DA 22-0590

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 104

CONTESSA BRYER, GUARDIAN AND CONSERVATOR, FOR JOHNNY LEE SHELDON,

Petitioner and Appellee,

v.

ACCIDENT FUND GENERAL INS. CO.,

Respondent/Insurer and Appellant.

APPEAL FROM: Montana Workers' Compensation Court, WCC No. 2021-5445
Honorable David M. Sandler, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jon T. Dyre, Crowley Fleck PLLP, Billings, Montana

For Appellee:

Steven S. Carey, Carey Law Firm, P.C., Missoula, Montana

Sydney E. McKenna, Justin Starin, McKenna & Starin Trial Attorneys, Missoula, Montana

Submitted on Briefs: April 5, 2023

Decided: June 6, 2023

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Accident Fund General Insurance Co. (Accident Fund) appeals from rulings of the Workers' Compensation Court (WCC) in that court's Cause No. 2021-5445. For the reasons set forth below, we affirm.

¶2 We restate the issues on appeal as follows:

> *1. Whether the WCC erred when it concluded that the statute of limitations in the underlying claim was tolled during the time that the injured worker, who was mentally incompetent, had no appointed guardian;*
>
> *2. Whether substantial credible evidence supports the WCC's finding that Sheldon was working with argon when the pressure relief valve burst; and*
>
> *3. Whether the WCC erred by awarding attorney fees under § 39-71-611, MCA, and by imposing a penalty against Accident Fund under § 39-71-2907, MCA.*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On July 3, 2017, Wynn Mader, plant manager of American Welding & Gas, Inc. (AWG), in Billings, was in his office when he heard a pressure relief valve burst in AWG's specialty gas room. After hearing the sound of escaping gas, he investigated and discovered plant technician Johnny Lee Sheldon, unconscious and bleeding from a head wound, lying on the floor near a high-pressure gas cylinder that was releasing gas into the room. As part of his job duties, Sheldon had been filling high-pressure cylinders with specialty gas mixes. The gases that Sheldon worked with included nitrogen and argon, and the valve releasing gas into the room was labeled "ARGON."

¶4 Mader turned off the gas and opened a garage door for ventilation. He returned to the office and asked another employee to call for an ambulance. He then returned to the specialty gas room to tend to Sheldon.

¶5 Mader could not detect Sheldon's heartbeat. He performed chest compressions until paramedics arrived. The paramedics determined that Sheldon was in cardiopulmonary arrest. Although Sheldon's heartbeat and breathing were ultimately restored, his brain had been deprived of oxygen for several minutes and he was in a coma. Physicians were unable to determine the cause of Sheldon's cardiopulmonary arrest, determining that he did not have a myocardial infarction or "heart attack," he had no arterial blockages or coronary artery disease, and his lab results did not indicate a possible cause for his condition.

¶6 An AWG employee took photographs of the scene on the day of Sheldon's accident. One of these photographs depicts that the "swing arm" of the cylinder-filling machine was attached to the valve marked "ARGON," and thus this was the valve that was delivering gas into the room at the time the pressure relief valve burst. Mader drafted an incident report which he circulated to Senior Vice President Kevin Adkins and Safety Director Andreas Boone for feedback. Mader's draft stated that Mader, Adkins, and Boone "were unable to determine if [Sheldon] had a medical emergency while the pump was running and the safety blew because it was over pressurized or if the safety blew which caused [Sheldon] to fall over and hit his head." After Adkins's and Boone's feedback, Mader revised the report to state that they had determined that Sheldon suffered some type of medical emergency after he turned on the gas but before the pressure relief valve burst.

¶7 Despite being required to report the incident to the Occupational Safety and Health Administration of the U.S. Department of Labor (OSHA) within 24 hours, AWG did not do so. AWG employees who were concerned about the safety of the facility contacted OSHA themselves, which sent investigators to AWG on July 6, 2017. OSHA investigators

met with Mader, Adkins, and Boone. The investigators toured the AWG facility and Mader recounted the events of July 3, 2017. OSHA's investigators inspected the specialty gas room. Mader advised the investigators that AWG had not "changed anything" in the room since Sheldon's injury except to move some cylinders at the request of the paramedics that AWG employees later returned to their approximate positions. Mader assured the investigators that "nothing ha[d] been touched" and that he had only been in the room once since the incident. In fact, at some point after Sheldon's injury, Mader had gone into the specialty gas room and affixed a paper label that said "Nitrogen" on top of the engraved "ARGON" label and a paper label that said "Argon" on top of the engraved "NITROGEN" label on the cylinder-filling machine—a fact that he did not disclose to the OSHA investigators.

¶8 On July 7, 2017, a First Report of Injury form regarding Sheldon was submitted to Accident Fund, AWG's workers' compensation insurance provider. The report described the incident as "alleges [sic] heart attack and contusion to head." Accident Fund hired a third-party adjuster, Gallagher Basset Services, Inc. (Gallagher Basset), to adjust the claim. Gallagher Basset assigned the claim to Ashley Davis, a claims examiner in another state, and Nicole Palagi, a Montana-based claims examiner. Palagi in turn hired a nurse case manager, Tanya R. Helvik RN, BAN, to assist her with the claim.

¶9 On July 24, 2017, the Yellowstone County District Court declared Sheldon an incapacitated person and appointed Alexis Danielle Calley as temporary guardian and conservator of Sheldon's estate and affairs. It is undisputed that Sheldon has remained mentally incompetent since the day of his accident on July 3, 2017.

¶10 On July 26, 2017, attorney Cory R. Laird advised Palagi that he had been retained to represent Sheldon in his workers' compensation claim. According to a declaration from Laird later filed by Accident Fund, Palagi advised Laird on July 27, 2017, that Accident Fund would not accept liability for Sheldon's workers' compensation claim. A short time later, Laird informed Calley that he and his firm would not pursue any workers' compensation claims regarding Sheldon's injury because Calley was unavailable and did not sufficiently communicate with Laird's firm. Calley then terminated Laird's representation.

¶11 On January 24, 2018, Calley's appointment as temporary guardian lapsed by operation of law. Sheldon remained without a guardian from January 24, 2018, until July 28, 2020, when the Hill County District Court appointed Bryer as Sheldon's temporary guardian. She was appointed as full guardian and conservator on November 23, 2020.

¶12 On March 23, 2021, Bryer petitioned the WCC for hearing. She alleged that Sheldon was filling gas cylinders with mixtures of 99% nitrogen and 1% oxygen on July 3, 2017, when the pressure relief valve popped off one of the cylinders, displacing the oxygen in the room and leading to Sheldon's medical condition.

¶13 On July 22, 2021, Accident Fund moved for summary judgment. It argued that Bryer's claim was time-barred because no petition for hearing was filed in the WCC until March 23, 2021, more than two years after the insurer denied the claim, and the claim was therefore barred by § 39-71-2905(2), MCA[1], which requires that a claimant seek a hearing

[1] This case is governed by the 2015 version of the Workers' Compensation Act because that was the law in effect at the time of Sheldon's industrial injury. *Ford v. Sentry Cas. Co.*, 2012 MT 156,

for resolution of a dispute over benefits within two years after benefits are denied. While acknowledging that § 39-71-602, MCA, provides that time limitations found within the Workers' Compensation Act (WCA) do not run against any injured worker who is mentally incompetent and without a guardian, Accident Fund argued that once Calley was appointed as Sheldon's temporary guardian, the time began to run and did not toll when the guardianship expired.

¶14 Accident Fund asserted that it denied Sheldon's claim on July 27, 2017. It submitted a declaration from Palagi along with its motion for summary judgment and brief in support, in which Palagi asserted that she issued a denial letter for Sheldon's claim on July 27, 2017, and that she sent that letter to Calley, Laird, and the Montana Department of Labor and Industry. Attached to her declaration was a "true and correct copy of the denial letter." The letter attached to her declaration was dated February 14, 2020.

¶15 In opposition to the motion for summary judgment, Bryer argued that Accident Fund misinterpreted § 39-71-602, MCA, and the statute of limitations was tolled while Sheldon did not have a guardian. She further argued that Accident Fund had failed to prove that it denied Sheldon's claim prior to February 14, 2020—the date of the letter Palagi declared was "true and correct." Bryer further asserted that the copy of the claim file she obtained from Accident Fund contained a similar letter that was dated February 15, 2020.

¶16 In its reply, Accident Fund claimed that the February 14, 2020 date was an "autofill" of the date the letter was printed. Accident Fund also filed a declaration from Laird in

¶ 32, 365 Mont. 405, 282 P.3d 687. All references herein are to the 2015 statutes unless otherwise noted.

which he asserted that he had received the denial letter from Palagi on July 27, 2017. The denial letter that Laird attached to his declaration was dated April 13, 2021.

¶17 On August 10, 2021, the WCC denied Accident Fund's motion for summary judgment. The WCC set aside the date of the denial letter, noting in a footnote that although it disagreed with Accident Fund's assertion that the date discrepancy was a "nonissue," the court would assume that Palagi sent the letter on July 27, 2017, and rule on the merits of Accident Fund's statute of limitations defense.[2] The WCC deemed Accident Fund's argument meritless. It found the first sentence of § 39-71-602, MCA, plain and unambiguous in stating, "[n]o limitation of time as provided [in the WCA] shall run as against any injured worker who is mentally incompetent and without a guardian . . . ." The WCC ruled:

> The statute of limitations began running, at the earliest, on July 27, 2017, when Accident Fund claims to have denied liability for Sheldon's alleged injury, because Calley was Sheldon's guardian at that time. However, under the plain language of § 39-71-602, MCA, the statute of limitations stopped running approximately six months later, on January 24, 2018, when Calley's temporary guardianship lapsed, because Sheldon was "mentally incompetent and without a guardian" and, therefore, had no one who could legally act on his behalf. The statute of limitations remained tolled for the next two and a half years, until July 28, 2020, when the Montana Twelfth Judicial District Court appointed Bryer to be Sheldon's temporary guardian. When Bryer was appointed Sheldon's temporary guardian on July 28, 2020, the statute of limitations began running again. At that time, Bryer had approximately a year and a half to file a Petition for Hearing to contest Accident Fund's denial of liability. Bryer filed her Petition for Hearing approximately eight months later, on March 23, 2021, approximately ten months before the statute of limitations ran.

[2] Although not mentioned by the parties or the WCC, our review of the record revealed a copy of the denial letter with yet another date: September 5, 2017. See Trial Ex. 14 at 101. It thus appears that Palagi drafted the denial letter no later than that date.

¶18 The matter proceeded to trial on October 5-7, 2021. On June 8, 2022, the WCC entered its Findings of Fact, Conclusions of Law, and Judgment and Order. In detailed findings, the court resolved the factual disputes between the parties largely in Bryer's favor. It ruled Accident Fund liable for Sheldon's injuries and further ruled that Bryer was entitled to her attorney fees and a statutory penalty because Accident Fund unreasonably denied liability.

¶19 In determining what happened to the air in the specialty gas room after the valve burst, the WCC found the testimony and opinions of Sheldon's expert witness Alan H. George, PhD, PE, persuasive and convincing, and thus entitled to considerable weight. Conversely, it gave no weight to the opinions of Accident Fund's expert witness John M. Freeman, Jr., MS, PE, CFEI, who reached his opinions after conducting experiments that the WCC found did not sufficiently replicate the conditions at the time of Sheldon's injury. The WCC also gave considerable weight to the causation opinions of Sheldon's medical experts, John C. Schumpert, MD, MPH, FACOEM, and Mark L. Sanz, MD, FACC, while it gave less weight to the testimony and opinion of Scott Adam Sample, DO, who testified for Accident Fund. For reasons set forth more fully below, and which the WCC explained at length, the WCC did not find the testimony of Mader and Adkins credible.

¶20 Pertinent to the issues on appeal, the WCC found that on the morning of July 3, 2017, Sheldon was working in the specialty gas room with the doors and windows closed. While he was filling cylinders with a gas mixture that contained argon, a pressure relief valve burst on one of the cylinders, creating a shockwave that knocked Sheldon over

backwards. He hit the back of his head on the floor and was knocked unconscious while argon gas escaped into the room from the burst valve.

¶21 Based on testimony from Dr. George and other evidence offered at trial, the WCC found that because argon is denser than air, it sank to the floor, and because Sheldon was lying unconscious on the floor, he inhaled a large amount of argon and went into cardiopulmonary arrest due to insufficient oxygen.

¶22 Based on the testimony of Mader and other witnesses, the WCC further found that Mader did not immediately go to the specialty gas room when he heard the valve burst because pressure relief valve bursts were a regular occurrence. It was only after Mader heard the sound of gas escaping for several seconds that he went to investigate. When Mader discovered Sheldon lying on the floor, he opened the room's garage door for ventilation and turned off the valve to the cylinder that had the burst valve. Mader then went back to the office and asked another employee to call 911. He then returned to the specialty gas room to assist Sheldon. When he determined that Sheldon did not have a heartbeat, he began chest compressions. However, the argon remained in Sheldon's lungs until paramedics intubated him and began administering oxygen some 20 minutes after the first 911 call. Even though medical personnel eventually succeeded in restoring Sheldon's heartbeat and breathing, he suffered catastrophic brain damage because he lacked oxygen for a significant amount of time.

¶23 The WCC found that physicians who treated Sheldon at the hospital initially suspected a myocardial infarction, or heart attack, caused by a blocked artery. But contrary to that initial suspicion, they found no blockage. The physicians also determined that

Sheldon had no illicit drugs in his system, ruling out another potential cause of cardiac arrest. Ultimately, Sheldon's treating physicians did not determine a cause for his condition, but the WCC noted that the medical records indicated they were not aware that he had been exposed to argon as one physician noted, incorrectly, that there was "no gas leaking or anything like that" when Sheldon was found unconscious.

¶24 The WCC made lengthy, detailed findings concerning AWG's actions after Sheldon's injury. It found that, shortly after the ambulance left, Boone took a photograph of the front of the machine Sheldon used to fill the cylinders that depicted a coupler attached to the valve labeled "ARGON" and a pressure reading of nearly 4,000 psi on that valve. However, Boone, Mader, Adkins, and Chuck Beal, an attorney for AWG, decided that Mader would state in his incident report that Sheldon was exposed to nitrogen gas, which would have been less hazardous than argon under these circumstances, and AWG representatives would assert that Sheldon was exposed to nitrogen, not argon. The WCC found that AWG's representatives "worked backwards from the conclusion they wanted to reach, which was that Sheldon had a medical emergency, unrelated to his work, and that the safety valve burst because he was already unconscious and unable to tend to the [cylinder-filling] machine." Thus, in Mader's incident report, he did not state that the coupler was attached to the valve labeled "ARGON," but instead asserted that the "nitrogen gauge . . . was at 4000 psi . . . ." After Mader provided his first draft of the incident report to Boone and Adkins, they revised the report to assert that both doors, a window, and a ceiling vent were open when Mader first entered the specialty gas room, they further claimed that Mader "did not notice any adverse atmospheric conditions" when he entered

the room, and they rewrote Mader's conclusion, which originally opined that Sheldon either suffered a medical emergency or fell and hit his head because of the burst pressure valve, to instead state unequivocally that Sheldon suffered a medical emergency prior to the pressure valve bursting.

¶25 The WCC found that Mader also relabeled two of the valves on the cylinder-filling machine, putting a paper label that said "Nitrogen" over the engraved "ARGON" label and putting a paper label that said "Argon" over the engraved "NITROGEN" label. Mader and Adkins then testified that, prior to Sheldon's injury, AWG had connected the argon supply to the line leading to the nitrogen valve and the nitrogen supply to the line leading to the argon valve because the company was performing work in the bulk tank area and had brought in a temporary nitrogen tank. The WCC did not believe that AWG had switched the lines so that the valve that was labeled "ARGON" at the time of Sheldon's injury actually delivered nitrogen, and vice versa; rather it found that Mader relabeled the valves in an attempt to mislead observers into believing that Sheldon had been exposed to nitrogen after the valve burst. The court found that Mader and Adkins failed to offer a reasonable explanation for why AWG would have chosen to swap the gas lines, other credible evidence contradicted their assertion that the gas lines had been swapped, and both Adkins and Mader had been untruthful in other instances, such as incorrectly telling OSHA investigators that "nothing" had been changed in the specialty gas room between the time of the incident and OSHA's arrival, thus causing the WCC to distrust their testimony. Regarding Mader's testimony that he had told OSHA investigators that nothing had been changed in the specialty gas room when he knew that was not true, the WCC stated:

"Mader's claim at trial that he did not tell the OSHA investigators that he had relabeled the nitrogen and argon valves and control knobs because he was just trying to be 'concise' and did not want to burden them with 'extra information' strained credulity beyond the breaking point."

¶26 The WCC found the testimony of 18-year AWG employee Charlene Kananen more credible. She testified that it would have been simpler to connect the temporary nitrogen tank to the nitrogen vaporizer. The WCC also noted that Mader admitted that in 2015, AWG swapped gases and had difficulty purging the lines sufficiently to eliminate cross-contamination. And, although Mader alleged that he added the paper labels in the specialty gas room because other employees would be taking on Sheldon's cylinder-filling duties and he wanted to ensure that they were all aware of the swapped lines, he could not explain why he did not also relabel the valves in the "non-specialty gas room," which was supplied by the same bulk tanks as the specialty gas room. Because the WCC did not believe that AWG had swapped the gas lines prior to Sheldon's accident, if at all, it found that the gas that Sheldon was working with, delivered from the valve that said "ARGON," was indeed argon.

¶27 After weighing the evidence and making findings accordingly, the WCC found:

> As a direct effect of being knocked over backwards and hitting the back of his head on the concrete floor when the safety valve burst, Sheldon suffered a concussion with loss of consciousness. As a direct and primary effect of inhaling argon, i.e., more than 51% of the cause [as required by § 39-71-119(5)(b), MCA], Sheldon suffered other injuries, including: (1) cardiopulmonary arrest with ventricular fibrillation; (2) moderate spasm of his proximal right coronary artery; (3) severe spasm of his mid right coronary artery; and (4) anoxic encephalopathy, i.e., a brain injury caused by the lack of oxygenated blood.

¶28 The WCC further scrutinized the investigation conducted by Gallagher Bassett's claims examiners and found it wanting. The WCC found that Davis, the out-of-state claims examiner, spoke "briefly" with Mader, who informed her that Sheldon was working in a well-ventilated room performing non-strenuous job duties at the time of the incident. Mader suggested that Sheldon may have suffered a heart attack or concussion. Davis did not ask Mader any follow-up questions and she did not learn that a pressure relief valve had burst or that Sheldon had been exposed to gas blowing into the room.

¶29 Helvik procured Sheldon's medical records. Helvik also spoke to one of Sheldon's sisters and learned that, after hearing a valve burst, one of Sheldon's co-workers discovered him on the floor, not breathing and with no pulse. Sheldon's sister informed Helvik that OSHA was investigating the matter. Helvik forwarded the medical records and relayed the sister's comments to Palagi.

¶30 After reviewing Sheldon's medical records, Palagi asked Helvik several questions about the information contained within them. Helvik explained, in part, that the records indicated that physicians initially believed Sheldon was having a "heart attack" due to a blocked artery, but they discovered this was not the case and they were ultimately unable to determine why his heart was deprived of oxygen and he went into cardiac arrest. She noted that there was an unanswered question as to whether he may have suffered an arterial spasm due to "the nitrogen he was handling."

¶31 Palagi then denied the claim, explaining that Sheldon's physicians had not provided a cause for their diagnosis of cardiac arrest and further asserting that Sheldon did not suffer

an accident or incident that caused or contributed to his cardiac arrest. After issuing her denial letter, Palagi ceased investigating the claim.

¶32 The WCC found the denial of the claim unreasonable. It found the pre-denial investigation inadequate because the claims examiners did not follow obvious leads and thus failed to obtain the available evidence. In particular, it faulted Palagi for failing to discover that Sheldon was exposed to a gas after a valve burst. The WCC noted that if Palagi had uncovered this information, she could have informed Sheldon's physicians and asked those physicians to opine whether the exposure could have caused Sheldon's cardiopulmonary arrest. The WCC stated that it was "convinced that Palagi did not follow the obvious leads because she was solely focused on finding a basis for denying liability for Sheldon's 'catastrophic' claim, which is unreasonable."

¶33 The WCC further found the claims adjusting unreasonable because Accident Fund had failed to keep its claim file in accordance with § 39-71-107(3), MCA, which requires that the claims examiner maintain the claim file in Montana and "in a manner that allows the documents to be retrieved from that office and copied at the request of the claimant . . . ." The WCC found that in this case, Palagi sent an incomplete copy of the claim file when Bryer requested a copy because she failed to keep the documents together and that Accident Fund failed to include a copy of Palagi's denial letter when it later produced a more-complete copy of the claim file pursuant to subpoena because the letter was not kept as part of the file.

¶34 Based on these factual findings, the WCC accordingly determined that Sheldon's claim was compensable, that Bryer was entitled to her attorney fees, and it imposed a statutory penalty against Accident Fund.

STANDARDS OF REVIEW

¶35 We review a court's grant of summary judgment de novo. *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 6, 402 Mont. 277, 477 P.3d 1065. In so doing, we use the same standard used by the trial court: whether no genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law. *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 9, 353 Mont. 265, 222 P.3d 566.

¶36 Our review of the WCC's findings of fact is both deferential and limited in scope. *Gamble v. Sears*, 2007 MT 131, ¶ 20, 337 Mont. 354, 160 P.3d 357. We review the WCC's findings of fact to determine whether they are supported by substantial credible evidence. Substantial credible evidence is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. If there is conflicting evidence, we consider whether substantial credible evidence supports the WCC, not whether the evidence might support contrary findings. We do not resolve evidentiary conflicts but restrict our inquiry to determining whether substantial credible evidence supports the findings actually made by the WCC. *Keller v. Liberty Northwest, Inc.*, 2010 MT 279, ¶¶ 20-21, 358 Mont. 448, 246 P.3d 434 (citations and quotations omitted). We will not substitute our judgment for that of the WCC as to the weight of evidence on questions of fact. *Abfalder v. Nationwide Mut. Fire Ins. Co.*, 2003 MT 180, ¶ 10, 316 Mont. 415, 75 P.3d 1246 (citation omitted).

Indicating the high level of deference this Court affords to the WCC's findings, we will consider evidence to be substantial even if it is contradicted by other evidence, is somewhat less than a preponderance, and is inherently weak. *Gamble*, ¶ 20 (citations omitted).

¶37 We review the WCC's conclusions of law for correctness. Interpretation and construction of a statute is a matter of law. *Neisinger v. N.H. Ins. Co.*, 2019 MT 275, ¶ 13, 398 Mont. 1, 452 P.3d 909.

DISCUSSION

1. Whether the WCC erred when it concluded that the statute of limitations in the underlying claim was tolled during the time that the injured worker, who was mentally incompetent, had no appointed guardian.

¶38 Accident Fund argues that the WCC erred in denying Accident Fund's motion for summary judgment on the basis that Bryer's Petition for Hearing was untimely filed. Under § 39-71-2905(2), MCA, a petition for hearing must be filed within two years after benefits are denied. Accident Fund maintains that it denied benefits on this claim on July 27, 2017, and therefore the WCC should have dismissed Bryer's Petition for Hearing, filed March 23, 2021, as untimely.

¶39 Based on the plain language of § 39-71-602, MCA, the WCC concluded that the statute of limitations was tolled during the time that Sheldon was without a guardian. Section 39-71-602, MCA, provides in relevant part:

> No limitation of time as provided in . . . the [WCA] shall run as against any injured worker who is mentally incompetent and without a guardian . . . . A guardian . . . may be appointed by any court of competent jurisdiction, in which event the period of limitations . . . shall begin to run on the date of appointment of such guardian . . . .

¶40 In interpreting this statute, the WCC determined that the limitations period was tolled from the expiration of Calley's guardianship appointment on January 24, 2018, until Bryer was appointed on July 28, 2020. Therefore, Bryer's Petition for Hearing, filed March 23, 2021, was timely.

¶41 While Accident Fund does not dispute that Sheldon was without a guardian for the period of January 24, 2018, until July 28, 2020, it nevertheless argues that § 39-71-602, MCA, does not toll a statute of limitations once it has begun to run. It asserts that Sheldon had a guardian when it denied the claim on July 27, 2017, and the time limitation to challenge the denial in the WCC expired two years later on July 27, 2019. Accident Fund focuses on the heading of § 39-71-602, MCA: "Statute of limitation not to apply during minority or mental incompetency unless guardian appointed." Accident Fund argues that the appointment of a guardian triggers the running of the limitations period and any subsequent absence of said guardian is irrelevant.

¶42 In interpreting a statute, we first look to the plain meaning of the words used. When the language of a statute is plain, unambiguous, direct, and certain, the statute speaks for itself and no further interpretation is required. It is not a court's function to insert what has been omitted or omit what has been inserted; instead, our function is to ascertain and declare what, in terms of substance, is contained therein. *In re Estate of Langendorf*, 262 Mont. 123, 125-26, 863 P.2d 434, 436 (1993) (citations omitted). We interpret a statute by viewing it in the statutory context in which it appears. *In re Maynard*, 2006 MT 162, ¶ 5, 332 Mont. 485, 139 P.3d 803 (citation omitted). In matters of statutory interpretation, the

text of a statute takes precedence over the heading. *In re Maynard*, ¶ 5 (citing *Orozco v. Day*, 281 Mont. 341, 348, 934 P.2d 1009, 1013 (1997) (citation omitted)).

¶43 The WCC determined the language of § 39-71-602, MCA, to be plain and unambiguous. It noted that in its first sentence, the statute provides "that the statutes of limitations in the [WCA] do not 'run . . . against any injured worker who is mentally incompetent and without a guardian.'" The WCC pointed out that nothing in the statute provides that once the limitations period begins to run, "it keeps running even though the injured worker is mentally incompetent and no longer has a guardian, and thereby does not have anyone with legal authority to act on his behalf."

¶44 The WCC was correct. The language of § 39-71-602, MCA, plainly and unambiguously tolls the applicable statute of limitations when an injured worker who is mentally incompetent has no guardian and thus no person who has the legal authority to act on the injured worker's behalf. Accident Fund's argument that we should overlook the unambiguous language of the statute and instead construe a different meaning by parsing the words of the statute's heading is unavailing. We affirm the WCC's denial of Accident Fund's motion for summary judgment on this issue.

2. Whether substantial credible evidence supports the WCC's finding that Sheldon was working with argon when the pressure relief valve burst.

¶45 Accident Fund next argues that this Court should overturn certain findings of fact made by the WCC because it contends those findings are contrary to undisputed physical evidence. Specifically, Accident Fund alleges that the photographs and video recordings taken by OSHA investigators on July 6, 2017, undeniably show that the temporary nitrogen

tank was connected to the argon vaporizer at the time OSHA inspected AWG and thus it is undeniable that Sheldon was exposed to nitrogen, not argon, when the pressure relief valve burst. Relying on *Incret v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 107 Mont. 394, 86 P.2d 12 (1938), and *Morton v. Mooney*, 97 Mont. 1, 33 P.2d 262 (1934), Accident Fund argues that physical evidence must prevail over conflicting witness testimony and that in this case, the WCC erred by not finding that the OSHA photographs and video recordings prove that the temporary nitrogen tank was connected to the argon vaporizer at the time of Sheldon's injury. Accident Fund argues that the WCC incorrectly relied on inferences, the testimony of less-knowledgeable witnesses, and its own beliefs as to what "made sense" over the OSHA evidence and Mader's testimony.

¶46 Accident Fund further argues that this Court should not defer to the WCC's factual findings but should review de novo the OSHA photos and video recordings, relying on *Shupert v. Anaconda Aluminum Co.*, 215 Mont. 182, 187-88, 696 P.2d 436, 439 (1985), in which this Court held that, "when the critical evidence, particularly medical evidence, is entered by deposition, . . . this Court . . . is in as good a position as the Workers' Compensation Court to judge the weight to be given to such record testimony, as distinguished from oral testimony, where the trial court actually observes the character and demeanor of the witness on the stand." (Citation and internal quotation omitted.)

¶47 We have long held that the WCC, as the finder of fact, is in the best position to assess witnesses' credibility and testimony, and it is not our job to assess whether contrary findings could have been made. *Abfalder*, ¶¶ 20-21. We do not resolve conflicts in the evidence and we defer to the WCC's findings concerning the credibility and weight of

witnesses who testify in person at trial. *Quick v. Mont. State Fund*, 2009 MT 162, ¶ 21, 350 Mont. 455, 208 P.3d 415 (citations omitted). We will not disturb the WCC's findings as to the relative credibility of the witnesses who testified before it, nor will we accept Accident Fund's invitation to override the weight the trial court gave to those witnesses' testimony.

¶48 While it is true that the WCC did not discuss the OSHA photographs in its findings of fact, the WCC, as the trier of fact, was in the best position to weigh the evidence and determine what, if any, weight to give to those exhibits. In that regard, OSHA arrived at AWG three days after Sheldon's incident and it is undisputed that in the interim, Mader altered the scene, switching the labels on the argon and nitrogen valves, and then misrepresented to the OSHA investigator that AWG had not changed "anything" in the specialty gas room. Therefore, the OSHA investigator did not scrutinize the gas lines to determine with any certainty that the line that originated at the temporary nitrogen tank ended at the valve with the paper "Nitrogen" label affixed on top of the engraved "ARGON" label. Mader admitted during his testimony that, had the OSHA investigator known that Mader changed the labels in the specialty gas room after Sheldon's injury, the investigator could have traced the gas line from the tank to the valve—or could have confirmed that the former "ARGON" valve now delivered nitrogen as the paper label indicated—but did not do so because the investigator had no cause to believe the gas delivery system warranted investigation to determine whether the line that Sheldon was using when the pressure relief valve burst was delivering argon or nitrogen.

¶49 But even if the photographs and video recordings demonstrate that the temporary nitrogen tank was connected to the argon vaporizer at the time of OSHA's inspection on July 6, 2017, this does not demonstrate that such was the case on July 3, 2017, when Sheldon was found unconscious. Accident Fund maintains that "[a]ll [AWG] had to do was connect a pipe from the back of the temporary nitrogen tank into the blue pump that was already plumbed to the argon vaporizer. Simple." If switching the lines was as simple as unplugging them and plugging them back in, then such could easily have occurred in the interim between Sheldon's injury and OSHA's arrival. Accident Fund's assertion that the OSHA images conclusively demonstrate, to the exclusion of all evidence to the contrary, that the "ARGON" valve in the specialty gas room delivered nitrogen on July 3, 2017, is unavailing and provides no basis to disturb the WCC's findings in this regard.

3. Whether the WCC erred by awarding attorney fees under § 39-71-611, MCA, and by imposing a penalty against Accident Fund under § 39-71-2907, MCA.

¶50 Although Accident Fund maintains that Sheldon did not suffer a compensable injury, it argues that even if we conclude that Accident Fund is liable to pay benefits in this case, we should reverse the WCC's determination that Accident Fund is liable for attorney fees and a statutory penalty. Accident Fund argues that the WCC incorrectly found that its claims adjusting was unreasonable and erred as a matter of law in concluding that its claims examiners had a duty to investigate the claim further before denying liability.

¶51 Section 39-71-611(1), MCA, provides:

> 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
> (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.

¶52 Section 39-71-2907(1)(b), MCA, provides, in relevant part, "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 . . . the insurer unreasonably delays or refuses to make the [compensation] payments."

¶53 This Court has applied the same reasonableness standard to both § 39-71-611, MCA, and § 39-71-2907, MCA. *See Taylor v. State Comp. Ins. Fund*, 275 Mont. 432, 440, 913 P.2d 1242, 1247 (1996). Thus, Accident Fund is either liable for both or neither.

¶54 Reasonableness is a question of fact, subject to the substantial credible evidence standard of review. *Narum v. Liberty Northwest Ins. Corp.*, 2009 MT 127, ¶ 34, 350 Mont. 252, 206 P.3d 964 (citation omitted). In reviewing the WCC's reasonableness findings, we restrict our inquiry to determining whether substantial credible evidence supports the findings actually made by the WCC. *Keller*, ¶ 21.

¶55 The WCC found that Accident Fund's claims adjusting was unreasonable because the insurer's investigation was inadequate.[3] The WCC found that Palagi "did not follow obvious leads and, consequently, did not obtain the available evidence before denying

[3] As noted above, the WCC found two independent bases to support its award of attorney fees and imposition of the statutory penalty. Because we have upheld the WCC's determination that Accident Fund denied liability without conducting sufficient investigation into the claim, we do not reach the issue of whether the WCC's determination that the failure to maintain the claim file in accordance with § 39-71-107(3), MCA, independently supports attorney fees and a penalty under the applicable statutes.

liability[.]" The WCC found that Palagi knew OSHA was investigating the incident, which should have caused her to investigate whether an unsafe condition existed at AWG that may have played a part in Sheldon's thus-far unexplained cardiopulmonary arrest. Helvik had informed Palagi that there was a question as to whether the "nitrogen [Sheldon] was handling" could have caused an arterial spasm, but Palagi failed to follow up to explore whether Sheldon had been exposed to gas. The WCC found, "Palagi's failure to discover that a safety valve had burst and that a gas was blowing into the specialty gas room—which Palagi acknowledged at trial was a 'critical' piece of evidence that she did not have before she denied liability for Sheldon's claim—is inexplicable."

¶56 As we have stated, substantial credible evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Keller*, ¶ 20. This Court has repeatedly held that insurers have an affirmative duty to investigate workers' compensation claims and that, absent such investigation, the denial of a claim for benefits is unreasonable. *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 50, 303 Mont. 364, 15 P.3d 948. We are unpersuaded by Accident Fund's argument that *Marcott v. Louisiana Pac. Corp.*, 275 Mont. 197, 911 P.2d 1129 (1996), compels us to overturn the WCC's finding of unreasonableness. In *Marcott*, this Court upheld the WCC's determination that an insurer's investigation was not so inadequate as to be unreasonable where the insurer interviewed the injured worker and the only eyewitness to the incident, reviewed the worker's medical records, and sought legal advice on the compensability and liability issues regarding these reported facts. In that case, this Court held that insurers have an affirmative duty to reasonably investigate and evaluate a claim, but there is no requirement that an insurer

"attempt to build a case for the claimant by discounting the claimant's own statements to the employer and to his doctors." Thus, this Court concluded that substantial credible evidence supported the WCC's finding that the insurer reasonably relied on the information provided by the claimant. *Marcott*, 197 Mont. at 212, 911 P.2d at 1138.

¶57 In this case, Palagi had several indications that her investigation was incomplete at the time she denied the claim. Unlike *Marcott*, where the insurer denied liability after the investigation uncovered evidence that indicated the claim was not compensable, in the present case, Palagi ended her investigation before there was any indication as to whether or not the claim was compensable—and while Palagi had "obvious leads" that she did not follow. More to the point, in its findings of fact, the WCC enumerated several pieces of evidence which support its finding of unreasonableness, specifically laying out "obvious leads" that Palagi uncovered but failed to follow. In upholding the WCC's finding of unreasonableness, our holding today is consistent with *Marcott* under the applicable standard of review: in both cases, substantial credible evidence supports the WCC's findings and we will not disturb those findings on appeal.

¶58 In addition to challenging the WCC's findings, Accident Fund argues that the WCC erred as a matter of law by expanding the scope of Palagi's duty to investigate the claim. Accident Fund argues that Palagi had no reason not to deny benefits on July 27, 2017, because Sheldon's medical records did not indicate causation. It contends that the WCC erred in determining that Palagi had an investigatory duty to follow "obvious leads," including asking Mader if Sheldon had been exposed to any gas and, upon learning that he had, informing Sheldon's treating physicians of such and then asking their opinion as to

whether the gas exposure was the cause of his cardiopulmonary arrest. Accident Fund argues that the burden of proof as to causation is on the claimant and therefore the insurer has no duty to prove causation.

¶59 Relying on *Lovell v. State Comp. Mut. Ins. Fund*, 260 Mont. 279, 860 P.2d 95 (1993), Accident Fund asserts that the insurer's duty is merely to conduct a "minimal" investigation and by hiring a nurse case manager—who interviewed Sheldon's sister and learned that OSHA was investigating the incident—and reviewing the medical records, Palagi conducted sufficient investigation to satisfy this standard. In *Lovell*, 260 Mont. at 288, 860 P.2d at 101, this Court upheld the WCC's determination that an insurer unreasonably terminated benefits where the claims examiner learned that the claimant was receiving Social Security benefits and erroneously assumed the benefits were for his industrial injury without further inquiry. We explained: "[W]e have held that an insurer has a duty to make at least a minimal investigation of a claim's validity in light of the relevant statutes. Absent such an investigation, denial of a claim for benefits is unreasonable." *Lovell*, 260 Mont. at 288, 860 P.2d at 101 (citing *Gaumer v. Mont. Dep't of Highways*, 243 Mont. 414, 421, 795 P.2d 77, 81 (1990)).

¶60 The penalty set forth in § 39-71-2907, MCA, is not intended to eliminate an insurer's assertion of a legitimate defense to liability. *Stewart v. Liberty Northwest Ins. Corp.*, 2013 MT 107, ¶ 42, 370 Mont. 19, 299 P.3d 820. Here, Accident Fund asserts that there is no question that Palagi conducted "at least a minimal investigation" into Sheldon's claim and thus the WCC erred as a matter of law by imposing a greater duty upon her. We disagree

with Accident Fund's assertion that Palagi's investigation was sufficient under even a "minimal" standard.

¶61 In *Stevens v. State Comp. Mut. Ins. Fund*, 268 Mont. 460, 470, 886 P.2d 962, 968 (1994) (overruled in part on other grounds), we explained: "In determining whether there is a reasonable basis for denying a claim . . . there must be a reasoned review of *all available evidence* in the case. The review of the evidence should be followed by an impartial evaluation of the evidence reviewed." (Emphasis added.) We further explained that after the insurer reviews the evidence, it must "conduct further investigation if the review and evaluation suggests that is necessary," and we reversed the WCC's determination that the claimant was not entitled to a penalty and attorney fees because we concluded the insurer insufficiently investigated before terminating benefits in reliance on the word of a single witness who the WCC found to lack credibility. *Stevens*, 268 Mont. at 469-71, 886 P.2d at 967-68. We found that the claims adjuster in *Stevens* failed to adequately investigate prior to terminating the claimant's benefits because the adjuster did not investigate the credibility of the witness; review other available evidence, including two investigative reports; or interview potential witnesses. *Stevens*, 268 Mont. at 467-68, 886 P.2d at 966-67.

¶62 While in *Stevens*, we faulted the insurer for failing to review the evidence it had gathered, in this case, as found by the WCC, Palagi failed to conduct further investigation that the review and evaluation suggested was necessary. Specifically, she failed to investigate *what happened*. Upon learning that Sheldon did not have a heart attack and that his medical providers were at a loss as to what may have caused his cardiopulmonary

arrest, Palagi should have, at a minimum, interviewed witnesses to determine whether or not Sheldon was exposed to gas from the burst safety valve. The fact that Palagi had no basic understanding as to what happened in the specialty gas room on the morning of July 3, 2017, indeed suggests that further investigation was necessary. Furthermore, Helvik informed Palagi that Sheldon's sister stated that Sheldon was found unconscious after a valve burst and that OSHA was investigating, but Palagi made no effort to determine if any connection existed between the burst valve and Sheldon's condition, or to uncover the reason for OSHA's investigation—omissions akin to those made by the claims adjuster in *Stevens*, who received an investigative report but failed to read it and did not question potential witnesses. *Stevens*, 268 Mont. at 470, 886 P.2d at 967-68.

¶63 We are unpersuaded by Accident Fund's argument that the WCC erred as a matter of law by expanding the scope of Palagi's investigative duty beyond the "minimal" investigation required by case law. We conclude that Palagi's investigation was even less thorough than the *Stevens* investigation that we previously determined was so inadequate as to constitute an unreasonable denial of benefits.

¶64 Finally, we are unpersuaded by Accident Fund's argument that, even if Palagi had followed the "leads" specified by the WCC, she would have "hit a dead end" and inevitably concluded that Sheldon's claim was not compensable. Accident Fund also raised this argument in the WCC, which declined to speculate as to what evidence Palagi might have discovered if she had conducted an adequate investigation, nor what conclusions she might have reached in evaluating the evidence she discovered. The court concluded that the insurer's lack of reasonable investigation is sufficient to warrant imposition of a penalty

and award of attorney fees. We likewise decline to speculate as to where an adequate investigation may have ultimately led Palagi.

CONCLUSION

¶65 The WCC correctly concluded that Bryer's Petition for Hearing was timely filed where § 39-71-602, MCA, tolled the limitations period during the time that Sheldon was without a guardian. In addition, substantial credible evidence supports the WCC's findings and it did not err as a matter of law in determining that the insurer failed to adequately investigate the workers' compensation claim before denying it.

¶66 Affirmed.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE