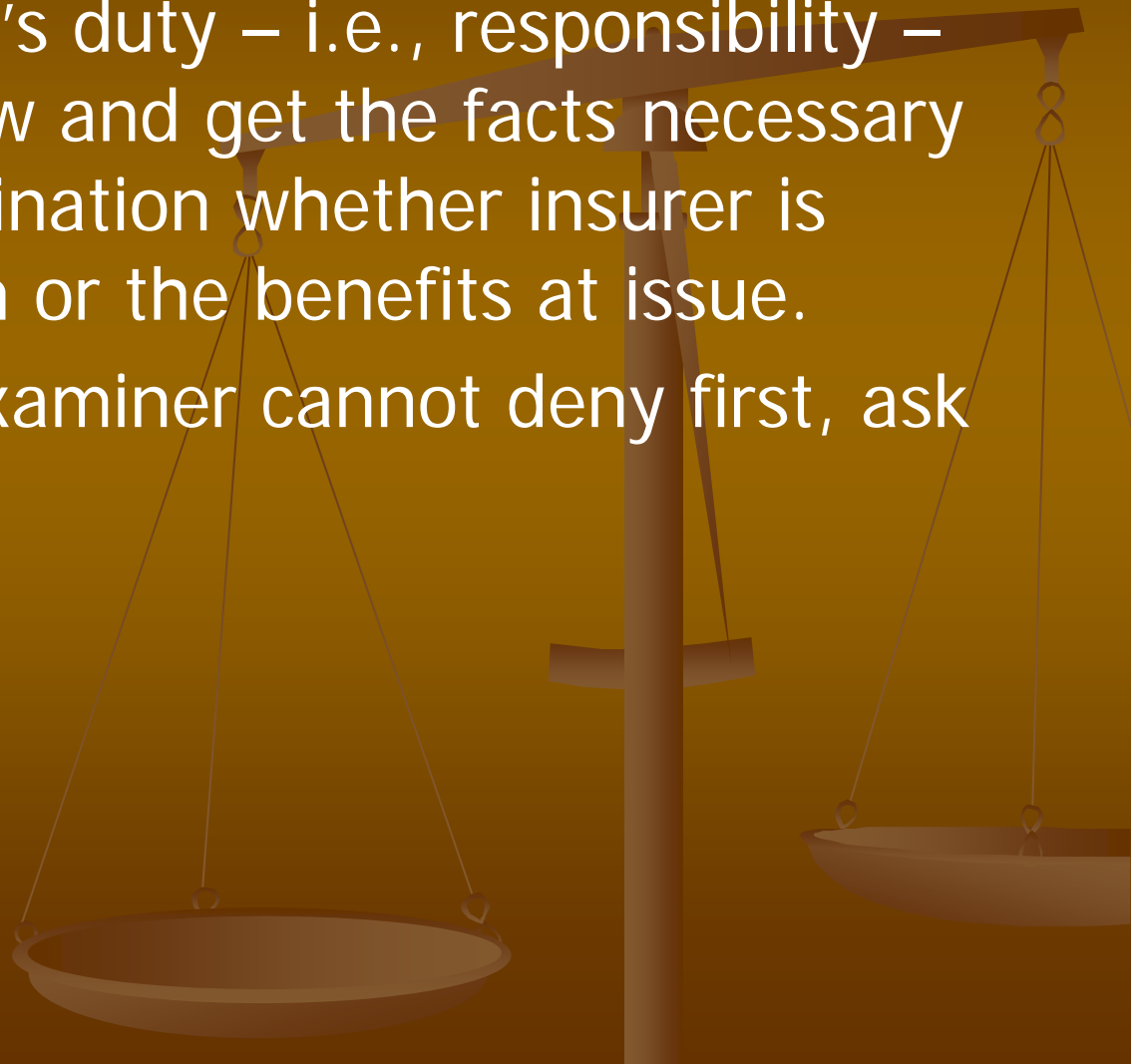


The insurer's duty to investigate  
versus the claimant's burden of proof  
AND  
Objective Medical Findings

David M. Sandler  
Judge, Montana Workers'  
Compensation Court

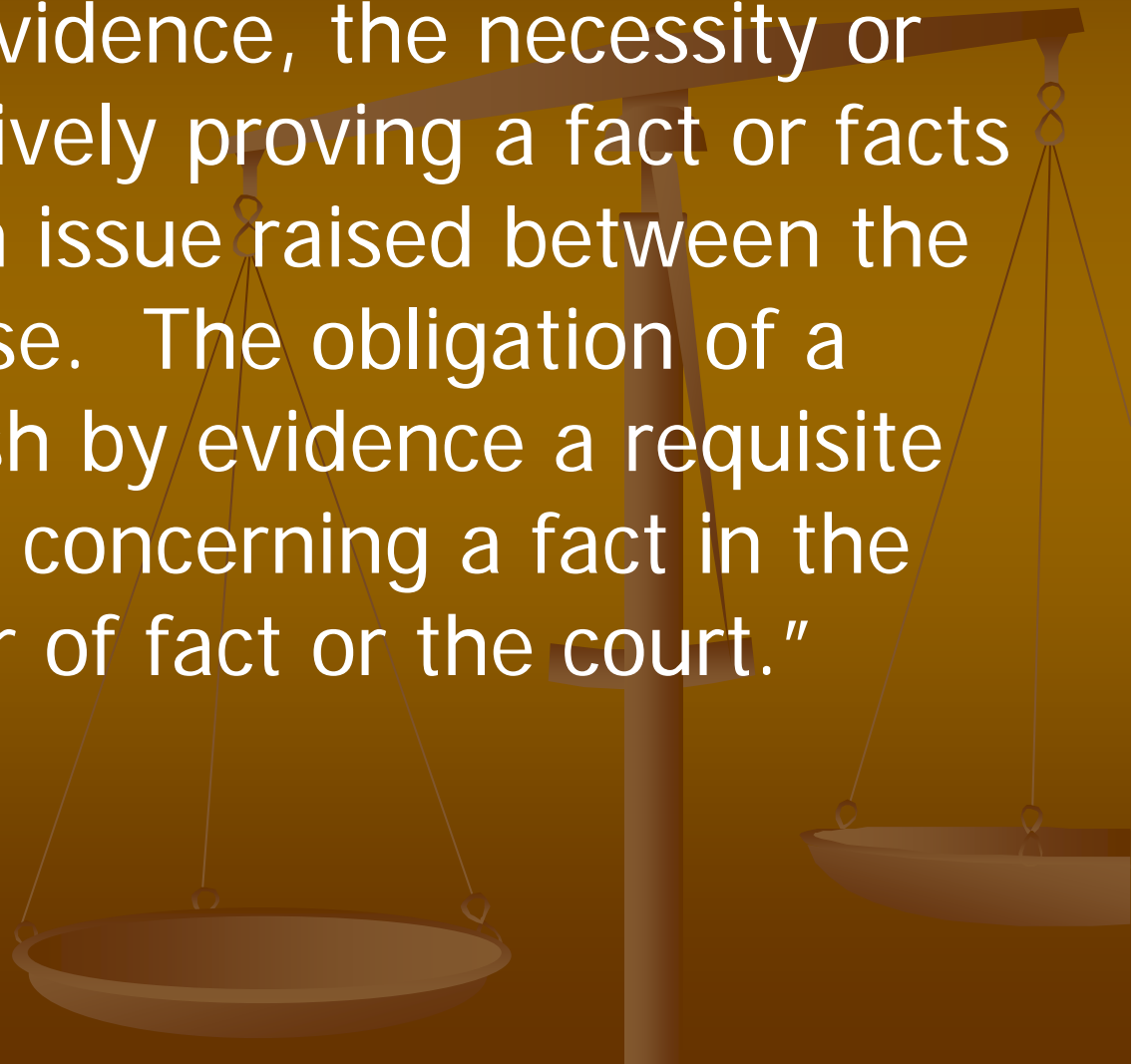
# Duty to Investigate

- A claims examiner's duty – i.e., responsibility – to research the law and get the facts necessary to make a determination whether insurer is liable for the claim or the benefits at issue.
- In short, claims examiner cannot deny first, ask questions later.



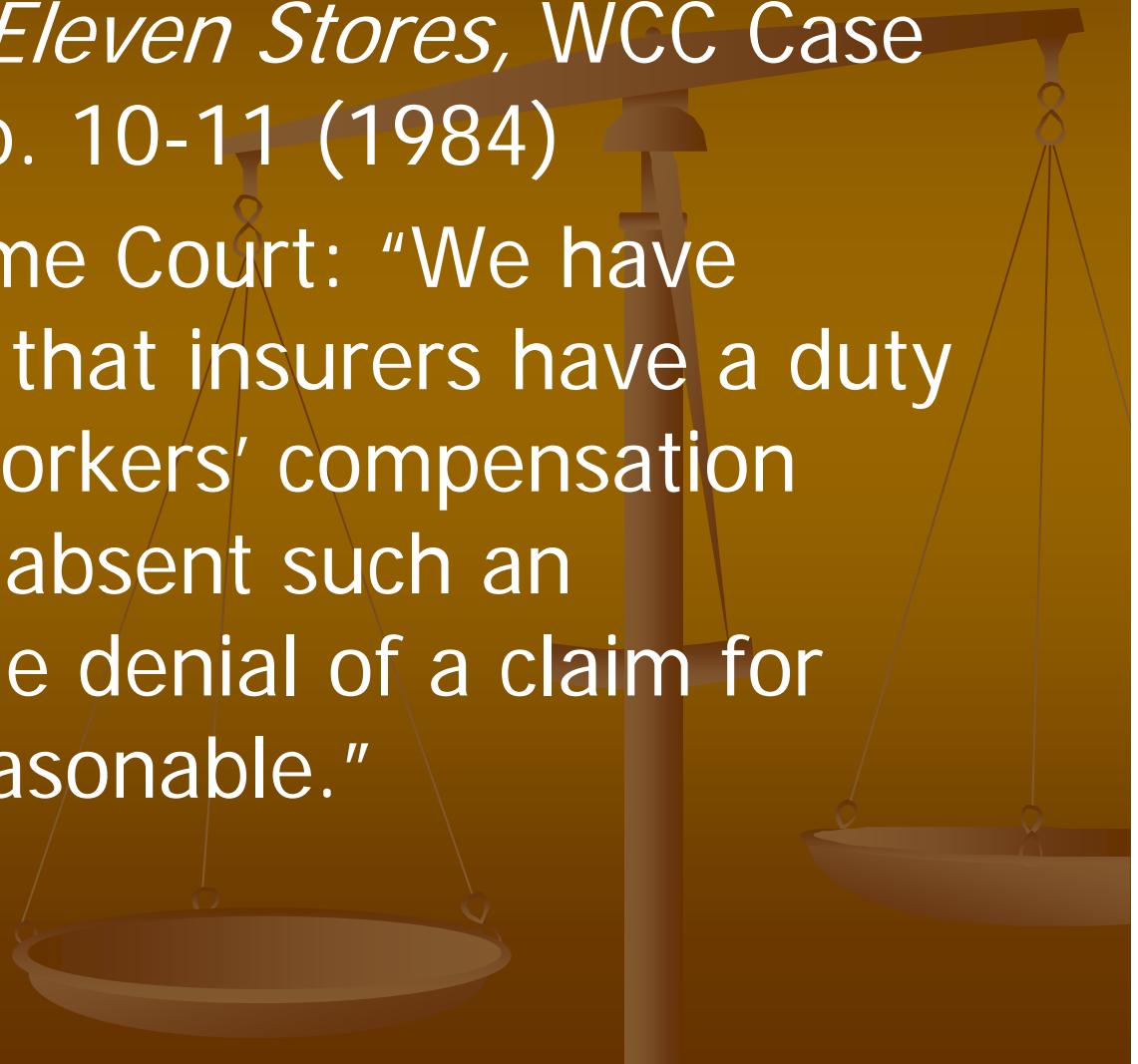
# Burden of Proof

- “In the law of evidence, the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause. The obligation of a party to establish by evidence a requisite degree or belief concerning a fact in the mind of the trier of fact or the court.”

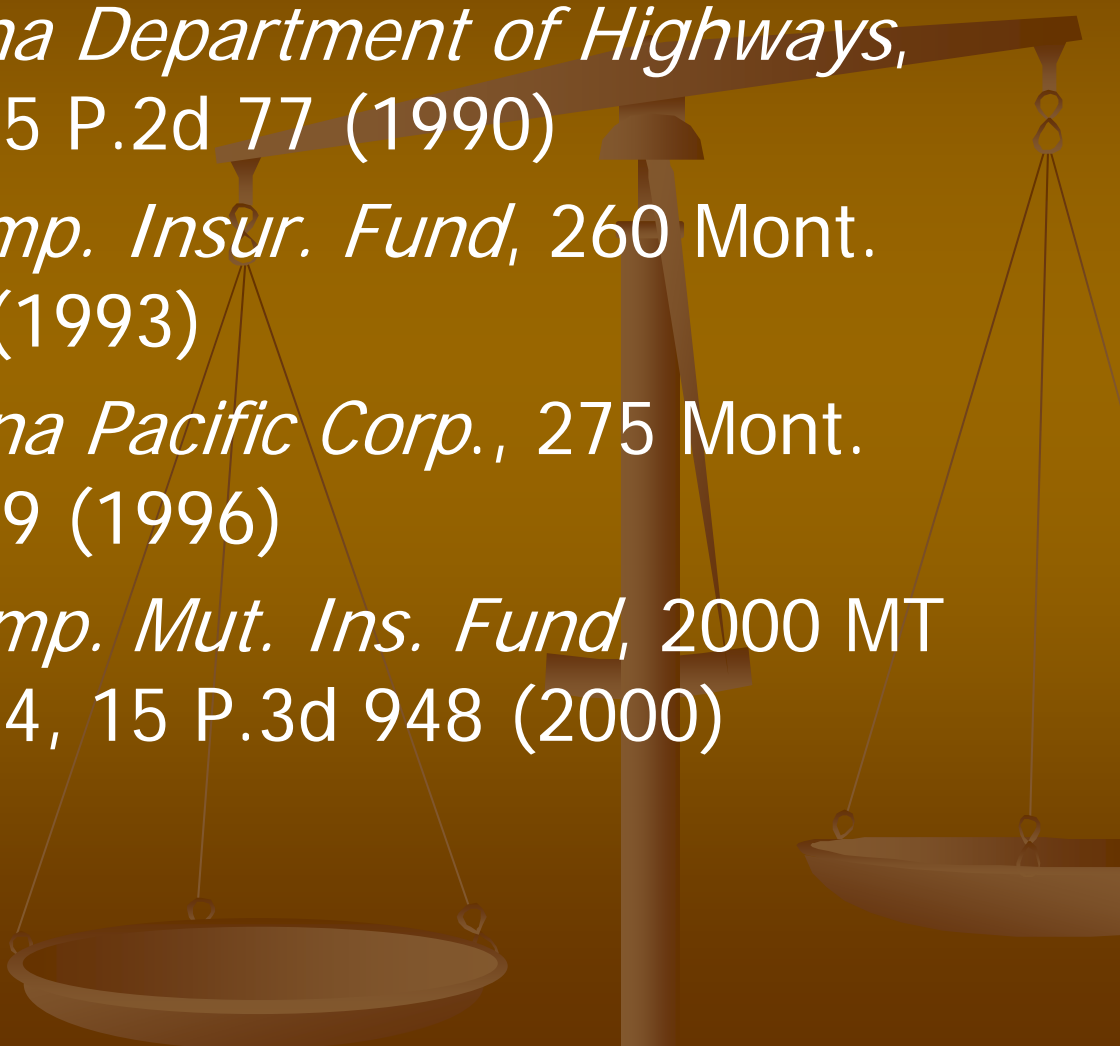


# History of Duty to Investigate

- *Coles v. Seven Eleven Stores*, WCC Case No. 583-138, pp. 10-11 (1984)
- Montana Supreme Court: "We have repeatedly held that insurers have a duty to investigate workers' compensation claims and that absent such an investigation, the denial of a claim for benefits is unreasonable."



# Montana Supreme Court cases re: duty to investigate

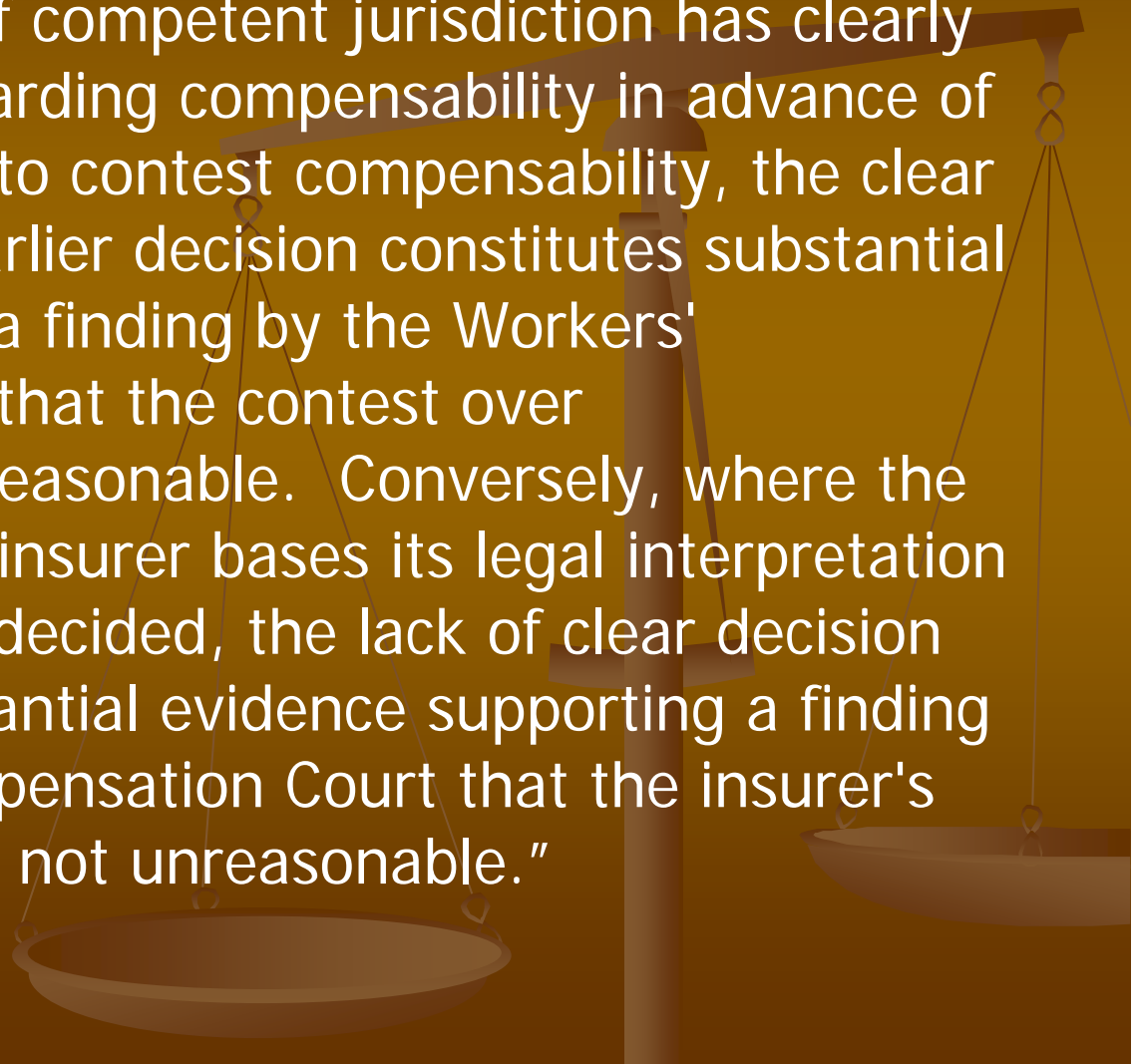
- *Gaumer v. Montana Department of Highways*, 243 Mont. 414, 795 P.2d 77 (1990)
  - *Lovell v. State Comp. Insur. Fund*, 260 Mont. 279, 860 P.2d 95 (1993)
  - *Marcott v. Louisiana Pacific Corp.*, 275 Mont. 197, 911 P.2d 1129 (1996)
  - *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, 303 Mont. 364, 15 P.3d 948 (2000)
- 

# Workers' Compensation Court cases re: duty to investigate

- *Selley v. Acuity and Victory*, 2018 MTWCC 4
  - *Morrish v. Amtrust* (unpublished)
  - *Floyd v. Zurich*, 2017 MTWCC 4
  - *Peters v. Zurich*, 2013 MTWCC 17
  - *Connors v. USF&G*, 2010 MTWCC 7
  - *Popenoe v. Liberty Northwest*, 2006 MTWCC 37
  - *Gonzales et al v. Montana Power*, 2001 MTWCC 19
  - *Siaperas v. Montana State Fund*, 2004 MTWCC 4
  - *McClanahan v. State Comp. Ins. Fund*, 1996 MTWCC 50
  - *Filcher v. National Union Fire*, 1996 MTWCC 30
- 

# How to investigate #1: Know the law

- “. . . where a court of competent jurisdiction has clearly decided an issue regarding compensability in advance of an insurer's decision to contest compensability, the clear applicability of the earlier decision constitutes substantial evidence supporting a finding by the Workers' Compensation Court that the contest over compensability is unreasonable. Conversely, where the issue upon which an insurer bases its legal interpretation has not been clearly decided, the lack of clear decision may constitute substantial evidence supporting a finding by the Workers' Compensation Court that the insurer's legal interpretation is not unreasonable.”



# How to investigate #2: Know the facts

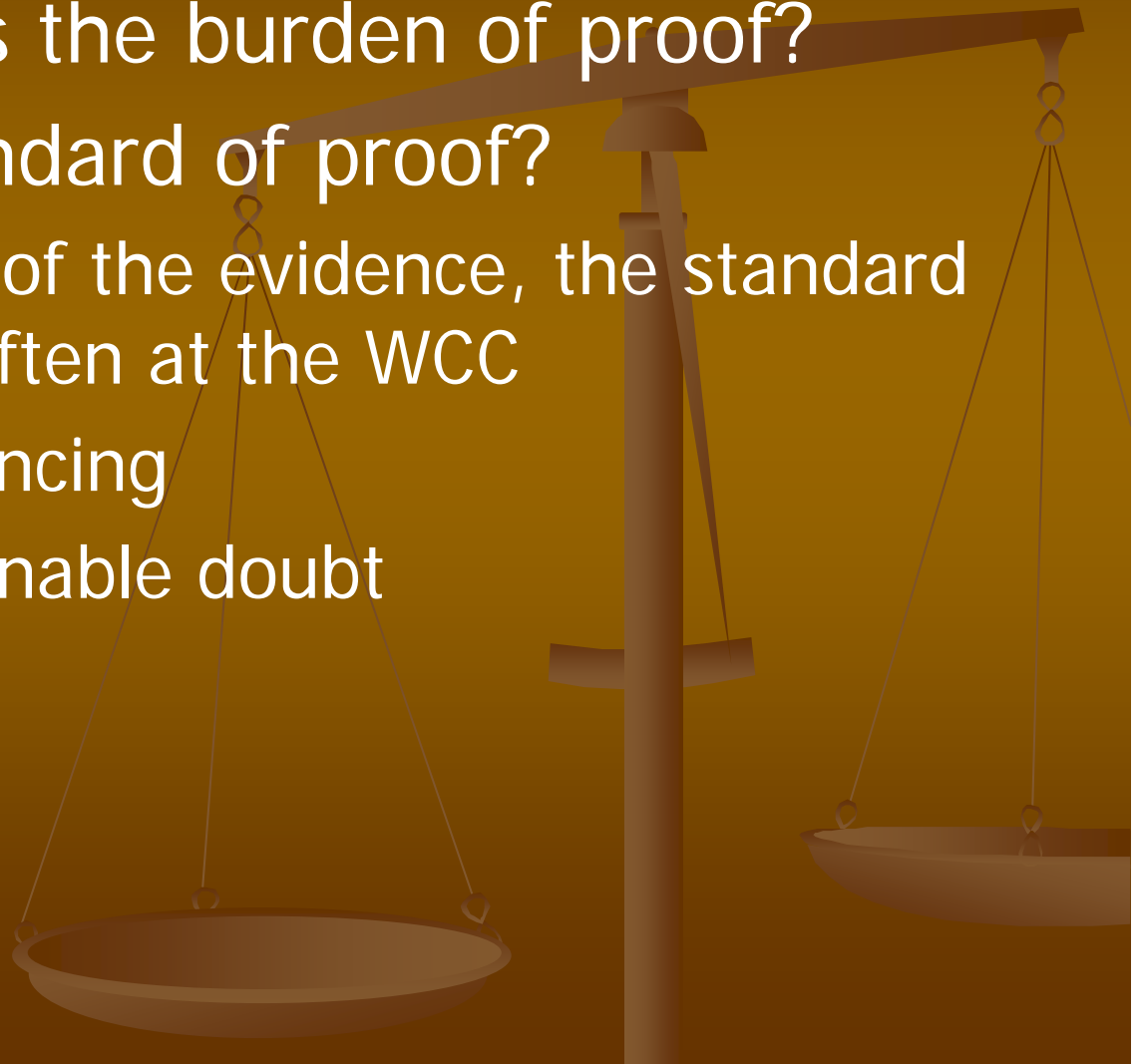
- Witnesses
- Documents
  - Understand what is being said
- Photographs and Videos
- Maps





# Burden of Proof

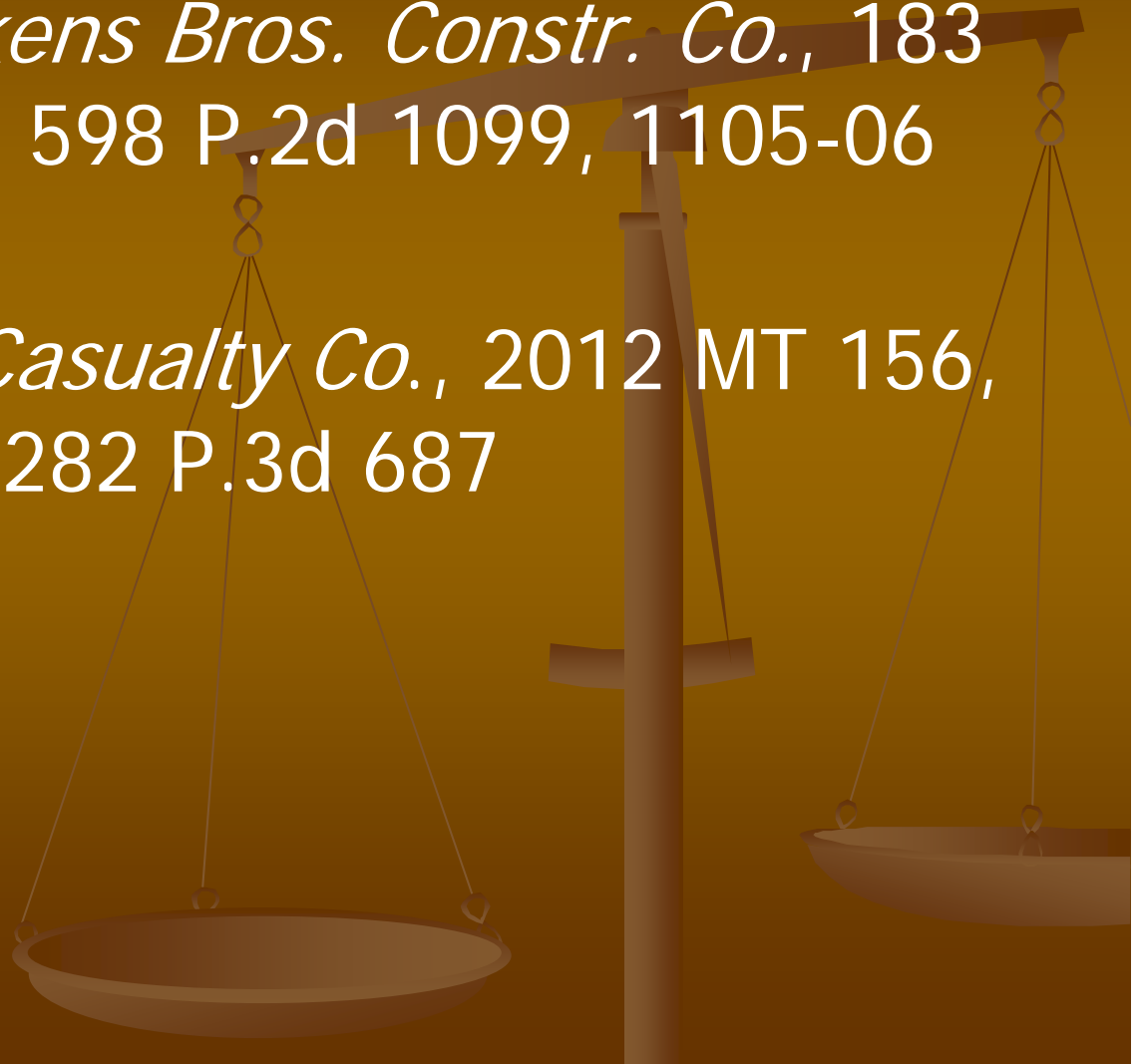
- Which party has the burden of proof?
- What is the standard of proof?
  - Preponderance of the evidence, the standard of proof most often at the WCC
  - Clear and convincing
  - Beyond a reasonable doubt



# Burden of Proof

## general rules

- *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979)
- *Ford v. Sentry Casualty Co.*, 2012 MT 156, 365 Mont. 405, 282 P.3d 687



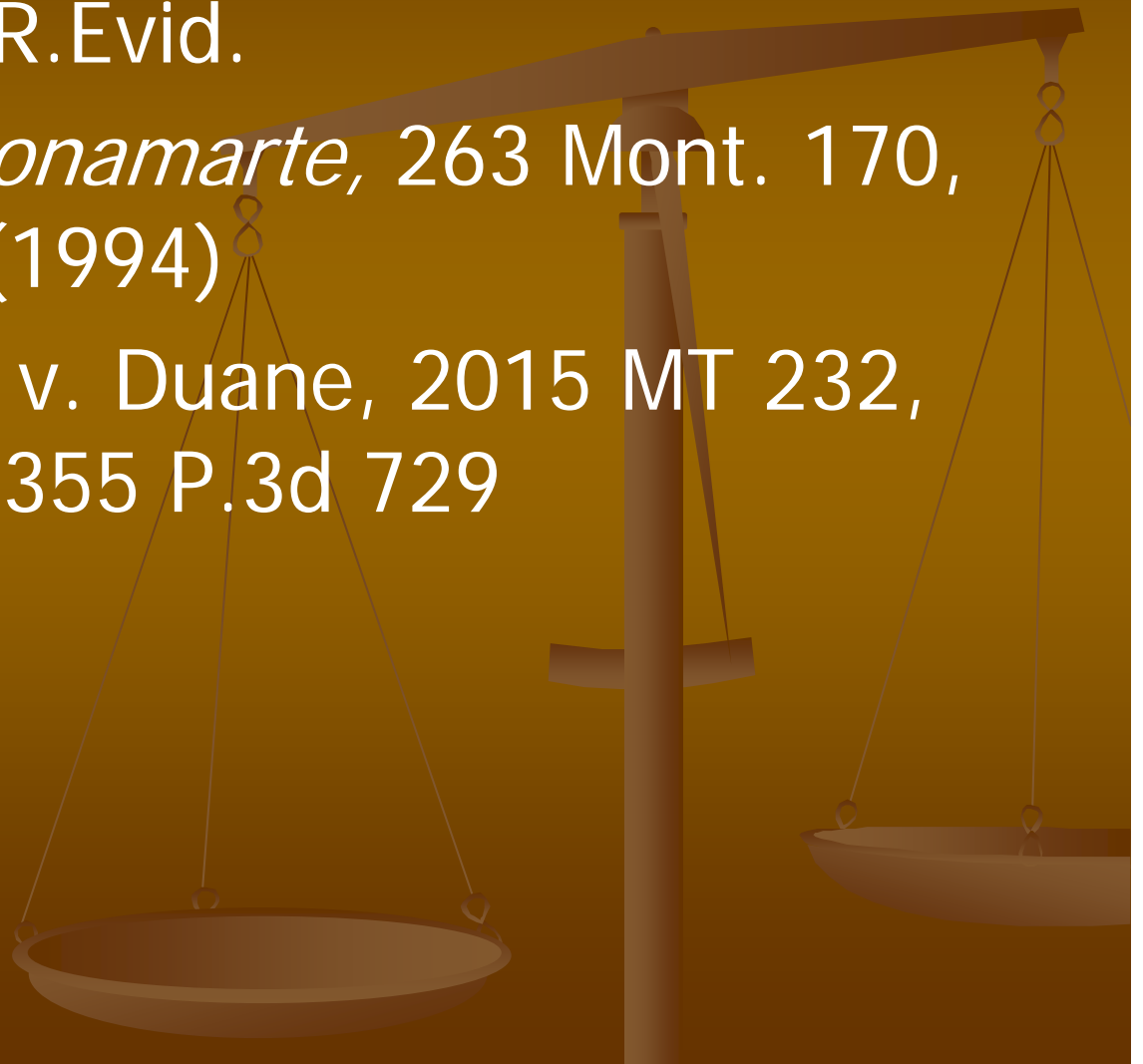
# Other types of cases



- PTD: *Weisgerber v. Am. Home Assurance Co.*, 2005 MTWCC 8
  - *But see Davis v. Liberty Ins. Corp.*, 2017 MTWCC 21
- Affirmative Defenses: *Preston v. Transp. Ins. Co.*, 2002 MTWCC 23 (citations omitted), *aff'd in part, rev'd in part*, 2004 MT 339, 324 Mont. 225, 102 P.3d 527
- *Belton* case: *Montana State Fund v. Zurich Am. Ins. Co.*, 2009 MTWCC 3
- Intoxication: *Devers v. Montana State Fund*, 2017 MTWCC 12
- Estoppel: *Selley v. Liberty Northwest Ins. Corp.*, 2000 MT 76, 299 Mont. 127, 998 P.2d 156

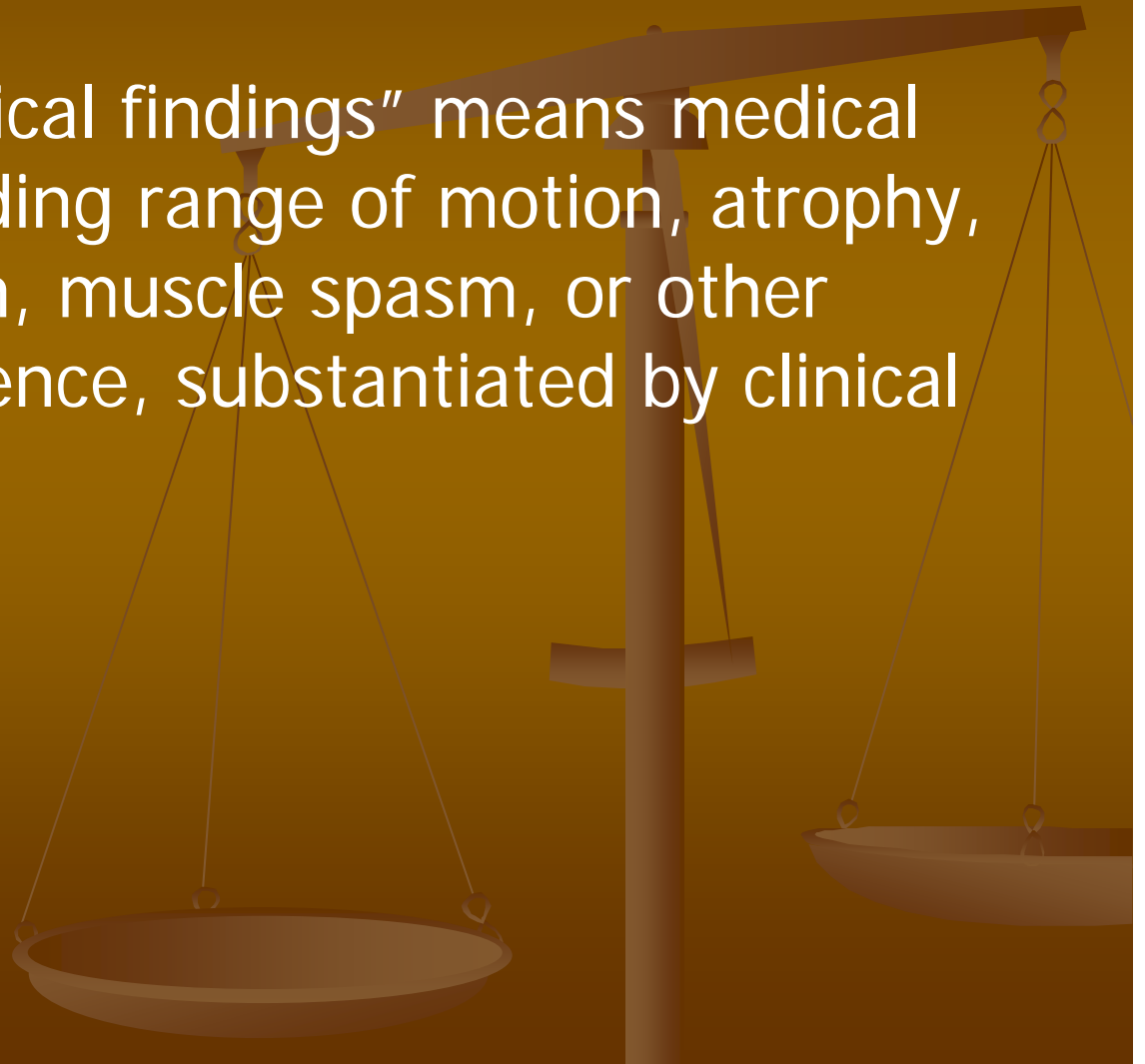
# Credibility

- Rule 611(e), M.R.Evid.
- *Bonamarte v. Bonamarte*, 263 Mont. 170, 866 P.2d 1132 (1994)
- *City of Missoula v. Duane*, 2015 MT 232, 380 Mont. 290, 355 P.3d 729



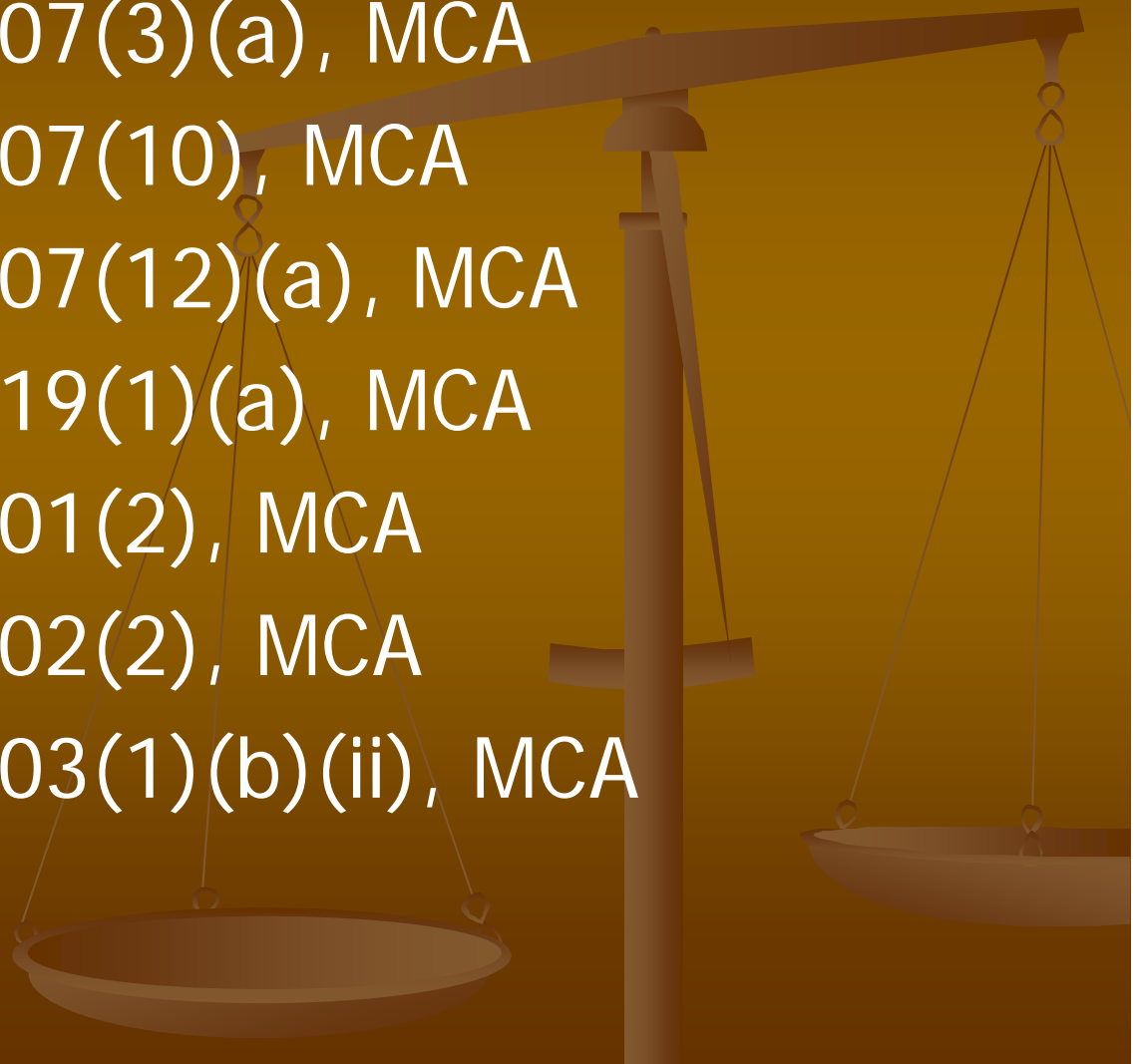
# Objective Medical Findings

- Section 39-71-116(22):
  - “Objective medical findings” means medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.



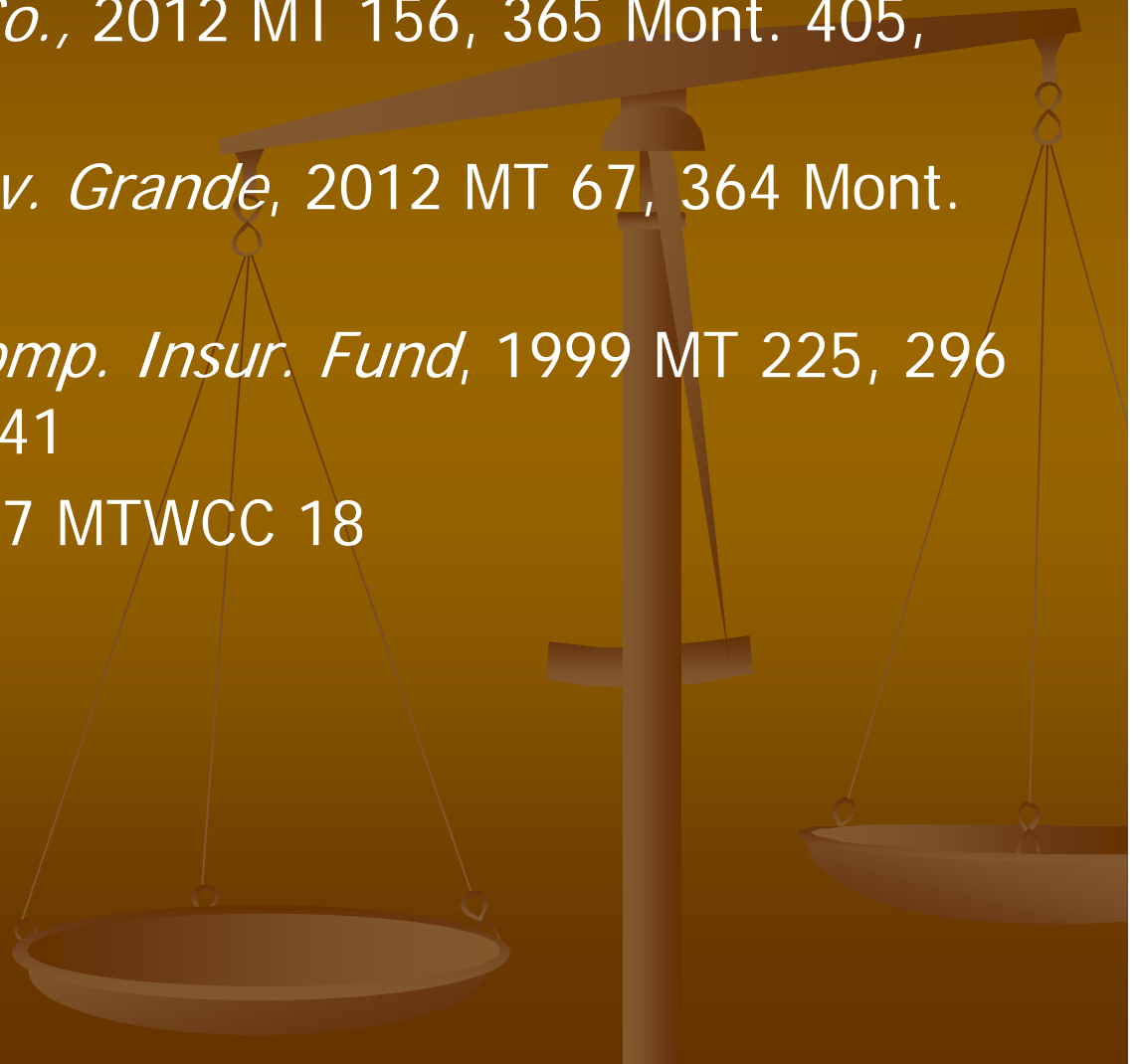
# Objective Medical Findings

- Section 39-71-407(3)(a), MCA
- Section 39-71-407(10), MCA
- Section 39-71-407(12)(a), MCA
- Section 39-71-119(1)(a), MCA
- Section 39-71-701(2), MCA
- Section 39-71-702(2), MCA
- Section 39-71-703(1)(b)(ii), MCA



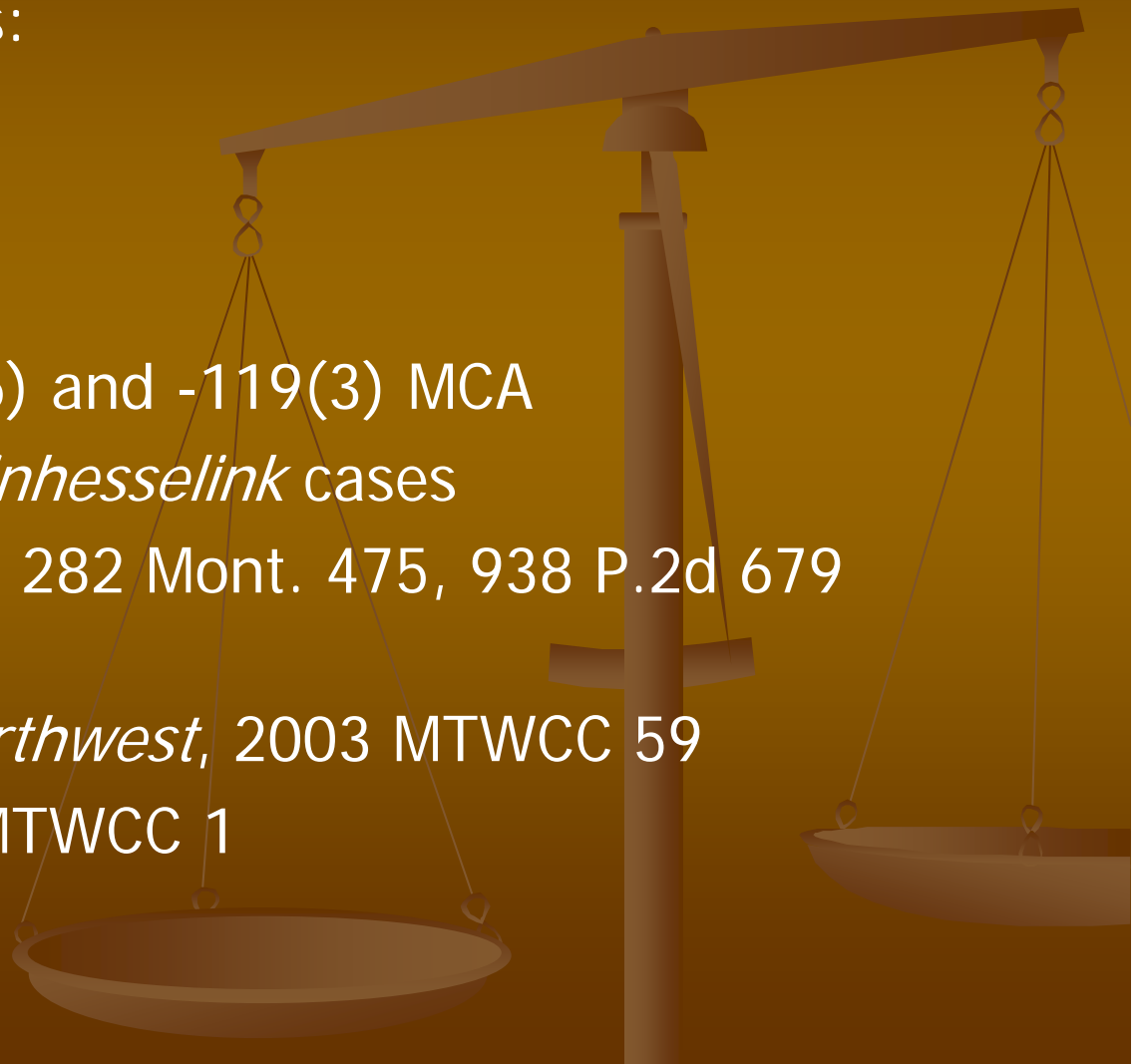
# Case Law

- *Ford v. Sentry Cas. Co.*, 2012 MT 156, 365 Mont. 405, 282 P.3d 687
- *Montana State Fund v. Grande*, 2012 MT 67, 364 Mont. 333, 274 P.3d 728
- *Matthews v. State Comp. Insur. Fund*, 1999 MT 225, 296 Mont. 76, 985 P.2d 741
- *Foster v. MSGIA*, 2007 MTWCC 18



# Emotional Distress

- Three types of claims:
  - Mental-mental
  - Mental-physical
  - Physical-mental
- Sections 39-71-105(6) and -119(3) MCA
- *Stratemeyer* and *Kleinhesselink* cases
- *Yarborough v. MMIA*, 282 Mont. 475, 938 P.2d 679 (1997)
- *Burgan v. Liberty Northwest*, 2003 MTWCC 59
- *TG v. MSGIA*, 2018 MTWCC 1





# Questions?

