

No. \_\_\_\_\_

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SUPREME COURT OF THE UNITED STATES

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Robert L. Allum,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

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On Petition for a Writ of Certiorari to  
the Supreme Court of the State of Montana

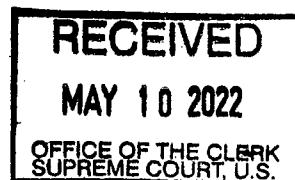
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**APPENDIX TO PETITION FOR WRIT OF CERTIORARI**

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Robert L. Allum  
*Pro Se*  
132 West Magnolia Drive  
Belgrade, Montana 59714  
Tel.: (406) 580-3912  
E-Mail: None

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ORIGINAL

FILED

03/29/2022

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 21-0641

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0641

ROBERT L. ALLUM,

Plaintiff and Appellant,

v.

ORDER

STATE OF MONTANA,

Defendant and Appellee.

FILED

MAR 29 2022

Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

Before this Court is an opposed motion to dismiss, filed by counsel for the State of Montana, and a response filed by self-represented Appellant Robert L. Allum.

The State argues that Allum's appeal should be dismissed with prejudice because Allum did not file an opening brief on or before February 28, 2022. The State notes that Allum has not sought an extension of time with this Court. M. R. App. P. 26(1). Anticipating Allum's potential arguments in his response, the State argues that Allum has litigated his claims previously before multiple courts, including this Court. The State refers to Allum's issue about the constitutionality of the Workers' Compensation Court, *Allum v. Montana State Fund*, 2020 MT 159N, ¶ 4, 400 Mont. 561, 464 P.3d 1012 (*Allum I*). The State points out that it is prejudiced when there is a lack of finality to litigation and contends that dismissal is appropriate. M.R. App. P. 13(3).

Allum responds that he has two motions pending before this Court. He states that he seeks to consolidate constitutional questions, "on whether the affirmative defense of *res judicata*, if opposed, can serve as a basis for granting a motion for summary judgment." Allum states that "[a]ll parties, herein, and the judicial branch, of the State of Montana, will incur additional time, effort, and expenses litigating the constitutional issues, until *stare decisis* quality decisions are rendered, by the Court, on the issues."

Page 1

APPENDIX A

Addressing Allum's pending motions, earlier this month this Court denied his motion to recuse the Justices. *See Allum v. State*, No. DA 21-0641, Order (Mar. 8, 2022). Allum then filed a Motion to Suspend Rules and Consolidate Constitutional Questions from Two Cases, and the State has since filed a response in opposition. Allum requests that M. R. App. P. 29 be suspended to allow consolidation of this pending appeal with his workers' compensation claim in the Workers' Compensation Court. He states "that if he files his opening brief, he will lose, the due process appeal rights, on the recusal issue." The State notes that Allum has provided no legal authority or argument for his motion. The State points out that Allum has been instructed about the proper procedure for raising constitutional issues. *Allum I*, ¶ 3.<sup>1</sup>

This Court gives wide latitude to self-represented litigants; however, this latitude cannot circumvent our procedural rules or prejudice the opposing party. *Greenup v. Russell*, 2000 MT 154, ¶ 15, 300 Mont. 136, 3 P.3d 124 (citing *Billings v. Heidema*, 219 Mont. 373, 376, 711 P.2d 1384, 1386 (1986)). This Court received the record from the Gallatin County District Court on January 28, 2022. The State correctly notes that Allum's opening brief was due on February 28, 2022. M. R. App. P. 13(1). Allum has not sought an extension of time in accordance with the Montana Rules of Appellate Procedure. Allum has filed other motions in lieu of filing an opening brief. The State's motion is well-taken and that dismissal is appropriate. Accordingly,

IT IS ORDERED that the State's Motion to Dismiss Appeal is GRANTED and this appeal is DISMISSED with prejudice.

IT IS FURTHER ORDERED that Allum's Motion to Suspend and Consolidate Constitutional Questions from Two Cases is DENIED as moot.

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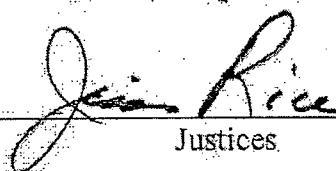
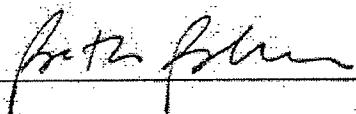
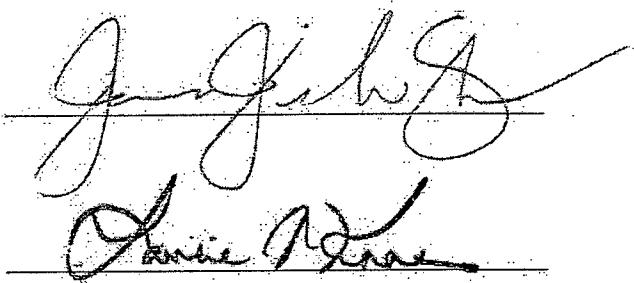
<sup>1</sup> This Court denied Allum's writs of supervisory control where he tried to raise constitutional questions as well as circumvent the Workers' Compensation Court's denial of his motions. *See also Allum v. Montana State Fund*, No. OP 19-0597, Order denying writ of supervisory control (Mont. Oct. 22, 2019) and *Allum v. Montana State Fund*, No. OP 19-0695, Order denying writ of supervisory control (Mont. Dec. 9, 2019).

The Clerk of the Supreme Court is directed to provide a copy of this Order to counsel of record and to Robert L. Allum personally.

DATED this 29 day of March, 2022.



Chief Justice



Justices

GALLATIN COUNTY CLERK  
OF DISTRICT COURT  
SANDY ERHARDT

2021 DEC -6 AM 10:30

FILED

BY NO DEPUTY

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

---

ROBERT L. ALLUM, )  
Plaintiff, ) Cause No. DV-21-162A  
vs. )  
STATE OF MONTANA, ) ORDER ON PLAINTIFF'S MOTION  
Defendant. ) FOR NEW TRIAL and/or MOTION TO  
 ) ALTER OR AMEND JUDGMENT

---

This Court issued its Order on Motions for Summary Judgment on September 27, 2021. The Court granted Defendant's Motion for Summary Judgment, dismissed Plaintiff's Complaint for Declaratory Judgment and denied Plaintiff's various Motions for Summary Judgment as moot.

On October 12, 2021, Plaintiff filed his Motion for a New Trial and/or Motion to Alter or Amend Judgment. On November 15, 2021, Defendant filed State of Montana's Response to Plaintiff's Motion for a New Trial and/or Motion to Alter or Amend a Judgment. Plaintiff filed his Reply to State of Montana's Response to Plaintiff's Motion for a New Trial and/or Motion to Alter or Amend a Judgment Filed October 12, 2021 and Submissions of New Dispositive Facts Occurring Thereafter on November 22, 2021. It

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App B

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appears Plaintiff is requesting that the Court reconsider its Order on Summary Judgment pursuant to Rules 59 and 60 of the Montana Rules of Civil Procedure.

Rule 59, M. R. Civ. P., governs motions for new trials and motions to alter or amend a judgment. Specifically, Rule 59(e) allows a party to move the Court to alter or amend a judgment or order and can be an appropriate vehicle through which to request reconsideration of an order on summary judgment. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 73, 304 Mont. 356, 22 P.3d 631. The Montana Supreme Court has set forth the following four grounds for altering or amending a judgment or order under Rule 59(e): (1) to correct manifest errors of law or fact upon which the judgment was based; (2) to raise newly discovered or previously unavailable evidence; (3) to prevent manifest injustice resulting from, among other things, serious misconduct of counsel; or (4) to bring to the court's attention an intervening change in controlling law. *Lee*, ¶ 75 (citing *Nelson v. Driscoll*, 285 Mont. 355, 360, 948 P.2d 256, 269 (1997)). The Supreme Court has further stated, however, that

a motion to alter or amend: (1) is not intended merely to re-litigate old matters nor are such motions intended to allow the parties to present the case under new theories; (2) should not present arguments which the court has already considered and rejected; (3) cannot be used to raise arguments which could, and should, have been made before judgment issued; and (4) is not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances.

*Lee*, ¶ 76 (citations omitted).

Similarly, a party may request a Court to provide relief from a judgment or order pursuant to Rule 60, M. R. Civ. P. Rule 60(b) enumerates six bases on which a party may petition the Court for relief from judgment: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence which by due diligence could not have

been discovered in time to move for a new trial; 3) fraud; 4) the judgment is void; 5) the judgment has been satisfied, released, or discharged, reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or 6) any other reason justifying relief from the operation of the judgment. In addition to the Rule 60(b) factors, the Court in *Lee* directed district courts to consider the criteria listed in *Nelson* when evaluating motions to alter or amend judgments.

A review of Plaintiff's motion demonstrates that the briefs consist of arguments that set forth Plaintiff's objections to the Court's Order on Motions for Summary Judgment. Such claims are better suited for appeal and do not meet the criteria the Supreme Court set forth for setting aside an order pursuant to a Rule 59(e) or Rule 60 motion.

Plaintiff's motion also does not seek to correct manifest errors of law or fact upon which the judgment was based; raise newly discovered or previously unavailable evidence; prevent manifest injustice resulting from, among other things, serious misconduct of counsel; or bring to the court's attention an intervening change in controlling law. In sum, Plaintiff disagrees with the Court's legal conclusion that his claims are barred by *res judicata*, and his motions and briefs specifically address that point. Of course, that is his right and he has a right of appeal which is the proper avenue to address his disagreements.

The Court also concludes Plaintiff's motion does not meet the criteria to alter or amend the judgment under M. R. Civ. P. 60(b). As noted above, Rule 60(b) sets forth six bases on which a court may relieve a party or its legal representative from a final judgment.

In support of his Motion, Plaintiff attached Exhibit A, a letter dated September 21, 2021, from the Montana State Fund. The letter states in pertinent part:

You note that you object to the January 25, 2021 denial of the addition of your low back as an accepted condition relative to your accepted November 18, 2013 work injury to your right knee.

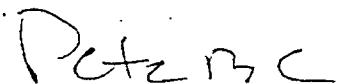
I have reviewed your letter with my legal department. Based on the available information, Montana State Fund maintains its previous denial.

Based on the Court's review of Plaintiff's briefs the only Rule 60(b) factor that could apply would be a claim that the above letter constitutes newly discovered evidence. However, a review of the letter does not cause the Court to conclude that the letter is newly discovered evidence – it is simply more evidence of the Montana State Fund's ongoing denial of his underlying workers compensation claim. Plaintiff does not claim any of the remaining 60(b) factors pertain to his motion.

As stated above, motions to alter or amend an order of the Court are not intended to routinely give litigants a second bite at the apple, but rather to afford an opportunity for relief in extraordinary circumstances. Plaintiff has not made a showing of such extraordinary circumstances. As a result, the Court concludes that Plaintiff's Motion to alter or amend, or for relief from judgment, pursuant to Rules 59 and 60, M.R.Civ.P., must be denied. Therefore,

**IT IS HEREBY ORDERED**, Plaintiff Robert Allum's Motion brought pursuant to Rules 59 and 60 of the Montana Rules of Civil Procedure for Re-Consideration of the Court's September 27, 2021, Order on Motions for Summary Judgment is **DENIED**.

Dated this 6<sup>+</sup> day of December, 2021.



Peter B. Ohman  
District Court Judge

cc: Robert Allum -mailed  
Ben Williams -emailed 12/16/21

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. DA 21-0641

ROBERT L. ALLUM  
Appellant/Plaintiff,

v.

STATE OF MONTANA  
Appellee/Defendant.

APPEAL FROM: The District Court of the Eighteenth Judicial District, Case No.  
DV-16-2021-0000162-DK, Judge Peter B. Ohman, Presiding

MOTION TO RECUSE JUSTICES LAURIE MCKINNON, JAMES A.  
RICE, BETH BAKER, JIM SHEA, DICK SANDEFUR, AND INGRID  
GUSTAFSON, FOR CAUSE.

COUNSEL OF RECORD:

For *Appellant*:

Robert L. Allum  
*Pro Se*  
132 West Magnolia Drive  
Belgrade, MT 59714:  
Telephone: 406-580-3912

RECEIVED  
FEB 08 2022  
Bowen Greenwood  
Clerk of Supreme Court  
State of Montana

For *Appellee*:

Ben Williams  
Counsel for State of Montana  
Montana Department of Labor & Industry  
P.O. Box 1728  
Helena, MT 59624-1728  
Phone: (406) 444-0280  
e-mail: ben.williams@mt.gov

Page 0

App C

## INTRODUCTION

Appellant, Robert L. Allum (Allum) was before the Montana Supreme Court, in 2020, on appeal, from the Workers' Compensation Court (WCC), in Case No. DA 20-0113 (Allum I). Allum I raised only two issues, (1) Whether WCC was a constitutional entity; and (2) did the Montana Supreme Court have subject-matter jurisdiction? The merits of the case were not reached, but, instead, the case was dismissed, pursuant to Section I, paragraph 3(c)(i), of the Montana Supreme Court's Internal Operating Rules.

Allum is before the Court, in this appeal, based upon Judge Ohman's granting the motion for summary judgment, of Appellee, State of Montana (State), based upon two arguments: (1) exclusivity of WCC of subject matter; and (2) *res judicata* of Allum I. Both of the current arguments, require the Court, to revisit their decision, in Allum I.

## BASIS OF RECUSAL

The Named Justices have a history of denying Allum's constitutional rights to due process, and exceed their constitutional authority, on multiple occasions; therefore, Allum will not, and cannot, receive a fair and impartial hearing, before these Justices. Examples justifying recusal:

Order on Petition for Supervisory Control,  
filed October 22, 2019, Case No. OP 19-0597

1. Justices exceeded their authority, in violation of Article III, § 1, of the

1972 Montana Constitution (Mont. Cont. Art.) ("separation of powers clause). WCC is an unconstitutional entity, the legislatively created, "office of workers' compensation judge," is part of the Mont. Const. Art. VI, Executive Branch. The Supreme Court Justices, only, have supervisory control, of the Mont. Const. Art. VII, inferior courts of the Judicial Branch.

2. Justices denied Allum's right to a trial by jury (Mont. Cont. Art II, § 26), by attempting to invoke the logic and *stare decisis* of *Shea v. North-Butte Mining Co.* 55 Mont. 522; 179 P. 499; 1919 Mont. LEXIS112 (1919). The right to a trial by jury, and other procedural safeguards, did not apply, in 1919, since the Act was voluntary. The Justices refuse to acknowledge and accept that *Shea* and its progeny, are no longer applicable, after 1973. The Legislature made participation, in the workers' compensation program, mandatory, by the employers and employees (en. 92-202.1 by Sec. 1, Ch. 492, L. 1973, currently § 39-71-401(1) MCA). The Justices appear to confuse a constitutional challenge to the unconstitutional act(s) of judicial officials, with a constitutional challenge of an unconstitutional statute; therefore, feigning confusion of Allum's legal theory of *res ipsa loquitur*. Justices provided no legal theory, or case law, to support their decision; instead choosing to deny Allum his right to a trial, by imposing procedural requirements, not found in constitutional law, state statutes, or American jurisprudence, namely, (1) Allum had to notify the Attorney General,

even though not applicable to challenges to unconstitutional act(s) of judicial officials; and (2) "file a brief with the law for his claims to a right of jury trial," contrary to U.S. Const. Amendment VII, and Mont. Const. Art. II, § 26. Thus, demonstrating the Justices' abuse of their office, and power, to deny Allum's constitutional rights, instead of preserving said rights.

Order on Petition for Supervisory Control,  
filed December 10, 2019, Case No. OP 19-0695

1. Justices exceeded their authority (*see* 1, above)
2. Justices denied Allum's right to cross examination and practiced "economic warfare," against Allum, by failing to follow the provisions of the Montana Administrative Procedures Act (MAPA), and the *stare decisis* of *Hert v. J.J. Newberry Company*, 587 P.2d 11, 12 (1978) Order on Petition on Rehearing; and *Goldberg v. Kelly* (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287. Justices failed to instruct Judge Sandler, the only "workers' compensation judge," for the State of Montana, to adhere to MAPA and the *stare decisis*.
3. The Justices' propensity to deprive Allum of a fair and impartial hearing of Allum II, is demonstrated by (1) the Justices willingness to classifying the violation of Allum 's due process rights, as a "non-emergency;" (2) that denying Allum the right of cross examination, is not "the court [] proceeding under a mistake of law;" and (3) "Allum retains the remedy of a timely appeal," to cover-up the foregoing constitutional violations, which violates the adage, "justice

delayed is justice denied".

Order on Appeal, decided June 16, 2020, Case No. DA 20-0113 (Allum I)

Justices knowingly violated the hornbook principles of (1) a judge is a person and a court is a physical place (*Todd v. United States* 158 U.S. 278 (1895), quoting Mr. Justice Story, in *United States v. Clark*, 1 Gallison 497); and (2) subject matter jurisdiction is required of every court, before rendering a decision (*Ruhrgas AG v. Marathon Oil Co.*, 526 U. S. 574, 583 (1999); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 1244 (2006); *Pinnow v. Montana State Fund*, 2007 MT 332, ¶16). Justices, by knowingly, violating these principles, demonstrated said Justices' intent, to violate Allum's due process rights in Allum I.

Allum II requires these same Justices, to address, the same subject matter jurisdiction (Judge Ohman's Order, based upon *res judicata* (*Thornton v. Alpine Home Ctr.*, 2001 MT 310, ¶ 14, 307 Mont. 529, 38 P.3d 855; and *Montana et al. v. United States*, 440 U.S. 147, footnote 11 (1979))); and constitutionality of WCC (Judge Ohman's Order based on exclusive jurisdiction of WCC). These Justices, in light of their actions in Allum I, now have a vested interest in denying Allum a fair and impartial hearing, on the merits, in Allum II.

Predecessors of these Justices, in *Kelleher Law Office v. State Comp. Ins. Fund*, 213 Mont. 412, 691 P.2d 823 (1984), "'by judicial fiat' extend[ed] lien protection to attorneys who have filed their retainer agreements with the Division

of Workers Compensation," in direct violation of § 37-61-420 MCA, until amended, effective October, 2021. Thus, it is a germane question, to ask these Justices, and any potential future judicial officer, presiding in Allum II, to state under oath, if said judicial officer, has received monies from injured worker's settlements, until October, 2021, without filing a complaint, or answer; and if in the affirmative, the amount, to establish the degree, of the financial interest, of any such judicial officer, in potentially denying Allum, his due process rights, to protect this violation of Montana law, for the benefit, of the judicial officer's licensed attorney friends.

Counsel for Appellee has been contacted, and message left.

Allum, based upon the foregoing, respectfully requests the named Justices recuse themselves, from the action, herein.

Respectfully submitted this 8th day of February, 2022.



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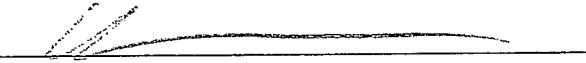
Robert L. Allum  
132 West Magnolia Drive  
Belgrade, MT 59714:  
Telephone: 406-580-3912  
*Pro Se*

**CERTIFICATE OF SERVICE**

I, the undersigned hereby certify that a true and correct copy of **MOTION TO RECUSE JUSTICES LAURIE MCKINNON, JAMES A. RICE, BETH BAKER, JIM SHEA, DICK SANDEFUR, AND INGRID GUSTAFSON, FOR CAUSE**, was hand delivered to the following:

Ben Williams  
Special Assistant Attorney General  
Montana Department of Labor and Industry  
P.O. Box 1728  
Helena, MT 59624-1728

DATED this 9<sup>th</sup> day of February, 2021.

  
ROBERT L. ALLUM

IN THE SUPREME COURT OF THE STATE OF MONTANA  
No. DA 21-0641

ROBERT L. ALLUM  
Appellant/Plaintiff,

v.

STATE OF MONTANA  
Appellee/Defendant.

**MOTION TO SUSPEND RULES AND CONSOLIDATE  
CONSTITUTIONAL QUESTIONS FROM TWO CASES.**

APPEAL FROM: The District Court of the Eighteenth Judicial District, Case No.  
DV-16-2021-0000162-DK, Judge Peter B. Ohman, Presiding

APPEARANCES:

For *Appellant*:

Robert L. Allum  
*Pro Se*  
132 West Magnolia Drive  
Belgrade, MT 59714:  
Telephone: 406-580-3912

For *Appellee*:

Ben Williams  
Counsel for State of Montana  
Montana Department of Labor & Industry  
P.O. Box 1728  
Helena, MT 59624-1728  
Phone: (406) 444-0280  
e-mail: ben.williams@mt.gov

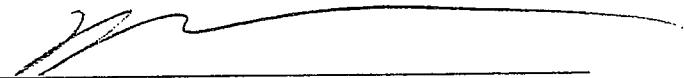
## BASIS OF REQUEST

Appellant Robert Allum (Allum) currently has an outstanding Motion to Recuse the Associate Justices, before the Court, which has resulted, in Allum not filing an opening brief, within the required time. Allum's reasoning, is that if he files his opening brief, he will lose, the due process appeal rights, on the recusal issue. Allum is waiting for a ruling and a scheduling order.

Allum is currently, prosecuting a workers' compensation claim, in case number WCC No. 2022-5873. The same constitutional question questions are arising, therein, as are present here. Allum is attaching "**RESPONSE SHOWING ORDER, DATED FEBRUARY 24, 2022, IS VOID.**" Allum, in the interest of justice and judicial economy, therefore, is attaching his affidavit, so certifying, for the request pursuant to the Montana Rules of Appellate Procedure, Rule 29, to suspend the rules.

Opposing counsel's office was contacted and a message left.

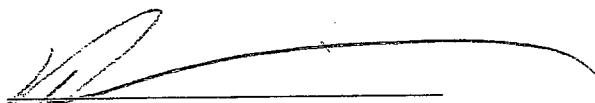
Respectfully submitted this 11th day of March, 2022.



Robert L. Allum  
132 West Magnolia Drive  
Belgrade, MT 59714:  
Telephone: 406-580-3912  
*Pro Se*

## AFFIDAVIT OF ROBERT ALLUM

I, Robert L. Allum, declare under penalty of perjury, that the foregoing Motion to Suspend Rules and Consolidate Constitutional Questions from Two Cases is based upon true facts, known personally to me, and the motion is made solely in the interest of justice and the conservation of time and judicial resources.



ROBERT L. ALLUM

March 10, 2022  
Belgrade, Montana

## CERTIFICATE OF SERVICE

I, the undersigned hereby certify that a true and correct copy of **MOTION TO SUSPEND RULES AND CONSOLIDATE CONSTITUTIONAL QUESTIONS FROM TWO CASES**, was delivered to the USPS, first class postage affixed addressed to the following:

Ben Williams  
Special Assistant Attorney General  
Montana Department of Labor and Industry  
P.O. Box 1728  
Helena, MT 59624-1728

DATED this 11th day of March, 2022.



ROBERT L. ALLUM

Robert L. Allum  
132 W. Magnolia Drive  
Belgrade, Montana 59714  
Telephone (406) 580-3912

In Proper Person

IN THE WORKERS' COMPENSATION COURT  
OF THE STATE OF MONTANA

\*\*\*\*\*

IN THE MATTER OF:

ROBERT L. ALLUM

Petitioner,

WCC No. 2022-5873

vs.

MONTANA STATE FUND and STATE  
OF MONTANA, ON BEHALF OF GREG  
GIANFORTE, GOVERNOR, AUSTIN  
KNUDSEN, A.G., AND CHRISTI  
SPREMSON, SECRETARY OF STATE,  
Respondents./

**RESPONSE SHOWING ORDER, DATED FEBRUARY 24, 2022, IS VOID.**

COMES NOW, the petitioner, ROBERT L. ALLUM (Allum), in proper person,  
and responds to the Order, dated, February 24, 2022, as follows:

**INTRODUCTION**

Montana Constitution, Article V, Section 11(6):

A law may be challenged on the ground of

noncompliance with this section only within two years after its effective date.

This provision, of the 1972 Montana Constitution, demonstrates the intent of Montana's legislators and governors to violate Article V, Section 11(3), otherwise, why would, the only violators, the legislators and governors, need a statute of limitations, to protect their violations, of the Montana Constitution, for perpetuity, against the citizens, of the State of Montana, and render § 1-3-230 MCA, "[v]oid act. Time does not confirm a void act[,]" nugatory. This provision will have a direct bearing, on the case at bar, and is beyond the subject matter jurisdiction, of the workers' compensation judge. The constitutionality of Section 11(6) should be adjudicated, prior to adjudicating, the case at bar, to avoid, the waste of administrative and judicial resources, in appeals, and retrials.

#### HORNBOOK PRIMER, ON CONSTITUTIONAL LAW

(Allum does not claim to be learned, in constitutional law, but the violations of constitutional principles, demonstrated, herein, are so egregious, a first year law students, could identify, or at least question, their existence.)

A hornbook primer, on constitutional law, is warranted, by Mr. David M. Sandler's (Sandler) (since his 2015 & 17 appointments and confirmations were not valid, as will be shown later, herein) comments and logic, in the Order, dated February 24, 2022. Sandler has demonstrated, his lack of knowledge or comprehension, of basic constitutional law. Sandler spotlighted, since 1972, the

practice of the legislatures, governors, and supreme court justices, in the arena of workers' compensation law, violating constitutional law, to the detriment of the Allum and all of the injured workers, of Montana .

A basic tenant of constitutional law, is, that, until a law is repealed, it is the law.

The State of Montana consists, of a tripartite form of government, with three equal, but separate branches of government, with separate and distinct duties and responsibilities. The officers, agents, and employees, of one branch, of government, may not exercise the power or duties of another. Montana Constitution, Article III, Section 1:

**Separation of powers.** The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The primary issue, herein, is Sandler's claim to be part of the judicial branch, or department, as Judge, of the Workers' Compensation Court.

The U.S. Supreme Court addressed the judicial branch, of the federal government (Article III) in, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995):

... Article III [federal judicial branch] creates: not a batch of unconnected courts, but a judicial *department*

composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy, supra*, at 109 (emphasis in original).

The U.S. Supreme Court, as early as 1850, in *Sheldon v. Sill*, 49 U.S. 441, 449 stated:

Courts created by statute can have no jurisdiction but such as the statute confers.

The discussion of the validity of WCC as a judicial branch "court" would be very short, if Sandler, or any supporter, of said position, would simply cite the enabling legislation, citing bill number, and public law.

The 1972 Montana Constitution establishes the judicial power, in Article VII, Section 1:

**Judicial power.** The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law.

Said Constitution, puts constraints, upon the courts, in: (1) Article VII, Section 4(2):

...The legislature may provide for direct review by the district court of decisions of administrative agencies.

(2) Article VII, Section 6(1):

Each district shall be formed of compact territory and be bounded by county lines (emphasis added).

and (3) Article VII, Section 8:

(1) Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.

(2) For any vacancy in the office of supreme court justice or district court judge, the governor shall appoint a replacement from nominees selected in the manner provided by law. If the governor fails to appoint within thirty days after receipt of nominees, the chief justice or acting chief justice shall make the appointment from the same nominees within thirty days of the governor's failure to appoint. Appointments made under this subsection shall be subject to confirmation by the senate, as provided by law. ... (emphasis added).

The U.S. Supreme Court, identified restraints, on the Legislature's authority to grant certain judicial powers, to non-judicial branch (non-Article III) tribunals, in *Thomas v. Union Carbide*, 473 U.S. 568 (1985) at page 584:

The Court's most recent pronouncement on the meaning of Article III is *Northern Pipeline*. A divided Court was unable to agree on the precise scope and nature of Article III's limitations. The Court's holding in that case establishes only that **Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.** 458 U.S. at 458 U. S. 84 (plurality opinion); *id.* at 458 U. S. 90-92 (opinion concurring in judgment); *id.* at 458 U. S. 92 (BURGER, C.J., dissenting) (emphasis added).

The Montana Constitution, also constraints, the powers, of the various elected officials, such as the Governor's ability, to appoint individuals, in Article VI, Section 8(2):

The governor shall appoint, subject to confirmation by the senate, all officers provided for in this constitution or by law whose appointment or election is not otherwise provided for. They shall hold office until the end of the governor's term unless sooner removed by the governor.

The Legislature is constrained, to include only one subject (with a few exceptions) in each bill, and state it clearly, in the title, of the bill, in the Montana Constitution, Article V, Section 11(3):

**Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void (emphasis added).**

## RESPONSES

### RESPONSE 1:

Sandler's footwork, in Order, ¶2, in analyzing HB100, the enabling act, for the creation, of the "office of the workers' compensation judge," befits "Dancing with the Stars". Sandler states:

**It has long been recognized that in 1975, when the Legislature established the Office of the Workers' Compensation Judge, it intended to create a judicial court to decide disputes over workers' compensation benefits (emphasis added). [Footnote 3]**

Footnote 3

*See, e.g.* 38 Op. Att'y Gen No.27 (1979) (stating in relevant part, that based on several factors: "it is my opinion the Legislature intended to create a new court of special limited jurisdiction in enacting the Office of Workers' Compensation Judge...." emphasis added)

One of the most drastic changes in the Workmen's Compensation Act of 1915 (Ch. 96, L. 1915) (WCA 1915), was the repeal of the Industrial Accident Board, consisting of the Commissioner of Labor and Industry, the State Auditor, and an appointee of the Governor (all members of the Executive Branch), in 1975, with HB 100 (Ch. 537, L. 1975), creating the "office of the workers' compensation judge" (in the Executive Branch).

Sandler's main statement ignores, the history, of the creation, of Workers' Compensation Court (WCC), by the Justices of the Montana Supreme Court, in violation, of the principles of constitutional law, presented above. The Justices of the Montana Supreme Court, violated the constitutional powers of the Legislature, by creating and naming, WCC, on July 16, 1976, in *Cosgrove v. Industrial Indemnity Co.*, Case No. 13265, by referring to the decision of the "office of workers' compensation judge," as the decision of the "Workers' Compensation COURT," on pages 1, 2, 4, and 7 of said decision. The Court further, established their unconstitutional creation, WCC, in *Skrukrud v. Gallatin Laundry Co., Docket Number: 13359*; Decision Date: December 14, 1976, at page 4, by erroneously stating:

A determination of issues one through four requires this Court to review the record, findings and conclusions of the workers' court. This is the first appeal from the workers' compensation court to be reviewed by the Supreme Court (emphasis added).

And at page 5:

Under the law as it now exists, this Court directly reviews the decision of the workers' court, section 92-852(2), R.C.M. 1947. The workers' court proceedings are administrative in nature and quasi-judicial, sections 92-852(1) and 82A-1016, R.C.M. 1947. The appropriate scope of this Court's review should be no different than it was under former law as expressed in above cited cases; that is, worker's court decisions will not be overturned if there is substantial evidence to support its findings and conclusions (emphasis added).

The Montana Supreme Court Justices have continued, *sua sponte*, renaming the decisions of the "workers' compensation judge," as decisions of the "workers' compensation court," in the Supreme Court's decisions, since that time. From the first appeal, in 1976, until 1980, in 47 (forty-seven) appeals, from the "office of the workers' compensation judge," the Court, renamed the appeal, from the "Workers' Compensation Court" (attached to the Petition).

Anyone, wishing to besmirch, the quality of the knowledge, of constitutional law, being exhibited in Montana, in the arena of workers' compensation, since 1975, need go no further, than the Order, herein, and the cited reasoning of Mike

Greely, A.G., as stated, on July 10, 1979, in his Attorney General's Opinion No. 27 (A.G. Op. Volume 38-27), which stated, in relevant part:

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

Greely quotes, *Todd v. United States* 158 U.S. 278 (1895), but Greely, could not have used, the term "judge" and "court" interchangeably, if he had read, or understood, the entire passage, from *Todd*, quoting Mr. Justice Story, in *United States v. Clark*, 1 Gallison 497:

"Now under the authority of the United States, there are but three courts known in law, the district, circuit, and supreme courts, and as Congress alone can by the Constitution ordain and establish courts, none can exist but such as they create and name. . . . A court is not a judge, nor a judge a court. A judge is a public officer who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power by the proper officer or officers at a time and place appointed by law (emphasis added)."

Sandler, next, states:

Indeed, the Legislature itself calls the entity in which the workers compensation judge presides the "workers' compensation court"[footnote 4] and has expressly made it a court of record.[footnote 5]

[Footnote 4]

Section 58 [of Ch. 464, L. 1987]. "Section 39-71-2901,

MCA, is amended to read:

39-71-2901. Location of office -- court powers --

- (1) The principal office of the workers' compensation judge must be in the city of Helena.
- (2) The workers' compensation court has power to:
  - (a) preserve and enforce order in its immediate presence;
  - (b) provide for the orderly conduct of proceedings before it and its officers;
  - (c) compel obedience to its judgments, orders, and process in the same manner and by the same procedures as in civil actions in district court;
  - (d) compel the attendance of persons to testify; and
  - (e) punish for contempt in the same manner and by the same procedures as in district court.
- (3) The workers' compensation judge ...
- (4) If the office of the workers' compensation judge becomes ...
- (5) If a temporary vacancy occurs because the workers' compensation judge is ...
- (6) A substitute judge must...
- (7) The workers' compensation judge shall ..." (emphasis added)

This amendment, if the intent was to create WCC, failed, because this amendment did not repeal Sec. 4, Ch. 537, L. 1975, the original enabling act, of the "office of the workers' compensation judge," nor enable the creation of WCC. All

the amendment did was add new judicial powers to an un-enabled, non-existent executive branch entity, and add the word "court" to the word, "judge" in the statute. Lastly, the amendment violates the separation of powers clause of the Montana Constitution, Art. III, § 1.

[Footnote 5]  
§ 3-1-102 MCA

§ 3-1-102 MCA reads:

Courts of record. The court of impeachment, the supreme court, the district courts, the workers' compensation court, the municipal courts, the justices' courts of record, and the city courts of record are courts of record.

Title 3 MCA is titled, "Judiciary, Courts". WCC is neither a court nor in the judicial branch, therefore, the legislation was a violation of the separation of powers clause of the Montana Constitution.

Sandler continued:

The Legislature has also decreed that, unlike appeals from administrative contested cases, which initially go to Montana's district courts,[Footnote 6] "an appeal from a final decision of the workers' compensation judge shall be filed directly with the supreme court of Montana in the manner provided by law for appeals from the district court in civil cases." [Footnote 7]

[Footnote 7]  
§ 39-71-2904 MCA

The enabling act HB100, Section 6(2), which demonstrates, that from its

inception, even "the office of the workers' compensation judge," was a constitutional violation of Article VII, Section 4(2):

...The legislature may provide for direct review by the district court of decisions of administrative agencies.

HB100 Section (1) stated the bill was "allocating "the office of the workers' compensation judge" to the department of ADMINISTRATION (caps in original)," now department of Labor and Industry (§ 2-17-1707 MCA). Additionally, § 2-3-102(1)(b) MCA exempts a judicial branch "officer" from filing or meeting "agency" requirements. The "office of the workers' compensation judge," and Sandler, have filed ARMs, under the code, ARM 24.5.101 *et seq.* Therefore, Sandler's official acts, defeat his legalistic argument, that WCC exists, and that he, Sandler, is a judicial branch officer.

Sandler's last argument, is to cite, another workers' compensation judge, Mike McCarter, trying to self-justify and self-aggrandize WCC, in *Seger v. Magnum Oil, Inc.* 1999 MTWCC 67, ¶ 8:

Thus, "[a] full reading of the Worker's Compensation Act reveals that the Court is not simply an administrative law court functioning under the executive branch of government but is a special court created pursuant to Article 7, section 1 of the 1972 Montana Constitution."

Montana Supreme Court Justice Nelson, who Sandler, was a law clerk for from 1998-99, in ¶ 42 of *Pinnow v. Montana State Fund*, 2007 MT 332, specifically stated the same incorrect, unconstitutional refrain:

¶ 42 Unlike the district courts, which have jurisdiction in all civil matters and cases at law and in equity, *see* Mont. Const, art. VII, § 4(1), the WCC is a court of *limited* jurisdiction created by the Legislature under Article VII, Section 1 of the Montana Constitution, *see Oberson v. Federated Mut. Ins. Co.*, 2005 MT 329, ¶ 11, 330 Mont. 1, ¶ 11, 126 P.3d 459, ¶ 11. More specifically, the WCC is an administrative tribunal governed by the Montana Administrative Procedure Act ("MAPA"; §§ 2-4-101 to -711, MCA). *See* § 39-71-2903, MCA; *see also Kloepfer v. Lumbermens Mut. Cas. Co.*, 272 Mont. 78, 81, 899 P.2d 1081, 1083 (1995); *Wheeler v. Carlson Transport*, 217 Mont. 254, 263, 704 P.2d 49, 55 (1985); *Hert v. J. J. Newberry Co.*, 179 Mont. 160, 161-62, 587 P.2d 11, 12 (1978).—

All of the cases cited are self-serving. Since 1975, when the Montana Supreme Court Justices, unconstitutionally, violated the separation of powers clause, of the Montana Constitution, the subsequent Montana Supreme Courts, the Legislatures, and Governors have created the false illusion that: (1) WCC was a constitution entity; (2) WCC had constitutional judicial branch powers; (3) the "workers' compensation judge" was actually the Judge of WCC, and workers' compensation judge staff were actually judicial branch staff, and not executive branch staff. Not one of the cases cited, nor any of the illusionary acts perpetrated, by Montana officials, ever cited the enabling act, for the creation of WCC, by any official Bill, or Public Law, enacted by the Legislature.

#### RESPONSE 2:

The validity of Sandler's appointment argument, in Order, ¶3, is easily

disposed of. Sandler cites in Footnote 9, Senate Joint Resolution SR0015 in the 64th Legislature, in 2015, which is titled and states:

A RESOLUTION OF THE SENATE OF THE STATE OF MONTANA CONCURRING IN, CONFIRMING, AND CONSENTING TO THE APPOINTMENTS TO THE THIRTEENTH JUDICIAL DISTRICT COURT AND THE MONTANA WORKERS' COMPENSATION COURT MADE BY THE GOVERNOR AND SUBMITTED BY WRITTEN COMMUNICATION DATED JANUARY 9, 2015, TO THE SENATE (emphasis added).

WHEREAS, the Governor of the State of Montana has made the appointment, below designated, that has been submitted to the Senate by the Governor pursuant to section 2-15-1707, MCA:

As Workers' Compensation Court Judge, David Michael Sandler, Kalispell, Montana (emphasis asdded).

§ 2-15-1707(2) MCA 2015 stated:

(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** (emphasis added).

§ 3-1-1001 MCA 2015 states:

**3-1-1001. Creation, composition, and function of commission.** (1) A judicial nomination commission for the state is created. Its function is to provide the governor with a list of candidates for appointment to fill any vacancy on the supreme court or any district court and to provide the chief justice of the supreme court with a list of candidates for appointment to fill any term or vacancy for the chief water judge or associate water judge pursuant to 3-7-221 (emphasis added).

§ 3-1-1010 MCA 2015 stated:

Lists submitted to governor and chief justice -- report on proceedings. (1) If a supreme court justice, a district court judge, the workers' compensation judge, the associate water judge, or the chief water judge gives notice of the judge's resignation to take effect on a specific date, the commission shall meet as soon as possible after the justice's or judge's proposed resignation date has been verified by the chief justice of the supreme court. . .

Two points of analysis:

1. The title cites an appointment to a non-existent office.
2. The appointment commingled judicial and executive branch powers and offices, in violation of the separation of powers clause, and one bill, one subject.

Next, Sandler, states, for his current authority, on pages 2-3 and footnote 10:

In 1917, then-Governor Bullock appointed the undersigned to a full six-year term as workers' compensation judge. On November 14, 2017, during the November 2017 Special Session, the Senate confirmed the undersigned. [Footnote 10] Thus, the undersigned is currently the workers' compensation judge.

Footnote 10

65th Legislature, Special Session, SR 0001

Sandler, conveniently, misstates the evidence found in the 65th Legislature Special Session November, 2017, SR 0001, which states in relevant part:

A RESOLUTION OF THE SENATE OF THE STATE  
OF MONTANA CONCURRING IN, CONFIRMING,

AND CONSENTING TO THE APPOINTMENTS TO THE SEVENTH JUDICIAL DISTRICT COURT, THE THIRTEENTH JUDICIAL DISTRICT COURT, AND THE WORKERS' COMPENSATION COURT MADE BY THE GOVERNOR AND SUBMITTED BY WRITTEN COMMUNICATION DATED NOVEMBER 13, 2017, TO THE SENATE.

WHEREAS, the Governor of the State of Montana has made the appointments, below designated, that have been submitted to the Senate by the Governor pursuant to section 5-5-302, MCA:

(1) As District Judge of the Seventh Judicial District of the State of Montana, in accordance with sections 3-1-1010 through 3-1-1013, MCA:

Olivia C. Rieger, Glendive, Montana.

(2) As District Judge of the Thirteenth Judicial District of the State of Montana, in accordance with sections 3-1-1010 through 3-1-1013, MCA:

Donald L. Harris, Billings, Montana.

(3) As Workers' Compensation Judge of the State of Montana, in accordance with sections 3-1-1010 through 3-1-1013, MCA:

David M. Sandler, Kalispell, Montana (emphasis added).

The title, of the resolution, conflicts, with the body, of the resolution. The title referred to, "The Workers' Compensation Court," while the appointment is for, the "Workers' Compensation Judge". Additionally, § 3-1-1001 MCA 2017 is the same as the 2015 version, and § 3-1-1010 MCA 2017 is the same as the 2015 MCA. Thus, both nominations, violate the separation of powers clause of the Montana Constitution. The Legislative branch has mandated (§ 3-1-1010 through § 3-1-1013 MCA 2015 & 2017) that the Executive branch (Governor) appoint

Executive branch personnel (workers' compensation judge) from a list, compiled by the judicial branch (§ 3-1-1010 MCA 2015 & 2017), in complete violation of § 3-1-1001 MCA 2015 & 2017. The function of the judicial nomination commission, as stated in § 3-1-1001, was "to provide the governor with a list of candidates for appointment to fill any vacancy on the supreme court or any district court." Therefore, § 3-1-1010 constitutionally conflicts, and exceeds, the statutory function, of the nomination commission's function in § 3-1-1001.

Sandler's nominations and confirmations, in 2015 and 2017 are unconstitutionally void, for the foregoing reasons.

#### **RESPONSE 3:**

Sandler's position that he lacks subject matter jurisdiction is agreed to by Allum, but for three different reasons:

1. Sandler's appointments and confirmations are unconstitutional.
2. WCC in a non-existent unconstitutional entity.
3. Workers' compensation judge lacks subject matter jurisdiction

because the issues, herein, do not involve benefits.

#### **RESPONSE 4:**

SB 140, introduced in the 67th Legislature, entitled,

AN ACT GENERALLY REVISING LAWS RELATED  
TO CERTAIN JUDICIAL APPOINTMENTS;  
PROVIDING A DIRECT APPOINTMENT PROCESS  
FOR THE GOVERNOR TO APPOINT DISTRICT

COURT JUDGES AND SUPREME COURT JUSTICES TO FILL JUDICIAL VACANCIES; REPEALING THE JUDICIAL NOMINATION COMMISSION; AMENDING SECTIONS 2-15-1707, 3-7-221, AND 39-71-2901, MCA; REPEALING SECTIONS 3-1-1001, 3-1-1002, 3-1-1003, 3-1-1004, 3-1-1005, 3-1-1006, 3-1-1007, 3-1-1008, 3-1-1009, 3-1-1010, 3-1-1011, 3-1-1012, 3-1-1013, AND 3-1-1014, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

was signed, into law, by Governor Gianforte, on March 16, 2021.

SB 140 contains the following unconstitutional sections:

Section 8. Section 2-15-1707, MCA, is amended to read:  
"2-15-1707. Office of workers' compensation judge -- allocation -- appointment -- 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 sections 1 through 7, for the appointment of supreme court justices 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." [emphasis added]

Section 10. Section 39-71-2901, MCA, is amended to read:

"39-71-2901. Location of office -- court powers -- withdrawal -- substitution -- vacancy.

(1) The principal office of the workers' compensation judge must be in the city of Helena.

(3) The workers' compensation judge shall withdraw from all or part of any matter if the judge believes the circumstances make disqualification appropriate. In the case of a withdrawal, the workers' compensation judge shall designate and contract for a substitute workers' compensation judge to preside over the proceeding from the list provided for in subsection (7).

(4) If the office of the workers' compensation judge becomes vacant and before the vacancy is permanently filled pursuant to sections 1 through 7, the chief justice of the Montana supreme court shall appoint a substitute judge within 30 days of receipt of the notice of vacancy. The chief justice shall select a substitute judge from the list provided for in subsection (7) or from the pool of retired state district court judges. The chief justice may appoint a substitute judge for a part of the vacancy or for the entire duration of the vacancy, and more than one substitute judge may be appointed to fill a vacancy.

(5) ...

SB140 violates the following constitutional provisions:

1. the Montana Constitution, Article V, Section 11(3), Section 8 conflicts with "certain judicial appointments," because, as admitted, in Section 8, of SB 140, § 2-15-1707(1) MCA, "[t]he office is allocated to the department of labor and industry," which is an Executive branch department, and therefore NOT a judicial appointment.

2. The Legislature, violates the Montana Constitution, Article III, Section 1, Separation of Powers, and Article VI, Section 8(2), Appointment Powers of the Governor, in Section 8, of SB 140, § 2-15-1707(2) MCA:

The governor shall appoint the workers' compensation judge for a term of 6 years in the same manner provided by sections 1 through 7, for the appointment of supreme court justices or district court judges. A vacancy must be filled in the same manner as the original appointment.

The Legislature is usurping the independence of the appointment powers of the governor ~~and relegating~~ the governor to a clerical position, subservient to the chief justice of the Montana Supreme Court.

3. SB 140, Section 8, contradicts SB; Section 10. Section 8 which requires, "[a] vacancy must be filled in the same manner as the original appointment," while section 10 requires, "[i]f the office of the workers' compensation judge becomes vacant" "...the chief justice of the Montana supreme court shall appoint..." Thus the contradiction, neither the governor nor the chief justice can comply with both sections.

4. SB 140, Section 10, § 39-71-2901(3) violates the delegation of governmental authority to private individuals. The workers' compensation judge is a private individual, when the legislature is delegating the governor's appointment authority to a private citizen, the delegation is unconstitutional and violates the separation of powers clause.

5. SB 140, Section 10, § 39-71-2901(4) violates the separation of powers clause and the governor's appointment clause of Article VI, Section 8(2).

## CONCLUSION

Sandler's audacity, as demonstrated above, is exemplified in this Order, dated February 24, 2022, itself. The first page carries the file stamp,

"FILED  
February 24, 2022  
Office of  
Workers' Compensation Judge  
Helena, Montana

While the final, signature page, contains a signature line for JUDGE and (SEAL), which reads "WORKERS' COMPENSATION COURT STATE OF MONTANA".

§ 3-1-201 MCA, which statutorily identifies the courts, which are allowed to have court stamps, does not include WCC or workers' compensation judge:

**"What courts have seals.** Each of the following courts shall have a seal:

- (1) the supreme court;
- (2) the district courts;
- (3) the municipal courts."

DATED this 10th day of March, 2022.

  
ROBERT L. ALLUM

CERTIFICATE OF SERVICE

I hereby certify that, this date, a true and accurate copy of the foregoing,  
**RESPONSE SHOWING ORDER, DATED FEBRUARY 24, 2022, IS VOID,**  
was delivered, first class postage attached, to USPS, addressed to the following:

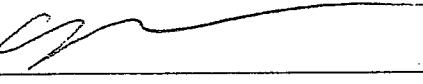
Melissa Quale  
Montana State Fund  
P.O. Box 4759  
Helena, MT 59604-4759

Greg Gianforte  
Governor  
P.O Box 200801  
Helena, MT 59620-2801

Austin Knudsen  
Attorney General  
PO Box 201401  
Helena, MT 59620-0401

Christi Jacobsen  
Secretary of State  
PO Box 202801  
Helena, MT 59620-2801

*11 P.M.*  
Dated this 10th day of March, 2022.

  
ROBERT L. ALLUM

## **MONTANA SUPREME COURT INTERNAL OPERATING RULES**

### **SECTION I. CLASSIFICATION AND CONSIDERATION FOR SUMMARY DISPOSITION, REBRIEFING, AND SUBMISSION ON BRIEFS**

1. Upon receipt of appellant's reply brief, or after the time for filing the same has expired, the office of the clerk of court shall promptly deliver copies of the briefs to all justices. All documents subsequently received pertaining to such appeals shall be promptly delivered to the justices.
2. Court staff then shall assign each case to the next available panel of five justices under the Court's panel rotation system and place each case on a conference agenda at least one week later.
3. On the conference date the following procedure will be used in considering the cases set for conference:
  - (a) Each case will be discussed by the justices assigned to that case. The first issue shall be oral argument. If three justices request oral argument, the case will be set for oral argument en banc, and no further discussion will be held on that case. If a justice would like to discuss assigning a case for oral argument prior to the conference for which the case is scheduled, the case shall be placed on the next appropriate classification conference agenda en banc for purposes of discussing oral argument of the case.
  - (b) If an appeal is deemed frivolous, it will be summarily dismissed. If a case is found to be insufficiently briefed, it may be returned to counsel for such rebriefing as is required.
  - (c) (i) If an appeal presents no constitutional issues, no issues of first impression, does not establish new precedent or modify existing precedent, or, in the opinion of the Court, presents a question controlled by settled law or by the clear application of applicable standards of review, the Court may classify that appeal as one for a memorandum opinion.
  - (ii) The decision of the case will provide the ultimate disposition without a detailed statement of facts or law. The decision shall not be citeable as binding precedent, but may be cited when relevant to establishing the application of law of the case, res judicata, or collateral estoppel; or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same

person. The opinion shall be filed as a public document with the clerk; shall be reported by result only to the LexisNexis Group and to West's Pacific Reporter along with the case title and Supreme Court cause number in the quarterly table of memorandum opinions issued by this Court; and shall be assigned a public domain, neutral-format citation in accordance with the Court's order dated December 16th, 1997, and posted to the State Bulletin Board.

(iii) A memorandum opinion may be entered pursuant to this subsection on a majority vote, even if the opinion is not unanimous, provided that all justices participating in the action shall agree that such summary disposition of the action may be made.

(iv) A petition for rehearing of a cause decided under this subsection may be served and filed pursuant to the provisions of Rule 20, M. R. App. P.

(d) If the case is classified as submitted on briefs, the five justices on the panel will discuss the merits of the case and take a tentative vote. If four or more justices reach a conclusion, the chief justice then will assign the case to one of the five justices on the panel for opinion writing, and that date will be the submission date for that case. If four justices do not vote for one position, the case will be assigned for en banc consideration at the conference one week later.

e) The Court will enter an appropriate order in each case, advising counsel or the parties of summary disposition, rebriefing requirements, or submission on briefs.

(f) Cases classified for oral argument shall be placed on the calendar. The Court will enter an appropriate order giving notice of the time set for hearing oral argument.

## **SECTION II. ORAL ARGUMENT**

1. A conference will be held following oral argument. The members of the Court will discuss and vote on the case.

2. Oral argument cases on which a vote has not yet been taken will receive first priority at all Court conferences. A justice absent at a subsequent conference will be responsible for presenting his or her views in writing in time for conference.

3. When four justices have reached a tentative decision on a case, that case will be assigned for opinion writing by the chief justice. The date the case is assigned for

opinion writing is the submission date for the case.

### **SECTION III. OPINIONS**

1. The basic aim is that the final opinion in each case shall be signed and filed with the clerk not later than 180 days following the submission date. Complexity of issues and case load may require additional time for filing of the final opinion with the clerk. 2. Within the foregoing period of 180 days, the following apply:

- (a) Within ninety days of the submission date, the opinion-writing justice shall circulate an opinion draft. The ninety-day period for circulation of an opinion draft is a basic aim; however case load and complexity of issues may require additional time. The draft opinion shall be considered at the next conference, subject to the requirement that the opinion must be circulated by noon on Friday in order to be considered at the next week's conference.
- (b) At the conference, the opinion draft shall be voted upon. If four justices vote in favor, the draft shall be finalized.
- (c) A justice shall circulate copies of his or her signed dissenting or concurring opinion as soon as practical after the date on which a majority approve a proposed opinion.

### **SECTION IV. OPERATION AS SEVEN-JUSTICE AND FIVE-JUSTICE COURT**

1. The Supreme Court en banc shall consist of seven members. The Court en banc shall hear all cases in which the accused shall have been sentenced to death, cases in which a bona fide challenge is made to the constitutionality of a statute, cases involving a question certified to the Court by another court pursuant to Rule 15, M. R. App. P., and such cases as shall be determined by two or more justices to require a hearing en banc.

2. Any petition for rehearing shall be considered by those justices hearing the case in the first instance. Whether decided by a five judge panel or en banc, if four members would grant a petition for rehearing, the petition shall be granted. Those justices hearing the case in the first instance shall then determine whether to decide the case on the briefs or after oral argument. If a petition for rehearing is granted, the parties to the appeal will be notified as to whether the case will be decided on briefs or after oral argument.

3. All proposed opinions shall be circulated to all justices, whether members of the panel or not. Any justice who is not a panel member may request participation in the panel conference on such proposed opinion.

## **SECTION V. ORDERS OF THE COURT**

1. This section is designed to provide a more efficient procedure for issuing and executing orders of the Court, and to conserve its judicial resources. All orders covered by paragraph 2 of this section shall be signed by the chief justice or in his or her absence, the acting chief justice, on behalf of the Court in this manner:

For the Court,  
By \_\_\_\_\_  
Chief Justice

2. The following orders shall be signed as provided in part 1:

(a) All orders based on stipulation of counsel.

(b) All orders covering matters decided by the Court in conference, with the exception of orders granting or denying petitions for rehearing.

(c) All orders fixing or extending the time within which an act must be done.

(d) All orders concerning court calendars, case classifications, participation in and time limits for oral argument, applications for filing of briefs or for oral argument for amicus curiae, and related orders.

(e) All interlocutory orders.

3. The following matters shall require the individual signatures of a majority of the justices:

(a) All opinions.

(b) Orders granting or denying rehearing, orders of dismissal, or other final dispositions.

## **SECTION VI. JUDICIAL RULEMAKING**

1. An application for the adoption, rescission, amendment, or implementation of a rule or program regulating Montana's lawyers may be made to the Supreme Court at any time. The moving party's application and all supporting documents shall be filed with the clerk of court.
2. The Court may provide a comment period for proponents and opponents to state their views on the application. The Court may also use this opportunity to voice its comments on the subject.
3. The Court shall consider the application at a public meeting.
4. If comments are received, the Court may provide the moving party an opportunity to respond to the comments. Response of the moving party includes not only substantive discussion of the comments received, but also potentially substantive changes to the subject matter of the application.
5. If substantive changes are made to the proposed rule or program by the applicants, the Court may re-open the comment and response periods.
6. Free flow of information is encouraged.
7. The publication of the application for the adoption, rescission, amendment, or implementation of a rule, program, or order, whether for comment or after final action by the Court, may be accomplished, at the Court's discretion, by publication in the *Montana Lawyer* magazine, by electronic publication on the websites of the State Law Library, the Court, or the State Bar of Montana, or by any combination thereof.
8. The adoption of this process is in no way intended to interfere with or preclude operation of the Court's original, inherent, and exclusive jurisdiction and responsibility under Article VII, Section 2(3) of the Constitution of the State of Montana to make rules governing the conduct of Bar members.

## **SECTION VII. GENERAL**

1. The chief justice shall assign all cases for opinion writing among the justices. The chief justice shall rotate on the five-member panels in the same manner as other justices and shall hear a like number of cases. The chief justice may be assigned up to one-third fewer cases for opinion writing than other justices because of his or her additional administrative duties.

2. The Court shall generally hold a conference on Tuesday afternoon. At all conferences, oral argument cases without a submission date shall be given top priority. The chief justice shall prepare an agenda for each conference. Each week's conference agenda shall be distributed by the preceding Friday afternoon. A conference agenda listing the appeals to be considered for classification and original proceedings and motions to be considered will be made public. In the event any justice is unable to attend a conference, if possible he or she shall advise the chief justice two days prior to the date of the conference. In addition, the justice shall submit a written vote setting forth his or her decisions on matters to be discussed at the conference.
3. The chief justice shall preside over all matters on which he or she sits. If the chief justice is not sitting on that case, the member of the Court with the shortest time to serve shall be the acting chief justice for that case.
4. In those cases in which a justice disqualifies himself or herself, the chief justice or acting chief justice shall designate a replacement.
5. These rules may be suspended or waived by order of the Court.
6. At the first weekly conference in each month, the clerk shall prepare and circulate among the justices a written report listing all matters which are past due under these rules, and giving the status of all uncompleted applications for writs, motions, and other matters requiring the attention of the Court.
7. A full written opinion shall be prepared unless the Court shall determine the disposition shall be by order or by memorandum opinion. An example of disposition by order is the following:

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. \_\_\_\_\_  
[Title of Cause] ORDER

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The appeal in this case is dismissed for failure of appellant to order or file a transcript within the time allowed by law. See Rules 8(3) and 9, M. R. App. P.

(DATED AND SIGNED)

8. Upon the filing of petitions, applications, or motions with regard to habeas corpus, post-conviction relief, mandamus, prohibition, supervisory control, extraordinary writ, or other requests not pertaining to a pending appeal, the clerk shall deliver a copy of the same to the justice assigned to be the lead justice on that case. Such assignments shall be made in rotation, by court staff. If the assigned justice deems it necessary, he or she shall order a response. When the ordered response is filed, the clerk shall deliver to each justice a copy of all papers filed and the matter will be placed upon the next Tuesday conference agenda. If the assigned justice determines that the Court should consider the petition or application before ordering a response, the matter shall be put on the next conference agenda, and the clerk will be requested to deliver to each justice a copy of the papers filed.
9. In all opinions regarding the abuse and neglect of children and the termination of parental rights pursuant to Title 41, chapter 3, MCA, the Court shall attempt to maintain the confidentiality of children by referring to both the children and the parents involved by their initials or first names only, as justice requires.
10. The foregoing rules supersede all prior internal rules of this Court, whether or not specific reference is made to such prior rules.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 19 2021

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

ROBERT L. ALLUM,

Plaintiff-Appellant,

v.

STATE OF MONTANA; et al.,

Defendants-Appellees.

No. 20-35835

D.C. No. 2:19-cv-00012-BMM  
District of Montana,  
Butte

ORDER

Before: SILVERMAN, CHRISTEN, and LEE, Circuit Judges.

The district court has certified that this appeal is not taken in good faith and has denied appellant leave to proceed on appeal in forma pauperis. *See* 28 U.S.C. § 1915(a). On November 5, 2020, this court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's November 5, 2020 order, and the opening brief received on December 24, 2020, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 2) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

Appellant's motion for an extension of time (Docket Entry No. 18) is

granted. All other pending motions are denied as moot.

No further filings will be entertained in this closed case.

**DISMISSED.**

forward. Appellant may use the enclosed forms for any motion to dismiss the appeal or statement that the appeal should go forward. [11883453] (CKP) [Entered: 11/05/2020 03:02 PM]

11/16/2020 8 Filed (ECF) Appellant Robert L. Allum Correspondence: Amended Notice of Appeal. Date of service: 11/16/2020 [11915815] —[COURT ENTERED FILING. Transferred from case 20-35996 (opened in error).] (TYL) [Entered: 12/04/2020 04:29 PM]

12/08/2020 9 Filed Appellant Robert L. Allum motion to dismiss the case. Deficiencies: None. Served on 12/04/2020. [11919591] (RR) [Entered: 12/09/2020 06:07 AM]

12/08/2020 10 Received original and 0 copies of Appellant Robert L. Allum opening brief of 25 pages (Informal: Yes). Served on 12/04/2020. Major deficiency: briefing is stayed (motion to dismiss pending). [11919791]—[Edited: Attached PDF with case number corrected. 12/09/2020 by LA] (KWG) [Entered: 12/09/2020 09:21 AM]

12/24/2020 11 Filed Appellant Robert L. Allum motion to file a complete informal opening brief. Deficiencies: None. Served on 12/21/2020. [11945091] (LA) [Entered: 12/24/2020 02:20 PM]

12/24/2020 12 Received original and 6 copies of Appellant Robert L. Allum opening brief of 34 pages (Informal: Yes). Served on 12/21/2020. Major deficiencies: briefing is stayed, motion to file substitute brief is pending. [11945095] (LA) [Entered: 12/24/2020 02:23 PM]

02/16/2021 13 Filed order (WILLIAM C. CANBY and MICHELLE T. FRIEDLAND) This appeal includes appellant's original notice of appeal filed on September 23, 2020 and the November 16, 2020 notice of appeal from the final judgment. See *Fidelity & Deposit Co. v. City of Adelanto*, 87 F.3d 334, 336 (9th Cir. 1996) (premature appeal from district court's dismissal order cured by dismissal of remaining parties); see also *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 680–81 (9th Cir. 1980). Appellant's motions for voluntary dismissal are denied because the motions request dismissal without prejudice [6], [9]. If appellant seeks voluntary dismissal of this appeal, the motion must request dismissal with prejudice. Within 14 days of this order, appellant may file a renewed motion for voluntary dismissal requesting dismissal with prejudice. If a renewed motion is not filed, appellant must file a response to this court's November 5, 2020 order. Appellant's motion to file an incomplete informal brief is denied [11]. The briefing schedule for this appeal remains stayed. Appellant's failure to comply with this order will result in the dismissal of this appeal for failure to prosecute pursuant to Ninth Circuit Rule 42-1. [12003191] (CKP) [Entered: 02/15/2021 08:25 AM]

02/26/2021 14 Filed (ECF) notice of appearance of Andrew Joseph Cziok (Agency Legal Services, Montana Attorney General's Office, 1712 9th Avenue Helena, MT 59620) for Appellees Department of Labor, Thomas E. Martelo, Montana, Anna Pudelka, Melissa N. Quale, State Fund and State of Montana. Date of service: 02/26/2021. (Party was previously proceeding with counsel.) [12017903] [20-35835] (Cziok, Andrew) [Entered: 02/26/2021 11:32 AM]

02/26/2021 15 Filed Appellant Robert L. Allum motion to take judicial notice Deficiencies: None. [12018127] (JFF) [Entered: 02/26/2021 01:34 PM]

02/26/2021 16 Added Attorney(s) Andrew Cziok for party(s) Appellee Thomas E. Martelo Appellee Melissa N. Quale Appellee Department of Labor Appellee Anna Pudelka Appellee Montana Appellee State Fund Appellee State of Montana, in case 20-35835. [12018185] (JFF) [Entered: 02/26/2021 01:50 PM]

03/01/2021 17 Filed Appellant Robert L. Allum request to take judicial notice. Deficiencies: None. Served on 02/18/2021. [12020483] (RL) [Entered: 03/01/2021 03:53 PM]

03/08/2021 18 ENTRY UPDATED. Filed Appellant Robert L. Allum motion to extend time to comply with the order dated 02/16/2021 including response to the 2/16/2021 order. Deficiencies: None. [12030306]—[Edited 03/11/2021 by RR] (RR) [Entered: 03/10/2021 05:09 AM]

08/19/2021	<u>19</u>	Filed order (BARRY G. SILVERMAN, MORGAN B. CHRISTEN and KENNETH K. LEE) The district court has certified that this appeal is not taken in good faith and has denied appellant leave to proceed on appeal in forma pauperis. See 28 U.S.C. § 1915(a). On November 5, 2020, this court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. See 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious). Upon a review of the record, the response to the court's November 5, 2020 order, and the opening brief received on December 24, 2020, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. [2]) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2). Appellant's motion for an extension of time (Docket Entry No. [18]) is granted. All other pending motions are denied as moot. No further filings will be entertained in this closed case. DISMISSED. [12205991] (WL) [Entered: 08/19/2021 12:17 PM]
09/02/2021	<u>20</u>	Filed Appellant Robert L. Allum motion to reconsider Panel order of the Court filed on 08/19/2021. Deficiencies: No further filings, Served on 08/25/2021. titled PFR EB [12219174] (DJV) [Entered: 09/02/2021 02:53 PM]
11/09/2021	<u>21</u>	MANDATE ISSUED. (BGS, MBC and KKL) [12282265] (JFF) [Entered: 11/09/2021 09:21 AM]

FILED  
April 11, 2022  
Office of  
Workers' Compensation Judge  
Helena, Montana

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

**WCC No. 2022-5873**

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**ROBERT L. ALLUM**

**Petitioner**

**vs.**

**MONTANA STATE FUND**

**Respondent.**

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**ORDER DENYING PETITIONER'S MOTION TO VACATE SCHEDULING ORDER,  
DENYING PETITIONER'S MOTION TO VACATE ORDER SETTING BRIEFING  
SCHEDULE, AND DENYING PETITIONER'S MOTION TO INDEFINITELY HOLD  
CASE IN ABEYANCE**

¶ 1 Petitioner Robert L. Allum has moved this Court to vacate its Scheduling Order, to vacate its Order Setting Briefing Schedule on Petitioner's Constitutional Challenges, and to indefinitely hold this case in abeyance while he again brings constitutional challenges against the Workers' Compensation Court and the workers' compensation judge in state district court.<sup>1</sup> However, on September 21, 2021, the Montana Eighteenth Judicial District Court granted summary judgment to the State of Montana on Allum's constitutional challenges against the Workers' Compensation Court on the grounds that Allum's challenges were barred by *res judicata*.<sup>2</sup> And, on March 29, 2022, the Montana Supreme Court dismissed with prejudice Allum's appeal of that grant of summary judgment to the State of Montana.<sup>3</sup> Because a dismissal with prejudice is a final judgment on the merits

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<sup>1</sup> See Motion for Abeyance of Case in Chief, Until All Constitutional Issues are Adjudicated, Before a Court of Competent Jurisdiction, Docket Item No. 10; Motion to Void Order, Filed March 30, 2022, Setting Briefing Schedule on Petitioner's Constitutional Challenges (Doc. No. 14), Docket Item No. 15; Motion to Stay Scheduling Order (Doc. No. 2), Docket Item No. 16.

<sup>2</sup> *Allum v. State of Mont.*, Gallatin County Cause No. DV-21-162A (Order on Motions for Summary Judgment dated September 27, 2021) (ruling that Allum's claims to declare "the WCC and the statutes under which it operates unconstitutional" were barred by *res judicata* because, "it is clear that Plaintiff had the opportunity to raise these constitutional issues in prior litigation, whether he did so effectively or not.").

<sup>3</sup> *Allum v. State of Mont.*, Supreme Court Cause No. DA 21-0641 (Order dated March 29, 2022).

**Docket Item No. 17**

**Page 1**

**APP H**

for purposes of *res judicata*,<sup>4</sup> it is evident that Allum's constitutional challenges against the Workers' Compensation Court and the workers' compensation judge will remain barred by *res judicata*, which "bars a party from relitigating a matter that the party already had the opportunity to litigate."<sup>5</sup> "This includes claims that were or *could have been* litigated in the first action."<sup>6</sup> It is also evident that Allum's constitutional challenges against the Workers' Compensation Court and the workers' compensation judge are entirely without merit.<sup>7</sup> This Court will not vacate its Scheduling Order nor its Order Setting Briefing Schedule on Petitioner's Constitutional Challenges, nor indefinitely hold this case in abeyance, so that Allum can again attempt to relitigate meritless constitutional challenges in state district court because Respondent Montana State Fund is entitled to a timely decision on the issue of whether Allum suffered a compensable low back injury on November 18, 2013.<sup>8</sup>

¶ 2 Accordingly, this Court enters the following:

ORDER

¶ 3 IT IS ORDERED that Allum's Motion to Stay Scheduling Order (Doc. No. 2) is denied.

¶ 4 IT IS FURTHER ORDERED that Allum's Motion to Void Order, Filed March 30, 2022, Setting Briefing Schedule on Petitioner's Constitutional Challenges (Doc. No. 14) is denied.

¶ 5 IT IS FURTHER ORDERED that Allum's Motion for Abeyance of Case in Chief, Until All Constitutional Issues are Adjudicated, Before a Court of Competent Jurisdiction is denied.

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<sup>4</sup> *Schweitzer v. City of Whitefish*, 2016 MT 254, ¶ 13, 385 Mont. 142, 383 P.3d 735 (citations omitted).

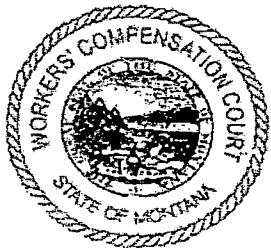
<sup>5</sup> *Adams v. Two Rivers Apartments, LLLP*, 2019 MT 157, ¶ 8, 396 Mont. 315, 444 P.3d 415 (citation omitted).

<sup>6</sup> *Id.* (emphasis in original).

<sup>7</sup> For example, Allum contends that the Workers' Compensation Court is unconstitutional because the Legislature did not grant it any jurisdiction. However, § 39-71-2905(1), MCA, states that the workers' compensation judge has "exclusive jurisdiction" to decide disputes "concerning any benefits under" the Workers' Compensation Act, §§ 39-71-101 et seq., MCA. Thus, as stated by the Montana Supreme Court, "The Workers' Compensation Court is a court with limited but exclusive jurisdiction to hear and determine disputes concerning workers' compensation benefits." *Moreau v. Transp. Ins. Co.*, 2015 MT 5, ¶ 10, 378 Mont. 10, 342 P.3d 3 (citations omitted).

<sup>8</sup> See *Larson v. Mont. State Fund*, 2015 MTWCC 1, ¶ 9 (citations omitted) (stating, "like claimants, insurers are 'entitled to a timely day in Court.'").

DATED this 11th day of April, 2022.



David M. Jordon  
JUDGE

c: Robert L. Allum  
Tom Bell  
Austin Knudsen, Montana Attorney General (courtesy copy)