently finds burdensome. Petitioners respond that the *Kline* process would be the correct procedure to follow now that § 39-71-604(3), MCA (2003), has been found unconstitutional. As no parties have argued that *Kline* is *not* the correct procedure to follow henceforth, there is no issue requiring resolution here.

**Intervenor’s Argument III.**

**If § 39-71-604(2), MCA (2003), has been ruled unconstitutional, the problems created are myriad.**

¶12 As this Court has not found § 39-71-604(2), MCA (2003), to be unconstitutional,[12] this argument is moot and need not be addressed further.

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[12] *See* Intervenor’s Argument I, above.

## Intervenor's Argument IV.

**The WCC does not have jurisdiction to award Private Attorney General (PAG) attorney fees under the Uniform Declaratory Judgment Act (UDJA), because the WCC is statutorily constrained to awarding attorney fees only as described in §§ 39-71-611, -612, MCA.**

¶13 Intervenor argues that the WCC cannot award attorney fees under the UDJA and the PAG theory of recovery because the WCC is statutorily constrained to awarding attorney fees only in the situations described within certain statutes in Title 39, ch. 71, MCA. Intervenor states that § 39-71-2905(1), MCA, limits the WCC's ability to impose any penalties and assessments except in disputes concerning benefits. Intervenor claims that §§ 39-71-611 and -612, MCA, set forth the only situations in which the WCC may award attorney fees, and those statutes do not include the PAG doctrine. Intervenor further asserts that PAG is an equitable doctrine, and that the WCC has no equitable powers.

¶14 Petitioners disagree with Intervenor's interpretation of these statutes. Rather than limiting the WCC to specific situations, Petitioners argue these statutes set forth guidelines for the WCC in those specific situations, and the statutes do not apply to situations outside those prescribed within the statutes themselves.

¶15 Section 39-71-611, MCA, states in pertinent part:

> (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
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> (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.
>
> . . .
>
> (3) Attorney fees may be awarded only under the provisions of subsection (1) and may not be awarded under the common fund doctrine or any other action or doctrine in law or equity.

¶16 Section 39-71-612, MCA, states:

> (1) If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title 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.
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> (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. . . .
>
> . . .
>
> (4) Attorney fees may be awarded only under the provisions of subsections (1) and (2) and may not be awarded under the common fund doctrine or any other action or doctrine in law or equity.

¶17 Section 39-71-2905(1), MCA, states:

> A claimant or an insurer who has a dispute concerning any benefits under chapter 71 of this title may petition the workers' compensation judge for a determination of the dispute after satisfying dispute resolution requirements otherwise provided in this chapter. . . . The penalties and assessments allowed against an insurer under chapter 71 are the exclusive penalties and assessments that can be assessed by the workers' compensation judge against an insurer for disputes arising under chapter 71.

¶18 Petitioners note that Respondent, in its Objection to Application for Attorney Fees and Costs, concedes that it is not an "insurer." While Respondent argues that because it is not an insurer, the WCC cannot assess penalty fees against it, Petitioners argue that because Respondent is not an insurer, the WCC is not statutorily constrained to limit its award of attorney fees only to benefit disputes. Thus, §§ 39-71-611 and -612, MCA, are inapplicable because they dictate when an *insurer* must pay attorney fees and costs. Likewise, § 39-71-2905, MCA, states that the penalties and assessments allowed *against an insurer* under chapter 71 are the exclusive penalties and assessments that can be assessed by the WCC *against an insurer* for disputes arising under chapter 71. Since Respondent is not an insurer, the WCC is not constrained to the penalties and assessments allowed against insurers under chapter 71 when fashioning a remedy.

¶19 As a practical matter, it would be absurd, and in fact no parties argue, that if this Court may issue declaratory judgments under the UDJA, that it may not then award such remedies as permitted under the UDJA. It would defy logic to award Petitioners the declaratory ruling they desire without also providing for attorney fees as permitted by statute. A reasonable interpretation of the above-cited statutes which would allow for this consistency exists, and as the Montana Supreme Court has repeatedly held, "[w]hen more than one interpretation is possible, in order to promote justice, we will reject an

interpretation that leads to an unreasonable result in favor of another that will lead to a reasonable result."[13]

¶20 Therefore, this Court concludes that Petitioners, having received their prayed-for declaratory judgment under the UDJA, are entitled to their attorney fees under the PAG doctrine, as this Court has held.

**Intervenor's Argument V.**

**Petitioners have failed to satisfy the first prong of the PAG, namely "the strength or societal importance of the public policy vindicated by the legislation."**

¶21 Intervenor makes no argument, nor draws attention to any perceived flaw in the Order,[14] but merely offers the conclusory assertion that the prong has not been satisfied. Not having drawn this Court's attention to any evidence that may have been overlooked or misinterpreted by the WCC, Intervenor's brief does not contain enough support for its own argument for this Court to revisit the issue.

**Intervenor's Argument VI.**

**The only remedy for a violation of Mont. Const., Art. II, § 10, is nondisclosure, and thus the WCC's remedy of declaring § 39-71-604(3), MCA (2003), unconstitutional – in turn forcing insurers to follow a procedure in order to obtain medical information – is not a permissible remedy because it still allows disclosure of the information.**

¶22 Intervenor argues that the annotations for Mont. Const., Art. II, § 10, demonstrate that "the only remedy ever found by the Montana Supreme Court for a violation of this right is non-disclosure and the same is true for requested records to which an objection is made. Therefore to vindicate the right of privacy there must be an order of non-disclosure."[15] Intervenor then claims the WCC's remedy of disclosure of health care information under

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[13] *Hiett v. Missoula County Public Schools*, 2003 MT 213, ¶ 32, 317 Mont. 95, 75 P.3d 341 (*quoting Rausch v. State Compensation Ins. Fund*, 2002 MT 203, ¶ 29, 311 Mont. 210, 54 P.3d 25).

[14] *See* Order, ¶ 33, which states, "[t]he public policy vindicated by this litigation is the protection of two fundamental rights specifically guaranteed by the Montana Constitution's Declaration of Rights. There are few, if any, matters of greater societal importance than the protection of the citizenry's fundamental constitutional rights."

[15] Intervenor's Brief at 12.

a procedure enacted by the Court "is not the same as non-disclosure,"[16] and that this is not a permissible remedy in light of the case law Intervenor found in the annotations. Intervenor therefore concludes that the only possible remedy is nondisclosure and the resulting "shut-down of the workers' compensation system in Montana."[17]

¶23 Notwithstanding the leap of logic required to reach the conclusion that because a specific remedy is not listed in the annotations to a constitutional provision, that remedy cannot be applied to a violation of that constitutional provision, a review of the aforementioned annotations contradicts Intervenor's assertion. *See, e.g., State v. Nelson*, 283 Mont. 231, 941 P.2d 441 (1997) (absent a compelling state interest, which the state may establish via probable cause, medical records are protected by the right to privacy); *State ex rel. Mapes v. District Court*, 250 Mont. 524, 822 P.2d 91 (1991) (defendant may seek medical information of plaintiff pertaining only to prior physical or mental conditions that might relate to damages claimed in present action); *O'Neill v. Dept. of Revenue*, 227 Mont. 226, 739 P.2d 456 (1987) (explains procedure created for disclosure of information from Realty Transfer Certificates); *Simms v. District Court*, 2003 MT 89, 315 Mont. 135, 68 P.3d 678 (sets forth procedure by which district court should decide if a plaintiff must undergo a medical procedure demanded by a defendant for discovery purposes); *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997) (statute prohibiting homosexual contact between consenting adults held unconstitutional).[18]

¶24 Simply put, Intervenor's argument that if a remedy does not appear in the annotations, it must not be a permissible remedy, is not only a questionable conclusion, it is also an erroneous statement of fact. Remedies aside from "nondisclosure" *are* included in the annotations to Mont. Const., Art. II, § 10, as demonstrated by the citations above. Moreover, contrary to Intervenor's apocalyptic scenario that the only possible remedy is nondisclosure and the resulting "shut-down of the workers' compensation system in Montana," the Court notes that the statutory subsections at issue in this case were enacted in 2003, prior to which the workers' compensation system in Montana did not shut down just as it has not shut down in the months since the Court issued its original Order. The Court denies Intervenor's motion for reconsideration on this issue.

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[16] *Id.*

[17] Intervenor's Brief at 13.

[18] *Gryczan* demonstrates that a statute can be found unconstitutional for violation of Mont. Const., Art. II, § 10, without somehow requiring a remedy of nondisclosure.

## Intervenor's Argument VII.

**By holding that § 39-71-604(3), MCA (2003), violates the due process rights of claimants, the WCC has violated the equal protection rights of insurers by not also holding that *ex parte* communications between claimants, their attorneys, and their health care providers violates the due process rights of insurers.**

¶25 Intervenor argues: "If [claimants] are entitled to due process in this physician-driven system, then the Court's ruling should have included a holding that claimants and their attorneys cannot have *ex parte* communications with the claimant's health care providers and instead must afford insurers the same opportunity to participate that [claimants and their attorneys] have."[19] Intervenor adds that by allowing claimants to meet privately with a treating physician, a determinative opinion may be solicited from the physician prior to the matter reaching the WCC – the mirror of the WCC's concern expressed in ¶ 23 of the Order that a private meeting between an insurer and a treating physician could result in the solicitation of a determinative opinion from the physician.

¶26 Petitioners respond that Intervenor's concerns are overstated. "The insurance company holds the purse strings," Petitioners explain. "No amount of discourse between a claimant and his treating physician can cause the insurer to pay benefits if the insurer feels that it has not had a fair opportunity to be heard."[20]

¶27 This issue is resolved on procedural grounds. Intervenor intervened in this action, but did not file a cross-petition for declaratory judgment praying for this Court to declare that *ex parte* communications between claimants, their attorneys, and their health care providers violate the due process rights of insurers. Having not filed a cross-petition, Intervenor cannot demand such a declaration, and their motion for reconsideration on this issue is denied.

¶28 Notwithstanding the procedural infirmity of Intervenor's position, however, it bears noting that the Court principally found §§ 39-71-604(3) and 50-16-527(5), MCA (2003), unconstitutional as violating workers' privacy rights pursuant to Art. II, § 10 of the Montana Constitution.[21] In the interest of fully addressing the issues raised, however, the Court also

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[19] Intervenor's Brief at 13.

[20] Petitioners' Response to Objections to Attorney Fees and Costs (Respondent and Intervenors) and to Motion to Reconsider (Liberty Northwest) and Request for Clarification (Montana State Fund) (hereinafter Petitioners' Response) at 9.

[21] 2005 MTWCC 53, ¶ 18.

addressed the equal protection challenge as an ancillary consideration, while acknowledging that it was not required to address the due process challenge.[22] Obviously, insurers cannot assert any constitutional privacy rights in their communications with an injured worker's treating physician. Therefore, irrespective of the Court's views of Petitioners' equal protection challenge, the Court's holding would be the same.

## Respondent's Argument I.

### The WCC does not have subject matter jurisdiction to issue declaratory judgments under the UDJA.

¶29 Respondent argues that the WCC cannot issue a declaratory judgment under the UDJA because it lacks subject matter jurisdiction. The UDJA, as codified at § 27-8-201, MCA, states, in pertinent part, "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Respondent argues that the WCC cannot have subject matter jurisdiction to issue declaratory judgments under the UDJA because it fails to meet the threshold requirement of being a "court of record." Respondent further argues that the WCC acts under the provisions of Montana Administrative Procedure Act (MAPA), and that MAPA confers upon the WCC only a "limited right to issue declaratory rulings."

#### *A. Is the WCC a court of record?*

¶30 Respondent asserts that courts of record are "limited by statute" by § 3-1-102, MCA, which states, "The court of impeachment, the supreme court, the district courts, and the municipal courts are courts of record." Therefore, Respondent concludes, the WCC cannot be a court of record because it is not included in this list.

¶31 In their response brief to the Motion for Reconsideration, Petitioners assert that the language of § 2-4-614, MCA,[23] demonstrates that the WCC is a court of record. Petitioners further argue that the provisions of MAPA support a determination that the WCC is a court of record in that § 2-4-704, MCA, mandates that the judicial review of an agency decision "must be confined to the record."

¶32 Petitioners further respond that the standard of review used by the Montana Supreme Court in reviewing WCC decisions, along with the fact that appeals from the WCC are made directly to the Montana Supreme Court and not a district court, demonstrate that the WCC is a court of record under Montana law. Petitioners point out that, pursuant to §

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[22] *Id.*

[23] Section 2-4-614, MCA, enumerates the contents of the record in a contested case.

39-71-2904, MCA, appeals from final decisions of the WCC must be "filed directly with the supreme court of Montana in the manner provided by law for appeals from the district court . . . ." These appeals, Petitioners add, are reviewed by the Montana Supreme Court using the same standards of review as for appeals from district court decisions. Petitioners contend that if the WCC was not a court of record, these appeals would have to be *de novo*. Petitioners argue that "[e]ssentially, whether a court is a 'court of record' is defined by the standard of review. If no record is made, then the appellate tribunal reviews the matter *de novo*. . . . [I]f it is a 'court of record,' then the appellate tribunal reviews matters either under a 'clearly erroneous' or 'abuse of discretion' standard."[24]

¶33 Although Respondent bases its claim that the WCC is not a court of record upon the WCC's lack of mention in § 3-1-102, MCA, the clear weight of authority, including other statutes and case law, tend toward a contrary conclusion. By way of illustration, the WCC is not specifically mentioned in § 3-1-101, MCA, enumerating the "courts of justice" in Montana. If one were to conclude that failure to list the WCC in § 3-1-102, MCA, means that the WCC is not a court of record, one must also conclude that the failure to list it in § 3-1-101, MCA, means that the WCC is also not a court of justice, an undoubtedly absurd result. Moreover, § 39-71-2901(2)(e), MCA, provides that the WCC has the same contempt powers as the district courts, and § 39-71-2904, MCA, states that appeals from the WCC go directly to the Montana Supreme Court. Also noteworthy is ARM 24.5.351(1), which allows for declaratory rulings by the WCC where the court has jurisdiction.

¶34 Further support for the status of the WCC as a court of record comes from Respondent itself. In an Opinion dated July 13, 1979, the Montana Attorney General explained:[25]

> The Office of the Workers' Compensation Judge was created by the Legislature in 1975 (Chapter 537, Laws of 1975) and was assigned to the Department of Administration for administrative purposes only, section 2-15-1014, MCA.[26] While the legislature did not expressly provide that the Office

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[24] Petitioners' Response at 5. *See, e.g., Dahl v. Uninsured Employers' Fund*, 1999 MT 168, 295 Mont. 173, 983 P.2d 363 (the WCC's findings of fact are reviewed to determine if they are clearly erroneous, and conclusions of law are reviewed to determine if they are correct).

[25] Attorney General's opinions are issued to answer questions of law raised by public agencies or officials, including: the legislature or either house of the legislature; any state officer, board or commission; the city attorney of any city or town; the county attorney or board of county commissioners of any county. . . . The opinions carry the weight of law, unless they are overturned by a court or the legislature changes the law or laws involved. *Attorney General's Website; see also* § 2-15-501(7), MCA.

[26] Section 2-15-1014, MCA, was renumbered as § 2-15-1707, MCA, in 1991. It was amended in 1989 and now reads:

> **2-15-1707. Office of workers' compensation judge – allocation – appointment –**

was part of the judicial branch there are a number of factors supporting that conclusion.

The powers and procedures in the Office of Workers' Compensation Judge are similar to other state courts. The judge's salary is identical to the salary of a district judge. Section 2-15-1014(4), MCA. The qualifications for office are the same as a district judge. Section 2-15-1014(3)(a), MCA. The Workers' Compensation judge is selected by the judicial nomination commission in the same manner as district judges. Section 2-15-1014(2), MCA. The provisions for expenses and other benefits are the same as those for district judges. Cf. Sections 39-71-2902 and 3-5-213, MCA. Significantly, judicial review of decisions of the Office of Workers' Compensation Judge must be brought directly to the Supreme Court, paralleling the procedure for an appeal from district court, section 39-71-2904, MCA. Appeals from administrative agency decisions must be filed at the district court level. See section 2-4-702, MCA. Generally, the department which is assigned an agency for administrative purposes only must provide the agency with staff, section 2-15-121(2)(d), MCA. However the Office of Workers' Compensation Judge has authority to hire all employees necessary to carry out its duties, section 39-71-2902, MCA.

The statutory provisions regarding the Workers' Compensation Judge are codified in Title 39, Chapter 71, Part 29, MCA, and make clear that the Office of Workers' Compensation Judge is a judicial function. Under the provisions of section 39-71-2905, MCA, the Court is assigned the duty of making a final determination of any dispute raised by petition of a claimant, employer, or an insurer. The Court may deny or determine the amount of any benefits to be received by a claimant. The Court has authority to make findings as to whether an award has been unreasonably delayed or refused, and to alter

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**salary.** (1) There is the office of workers' compensation judge. The office is allocated to the department of labor and industry for administrative purposes only as prescribed in 2-15-121.

(2) The governor shall appoint the workers' compensation judge for a term of 6 years in the same manner provided by Title 3, chapter 1, part 10, for the appointment of supreme or district court judges. A vacancy must be filled in the same manner as the original appointment.

(3) To be eligible for workers' compensation judge, a person must:

(a) have the qualifications necessary for district court judges found in Article VII, section 9, of the Montana constitution;

(b) devote full time to the duties of workers' compensation judge and not engage in the private practice of law.

(4) The workers' compensation judge is entitled to the same salary and other emoluments as that of a district judge but must be accorded retirement benefits under the public employees' retirement system.

> or amend that award, 39-71-2907, MCA. All compromise settlements are subject to the Court's approval, 39-71-2908, MCA.
>
> . . . .
>
> The only viable alternative to finding the Office of Workers' Compensation Judge as part of the judiciary is to declare it to be an administrative agency which possesses quasi-judicial powers. However, as pointed out above, there are numerous factors which distinguish the position from other administrative agencies and indicates the legislature intended to grant more than quasi-judicial authority.
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> . . . A thorough review of the legislative history and committee minutes indicates a concern over the impartiality and integrity of the hearings conducted by the worker's [*sic*] compensation division. The committee minutes show an intent on the part of the legislature to create a truly independent and impartial office for the purpose of adjudicating workers' compensation disputes. Those purposes are best served by holding that the office is part of the judical [*sic*] branch of government. . . . .
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> It is my opinion the legislature intended to create a new court of special limited jurisdiction in enacting the Office of Workers' Compensation Judge, and the court and all of its employees are members of the judicial branch of government. . . .

¶35 In 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.[27] In this situation, Respondent asks this Court to insert language into § 3-1-102, MCA, so that it reads ". . . and the municipal courts ***and no others*** are courts of record." Although § 3-1-102, MCA, enumerates several courts as courts of record, it contains no limiting language to indicate that only those courts mentioned qualify as courts of record in this State.

¶36 Furthermore, if the WCC does not have the jurisdiction to issue declaratory judgments concerning the constitutionality of a workers' compensation statute, it begs the question not only as to which court would have jurisdiction to do so, but what would be the practical effect for a petitioner whose prayer for declaratory judgment is an argument in the alternative to other workers' compensation issues which belong in this Court. If the WCC does not have such jurisdiction, the apparent alternatives are that either the Montana

[27] § 1-2-101, MCA. *See also Kadillak v. Anaconda Co.*, 184 Mont. 127, 138, 602 P.2d 147, 154 (1979).

Supreme Court has original jurisdiction or the jurisdiction rests within the district courts. Article II, § 2, grants the Montana Supreme Court original jurisdiction to issue, hear, and determine writs of *habeas corpus* and such other writs as may be provided by law. Since a petition for declaratory judgment is not a writ, original jurisdiction does not seem to lie in the state supreme court. If one were to conclude that jurisdiction rests within the district courts, one then must ask the district courts to enter an area of law normally outside their purview. Additional questions of venue and joinder arise, and judicial economy is compromised. Most important, it is this Court which has enforced and interpreted the Workers' Compensation statutes for more than thirty years, and it is this Court which is in the best position to make determinations as to those statutes' constitutionality.

¶37 Finally, case law demonstrates that the Montana Supreme Court consistently characterizes the WCC as an entity that is more like a district court than like an administrative body.[28]

¶38 In conclusion, although the WCC is not enumerated in § 3-1-102, MCA, the weight of the evidence in favor of the WCC being a "court of record" clearly outweighs the evidence to the contrary. Therefore, this Court concludes that it is a court of record under Montana law.

***B. May the WCC issue declaratory rulings under the UDJA, or only under MAPA?***

¶39 With respect to this issue, Respondent points to *Alaska Pac. Assurance Co. v. L.H.C., Inc.*,[29] which holds that the WCC has a limited right to issue declaratory rulings pursuant to § 2-4-501, MCA.[30] In *Alaska Pac.*, this Court refused to assume jurisdiction of a case in which an insurer sought a declaratory judgment that the decedent was an employee of defendant L.H.C., Inc. This Court believed the attorneys had engaged in a "race-to-the-courthouse" strategy. The case had already been filed in a district court, and the WCC concluded that the case should be decided where it was first raised.

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[28] *State ex rel. Uninsured Employers' Fund v. Hunt*, 191 Mont. 514, 519, 625 P.2d 539 (1981) (although the WCC is not vested with the full powers of a district court, it has broad powers that go beyond administrative agencies); *Gould v. County Market*, 233 Mont. 494, 766 P.2d 213 (1988) (the WCC occupies a unique position as more than an administrative body but less than a district court because its jurisdiction is limited to workers' compensation matters).

[29] 191 Mont. 120, 124, 622 P.2d 224, 226 (1981).

[30] Section 2-4-501, MCA, states: "Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. . . . A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases."

¶40 The Montana Supreme Court issued an initial Opinion which affirmed the WCC's decision, but which apparently also stated the WCC was without jurisdiction to issue declaratory judgments. After a motion for reconsideration, the Court modified its Opinion, agreeing that it had "overstated" when it said the WCC is not empowered to render declaratory judgments. The Court conceded that the WCC has a "limited right to issue declaratory rulings," pursuant to § 2-4-501, MCA.[31]

¶41 Section 2-4-501, MCA, states, in pertinent part, that "[e]ach agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency." Respondent claims that the WCC is therefore limited in its ability to issue declaratory rulings to only those subjects enumerated here.

¶42 Petitioners respond that § 39-71-203, MCA, gives the WCC the power, authority, and jurisdiction necessary to settle any dispute arising under Title 39, ch. 71. They further note that nothing in the UDJA limits the power to issue declaratory judgments under its auspices to only those courts enumerated in § 3-1-102, MCA. Because § 27-8-201, MCA, gives courts of record the power within their respective jurisdictions to issue declaratory judgments under the UDJA, and because the WCC is a court of record acting within its jurisdiction, Petitioners conclude that the WCC is empowered to issue declaratory rulings under the UDJA.

¶43 While Respondent urges this Court to interpret § 2-4-501, MCA, to mean that the WCC's only authority to issue declaratory rulings is via MAPA, ARM 24.5.351 – the rule provided for under § 2-4-501, MCA – does not specifically limit the WCC to MAPA. Section 2-4-501, MCA, does not state that the WCC may not issue declaratory judgments under the auspices of the UDJA; it merely commands the WCC to promulgate a rule setting forth a procedure to dispose of those actions for declaratory judgment concerning the applicability of statutory provisions, rules, or orders of the WCC. Again, Respondent asks the Court to read limiting language into a statute that is not there.

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[31] *Id.*

## Respondent's Argument II.

**The WCC has not been legislatively granted the authority to declare statutes unconstitutional, and thus does not have subject matter jurisdiction to do so.**

¶44 Respondent argues the WCC lacks jurisdiction to determine a constitutional issue because the WCC is a court of limited jurisdiction as defined by the Workers' Compensation Act and specifically lacks jurisdiction to decide tort cases. In support of this argument, Respondent cites *Liberty Northwest Ins. Corp. for Brand S Lumber v. State Compensation Ins. Fund*, 1998 MT 169, 289 Mont. 475, 962 P.2d 1167, in which the Montana Supreme Court held that the WCC did not have subject matter jurisdiction to hear Liberty's claim that the State Fund breached its duty of care by providing inaccurate information upon which Liberty relied to its detriment, because such a claim sounds in tort. The Court stated, "[e]ven though the Workers' Compensation Court has broad jurisdictional powers . . . we have never gone so far as to interpret the court's jurisdiction to encompass common law tort actions."[32] From this language, Respondent claims, the WCC lacks jurisdiction over "the sort of constitutional invasion of privacy tort action brought by Petitioners . . . ."[33] Respondent, however, mischaracterizes Petitioners' declaratory judgment action as a "constitutional invasion of privacy tort action."

¶45 Respondent relies upon *Barr v. Great Falls Int'l Airport Auth.*, 2005 MT 36, 107 P.3d 471, which, Respondent claims, stands for the proposition that a violation of the constitutional right to privacy provided for by Mont. Const., Art. II, § 10, is a "constitutional tort." In *Barr*, the plaintiff sued for rights violations after he was fired from his job at the airport because an unauthorized background check dug up a 1968 arrest in Alaska. On summary judgment, the district court concluded Barr had no expectation of privacy in the criminal record because it was public information. The Montana Supreme Court affirmed.

¶46 The Court reasoned that Barr was claiming a "constitutional tort," in that he alleged a violation of his rights under 42 U.S.C. § 1983, and further claimed his right to privacy under Mont. Const., Art. II, § 10, was violated by the allegedly negligent actions of his employer. From this holding, Respondent makes the leap that the case at hand would also be a "constitutional tort" because it implicates a potential violation of the constitutional right to privacy guaranteed by Mont. Const., Art. II, § 10. Respondent's conclusion is misplaced.

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[32] *Brand S*, ¶ 10.

[33] Response to Intervenor's Motion to Reconsider (Respondent's Response) at 3.

¶47 The Montana Supreme Court first recognized the concept of a tort action for violations of state constitutional rights in *Dorwart v. Caraway*.[34] In *Dorwart*, the Court found that violations of, *inter alia*, an individual's right to privacy as guaranteed by Mont. Const., Art. II, § 10,[35] could give rise to a cause of action sounding in tort. In finding that such a "constitutional tort" existed, the Court provided an exhaustive analysis as to the history and origin of "constitutional torts" as well as the rationale for "constitutional torts." Throughout this exhaustive analysis, the one unambiguous characteristic as to what constitutes a "constitutional tort" is that it is a claim for damages. In fact, the threshold question decided by the Court in *Dorwart* was: "Does violation of rights guaranteed by the Montana Constitution give rise to a cause of action for damages?"[36]

¶48 It should go without saying that a constitutional tort is, at its essence, a claim alleging tortious conduct which rises to the level of a constitutional tort by the nature of the conduct and the rights it implicates.[37] In the case at hand, no tortious conduct has been alleged and no claim for damages has been made. Rather, Petitioners have merely sought a declaratory judgment that the statutory subsections at issue are unconstitutional. An action to declare a statute unconstitutional is a declaratory judgment action – not a tort action. Indeed, there is no shortage of Montana cases from which to draw this ready distinction.[38] Therefore, Respondent's argument that the WCC does not have jurisdiction in a tort action, while apparently true, is nonetheless irrelevant.

¶49 Respondent further argues that § 39-71-2905, MCA, restricts the jurisdiction of the WCC to disputes concerning benefits under Title 39, chapter 71, and the Court may only determine workers' compensation benefit issues. Respondent concedes, however, that the Montana Supreme Court has held in *State ex rel. Uninsured Employers' Fund v. Hunt*[39] that this jurisdiction includes a "limited set" of cases not strictly involving disputes between

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[34] 2002 MT 240, 312 Mont. 1, 58 P.3d 128.

[35] *Id.*, ¶ 16.

[36] *Id.,* ¶ 30.

[37] *Daniels v. Williams*, 474 U.S. 327, 329, 106 S. Ct. 662 (1986).

[38] *See, e.g. Gryczan*, *supra.* (no tort action involved in action to declare § 45-5-505, MCA, unconstitutional for violation of Mont. Const., Art. II, § 10); *Assoc. Press, Inc. v. Dept. of Revenue*, 2000 MT 160, 300 Mont. 233, 4 P.3d 5 (no tort action in case in which ARM 42.2.701 held unconstitutional, because public's right-to-know outweighs coal mine's expectation of privacy); *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364 (no tort action in case in which §§ 37-20-103 and 50-20-109, MCA, prohibiting physician assistant-certifieds from performing first trimester abortions, held unconstitutional). *See also Duran v. Buttrey Food, Inc.*, 189 Mont. 381, 616 P.2d 327 (1980), *overruled on other grounds* (plaintiff won a tort action *and* a declaratory judgment that held § 46-6-603, MCA, unconstitutional, but did not call the declaratory judgment portion of the action a "constitutional tort").

[39] *Supra.*

insurers and employees, such as "which of several parties is liable to pay . . . benefits, or if subrogation is allowable, what apportionment of liability may be made between insurers, and other matters that go beyond the minimum determination of the benefits payable to an employee."[40]

¶50 Petitioners respond that a closer examination of *Hunt* shows that the Montana Supreme Court specifically rejected the arguments put forth by the UEF in that case that the WCC's jurisdiction extended only to benefit disputes and that the WCC is merely an administrative law court with limited jurisdiction.[41] Rather, Petitioners point out that the Supreme Court held that although the WCC "is not vested with the full powers of a District Court," it has "broad powers . . . that go beyond the minimum determination of the benefits payable to an employee."[42]

¶51 Petitioners further draw this Court's attention to additional case law supporting a conclusion that the WCC's jurisdiction extends to workers' compensation matters beyond disputes concerning benefits. In *Wunderlich v. Lumbermen's Mutual Casualty Co.*,[43] the court held that the WCC has "broad jurisdiction" for other disputes under the Workers' Compensation Act. In *Gould v. County Market*,[44] the court stated that the WCC occupies a "unique position" in that it is more than administrative but less than a full-fledged district court because its jurisdiction is limited to "workers' compensation matters."

¶52 Additionally, and as noted by Petitioners, pursuant to § 39-71-203, MCA, the WCC has the full power, authority, and jurisdiction to perform all things necessary in the exercise of any power, authority, or jurisdiction conferred upon it under Title 39, chapter 71. Certainly the constitutionality of a statute found within Title 39, chapter 71, must be part of the power, authority, and jurisdiction granted to the WCC under this statute.

¶53 Respondent has failed to demonstrate that the WCC lacks jurisdiction to declare a statute unconstitutional, providing such statute is within the jurisdiction of the WCC. Reconsideration of this Court's Order and Amended Order on the grounds of lack of subject matter jurisdiction is therefore denied.

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[40] *Id.*, 191 Mont. at 519, 625 P.2d at 542.

[41] *Id.*, 191 Mont. at 517, 625 P.2d at 541.

[42] *Id.*, 191 Mont. at 519, 625 P.2d at 542; *See* Petitioners' Response at 3.

[43] 270 Mont. 404, 892 P.2d 563 (1995).

[44] 233 Mont. 494, 766 P.2d 213 (1988).

ORDER

¶54 For the foregoing reasons, Intervenor's Motion to Reconsider is **DENIED**.

¶55 This Order is certified as final for purposes of appeal.

DATED in Helena, Montana, this 28th day of April, 2006.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Norman L. Newhall
Mike McGrath
Anthony Johnstone
Larry W. Jones
David A. Hawkins
Submitted: December 8, 2005