

APPLICATION FOR
WORKERS' COMPENSATION JUDGE

A. PERSONAL INFORMATION

1. Full name.

Morgan Marie Weber

2. Birthdate.

[REDACTED]

3. Current home address.

[REDACTED]

4. Email address.

[REDACTED]

5. Preferred phone number.

[REDACTED]

6. Date you became a U.S. citizen, if different than birthdate.

N/A

7. Date you become a Montana resident.

May 10, 1981

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

Name	Location	Date of Degree	Type of Degree
Corvallis High School	Corvallis, MT	June 1999	H.S. Diploma
Gonzaga University	Spokane, WA	May 2003	Bachelor of Business Administration

Valparaiso University School of Law	Valparaiso, IN	May 2007	Juris Doctorate
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10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.
- a. Gonzaga University
 - Gonzaga merit scholarship, Daniel G. Brajcich scholarship
 - Graduated *Cum Laude*
 - President's List, Dean's List
 - Gonzaga-in Florence Academic Year Abroad, 2001-2002
 - b. Valparaiso University School of Law
 - Merit scholarship
 - Class rank: top 30%
 - Legal writing teacher's assistant 2005-2007

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

Employer	Position	Dates
Browning, Kaleczyc, Berry & Hoven, P.C. 800 N. Last Chance Gulch, Ste. 101 Helena, MT	Associate (2010-2015), Shareholder/Partner (2016-present)	July 2010-Present
Markette & Chouinard, P.C. 601 1 st St. Hamilton, MT	Law Clerk	April 2009-June 2010
Reback, McAndrews, & Kjar 1230 Rosecrans Ave. #450 Manhattan Beach, CA	Associate	January 2008- January 2009

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.
- a. Montana State Bar, October 2009

- o United States District Court, District of Montana
- b. California State Bar, December 2007
 - o United States District Court, Southern District of California
 - o United State District Court, Central District of California
- 13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., workers' compensation, administrative law other than workers' compensation, employment law, torts, property, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, alternative dispute resolution, etc).

As an attorney at Browning, Kaleczyc, Berry, & Hoven, approximately 90% of my practice is workers' compensation defense and 10% is defense litigation. In my workers' compensation practice, I have defended self-insured's, insurers, and third-party adjustors in every aspect of a workers' compensation claim. Based on my extensive workers' compensation practice over the past decade plus, I am well-versed in workers' compensation law and the Workers' Compensation Court rules of procedure. In my litigation defense practice, I have represented financial institutions, medical malpractice carriers, insurance companies, housing authorities, landowners, and homeowners' associations. As a result, I am very familiar with the rules of evidence and civil procedure.

- 14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

I have made a number of educational presentations to workers' compensation insurance companies, third party adjustors, and self-insured's regarding current case law and best practices they should be implementing in their business models. I have also testified before the Legislature about the positive (or negative) impacts that various pieces of workers' compensation legislation would likely have on several occasions. In these instances, I was testifying on behalf of the workers' compensation insurance defense clients I represent.

- 15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

In the last ten years, I have appeared in the Montana Workers' Compensation Court on many occasions. I have appeared for pretrial conferences, argued hearings on motions and hearings for reinstatement of benefits, and defended my clients in three trials. In addition, I have appeared before both Montana district courts and justice courts. In district and justice courts, I have appeared for scheduling conferences, argued motions, and participated in both bench and jury trials.

- 16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

Gregory Stokes and Sherry Stokes v. Golden Triangle, Inc., 2015 MT 199 (DA 14-0726).
Represented Appellee Golden Triangle, Inc.

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

In my workers' compensation practice, I have had the opportunity to address several important legal issues.

I successfully argued on behalf of a self-insured for summary judgment that an injured worker was not entitled to acceptance of liability of her claim because mental-mental and mental-physical claims are not compensable under the Workers' Compensation Act. The injured worker alleged that a work injury caused her post traumatic stress disorder and aggravated her preexisting anxiety, depression, and pseudoseizures. I successfully argued that she did not suffer any compensable physical injuries. I also persuaded the Court that while the injured worker's treating physician had diagnosed increased neck and arm pain as a result of the work injury, the diagnosis was based entirely on the injured worker's subjective complaints of pain and was not substantiated by any objective medical evidence. Finally, I was able to convince the Court to agree that the injured worker's anxiety, depression, and post traumatic stress disorder were mental-mental injuries and that her pseudoseizures were a mental-physical condition. This case is important because it reaffirmed the Legislature's intent that mental-mental and mental-physical injuries are not compensable under the Workers' Compensation Act.

On behalf of the insurer for a small business, I successfully argued an injured worker was not entitled to reinstatement of his temporary wage loss benefits after he refused to return to modified duty being offered by his employer. In that case, the Workers' Compensation Court agreed with my client that the injured worker did not offer sufficient evidence to establish that the modified job would have exceeded his restrictions. The injured worker also tried to argue that the insurer should have hired a vocational rehabilitation counselor to draft a job analysis for the modified duty. The Court agreed with me that the statute does not require that a vocational rehabilitation counselor prepare a job analysis for modified or alternative employment with the time of injury employer prior to reaching maximum medical improvement. This is important for the Workers' Compensation system as a whole because it would be cost-prohibitive to have to pay a vocational rehabilitation counselor to draft a new job analysis every time new restrictions are issued, and the time of injury employer offers modified employment. This requirement would also hinder the Workers' Compensation Act's primary objective of returning a worker to work as soon as possible after a work injury.

I successfully defended an Insurer of another small business at trial where an injured worker argued that she had given sufficient notice of her alleged injury to her employer. I was able to persuade the Workers' Compensation Court that the injured worker was not credible and that her former managers' testimony should be given more weight. Additionally, and importantly, I effectively argued that notice of pain alone does not meet the statutory notice requirements and that an injured worker cannot satisfy their duty of giving notice of a work injury by notifying an employer of an entirely separate event occurring on a different day. The

case law established in this case solidified the notice requirements of the Workers' Compensation Act.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

I have not authored any legal books or articles.

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

May 5, 2022 (Bozeman, MT)

Conference: Jim Tillotson Service Program

Sponsor: Montana Municipal Interlocal Authority

Title: FMLA, ADA, Workers' Compensation Bermuda Triangle

Attendees: Montana municipal attorneys

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

My focused workers' compensation defense practice makes it difficult to provide pro bono services in my practice area. I have not kept track of my pro bono hours in the last five years. I serve my community through various non-profit organizations and service projects. I have also advised non-profit boards on legal issues when ethically able to do so.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

None.

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

None.

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

None.

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a workers' compensation judge.

In addition to my legal practice, I have a wide variety of experience, which make me a well-rounded individual and would assist me in serving as the workers' compensation judge.

I was born into a farming and ranching family and grew up working on the ranch and farm. This experience taught me the value of hard work, dedication, and exposed me early on to small business ownership in Montana. While in college, I worked as a wildland firefighter for the United States Forest Service for several summers, which taught me the important skills of risk management and implementing complex plans. I have also worked in the service industry in both restaurant and bar settings, which exposed me to a wide variety of people and taught me the value of working well with others, listening skills, and working well under pressure.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

- *Big Brothers Big Sisters; board member, secretary, president; 2011-2016*
- *Missoula Education Foundation; board member; 2020-2022*
- *Missoula Kiwanis Club; board member, secretary; 2017-present*

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

None.

E. PROFESSIONAL CONDUCT AND ETHICS

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No.

28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No.

29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No.

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

No.

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

Weber Investments, LLC. My brother and I created this company to purchase land from our parents, although ultimately decided not to move forward with the purchase. The company is not currently active, and I am willing to disengage from the company if needed.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

Yes.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a workers' compensation judge.

I am seeking the office of workers' compensation judge because it would be the highest honor to serve the State of Montana in a position where I know I can be successful. It would also be a privilege to be the first female workers' compensation judge in Montana. As a young adult, I traveled around the world and lived outside of Montana, which gave me the opportunity to fully appreciate how special Montana is. When I returned to Montana, I was elated when my

current firm offered me a position practicing workers' compensation. In the subsequent 13 years, I have had the opportunity to practice workers' compensation defense almost exclusively. Although many people believe that workers' compensation is "easy" because it is statutory, this could not be further from the truth. Montana workers' compensation is unique, it is challenging, and it requires a certain skillset to be a successful practitioner. Every case is different, and every case is important to all the stakeholders involved. I have had the opportunity to represent my clients in every aspect of a workers' compensation claim from the inception of a claim to its closure and have enjoyed the unique challenge that each case has presented. While practicing, I believe I have earned the respect of my clients, opposing counsel, and the Court.

While I have thoroughly enjoyed my private practice, I have always felt the call to public service, I believe I am uniquely well-suited to serve the public in this particular position, and am confident that I would be a successful and efficient workers' compensation judge. My life-long work ethic, attention to detail, and extensive workers' compensation experience make me an excellent candidate to be a successful judge. I possess the character and intellect to meet the challenges of being the next workers' compensation judge.

36. What three qualities do you believe to be most important in a good workers' compensation judge?

The three qualities which I believe to be most important in a good workers' compensation judge and which I possess include strong moral character, reasoned judgment, and efficiency.

Strong moral character is an important quality in a judge as a judge must be dependable, humble, fair, and approachable. Because there is only one workers' compensation judge in Montana, litigants must have complete confidence in the office that their arguments will be fully and fairly heard and this cannot happen if either party believes that the judge is not trustworthy. I believe that a judge should never assume he or she is the smartest person in the room and must be ready to hear all the facts as well as the parties' interpretation of the relevant law before making a fully informed and impartial decision based on the law. Absent a strong moral character, this simply cannot happen, making it a vital skill.

Next, a judge must be fair and consistent in the application of the law and therefore, reasoned judgment is an imperative skill. I believe that the job of a judge is not to bend the facts to fit the decision he or she would ultimately like to make based on his or her first impression of a case, but to hear all the facts from both sides, objectively and thoroughly analyze the facts against the law as written, and then make a fully informed decision.

Finally, I believe that efficiency is an essential skill, especially for the workers' compensation judge. The timeline for a workers' compensation claim in litigation is streamlined and faster than a normal case for a reason. The public policy of the Montana Workers' Compensation system is to return injured workers to work while ensuring that they receive all the benefits to which they are entitled at a reasonable cost to the employer. Accordingly, the stakes for both an injured worker and an employer/insurer are high when a case is in litigation. Therefore, the workers' compensation judge must have an extremely strong work-ethic and issue

fully informed decisions as quickly and efficiently as possible to ensure that the public policy goals of the Workers' Compensation Act are continuously met.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

I believe in judicial restraint and strict constructionism. The Constitution clearly establishes three separate but equal branches of government. It is the role of the judiciary to interpret and apply statutes and the Constitution as written. I do not believe that it is appropriate or within the power of a judge to interpret or apply the law in a manner which is inconsistent with the legislature's intent.

Montana law makes clear that there are rules for a judge to follow when determining statutory construction. It is the legislature's job to modify or review the law if necessary, not that of a judge. The legislature of course cannot anticipate every factual scenario which may arise in the application of the law. In those cases, it is not the judge's role to make new law based on his or her personal beliefs. Instead, he or she must apply the law as written to the facts and honor the legislature's intent. Additionally, there will be cases in which case law precedent and a statute may conflict. If there is ever any ambiguity between precedent and a statute, the judge should construe the statute as written.

The role of the judge is to be impartial and to apply the law as written. This approach best honors the separation of powers. Judicial restraint ensures that the people of Montana can trust that the system will work as it is intended. New legislation is the best approach to bringing about change and protecting Montana citizens—both employers' and employees' rights.

Finally, as it specifically relates to the role of the Workers' Compensation judge, the public policy of the Workers' Compensation Act is to provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease. However, it is also the intent of the Legislature that these benefits be provided to a worker at a reasonable cost to the employer. The Legislature has also made clear that the Workers' Compensation Act is to be construed according to its terms and not liberally in favor of either party. Therefore, the role of the Workers' Compensation judge is to balance the rights of the employer and the injured worker and strictly construe the terms of the Workers' Compensation Act in doing so.

As a judge, I will strive to apply the laws in a fair and impartial manner while preserving the integrity of the bench and the public trust.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.

See attached.

39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

a. Oliver H. Goe
Browning, Kaleczyc, Berry & Hoven P.C.
800 N. Last Chance Gulch, Suite 101
(406) 443-6820

b. Hon. David M. Sandler
Montana Workers' Compensation Court
P.O. Box 537
Helena, MT 59624

c. Steven S. Carey
Carey Law Firm, P.C.
P.O. Box 8659
Missoula, MT 59807

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as Workers' Compensation Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

June 28, 2023
(Date)

Margaret M. Weber
(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Wednesday, July 5, 2023

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

RECEIVED COPY

JAN 31 2018

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BROWNING, KALECZYC, BERRY, HOVEN

RECEIVED

JAN 29 2018

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

ATTORNEYS FOR LIBERTY MUTUAL INSURANCE

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 2017-3947

CARMEN HEICHEL,

Petitioner,

v.

LIBERTY MUTUAL INSURANCE,

Respondent/Insurer.

**LIBERTY MUTUAL INSURANCE'S RESPONSE BRIEF IN OPPOSITION TO
PETITIONER'S MOTION *IN LIMINE***

Petitioner has filed a Motion *in Limine* to exclude the written notes of Deanne Hegdahl. The bases for the Motion are that Liberty Mutual Insurance ("Liberty") did not make Ms. Hegdahl available for a deposition and therefore, she has not had the opportunity to cross-examine the witness, which is allegedly prejudicial. She further claims that the two notes should be excluded because they are hearsay and are not excluded from the rule by any of the exceptions. Petitioner's Motion is without merit.

If Petitioner wanted to take the deposition of a non-party witness, she should have served Ms. Hegdahl with a subpoena.¹ She has inexplicably refused to do so and instead has filed this Motion.² Liberty has no obligation to produce a former employee that it has no control over at a deposition and should not be punished for Petitioner's

¹ This would have been much more efficient than continuing with the deposition (see below) and filing this Motion.

² Trial is not scheduled until the week of February 20, 2018 and therefore, if Petitioner wants the opportunity to cross-examine Ms. Hegdahl, she has ample time to simply serve her with a subpoena and take her deposition.

adamant refusal to serve the witness with a subpoena. Further, Ms. Hegdahl's notes documenting Petitioner's own statements are not hearsay and even if they were, they are excluded from the hearsay rule. Finally, Petitioner failed to object to these notes when they were introduced as exhibits at her deposition and therefore, she waived any objection to their introduction at trial. Accordingly, Petitioner's Motion should be denied and the statements should be deemed admissible and allowed into evidence at trial.

Pertinent Facts

This case involves disputes about whether Petitioner suffered an injury on September 21, 2015 while at work at Super 1 in Evergreen, Montana and whether she timely notified her employer of the alleged injury. In September of 2015, Petitioner's direct supervisor in the bakery was Heidi Brown, the grocery manager was Justin Ridinger, and the store director was Deanne Hegdahl. Ms. Hegdahl stopped working for the store in approximately October of 2016, before Petitioner filed her Petition for Trial.

During discovery in this matter, Liberty produced the employment file of Petitioner. The employment file included the October 13, 2015 and November 16, 2015 written notes of Ms. Hegdahl, which Petitioner is now attempting to exclude from evidence. Mr. Ridinger, who is currently the store director and Ms. Brown, testified that it is common practice in the store to take these types of notes and include them in employee files. See Exhibits A (Ridinger, pgs. 22:11-24:25, 60:13-61:14) and B (Brown, pgs. 19:22-20:5). In addition to taking the depositions of Mr. Ridinger and Ms. Brown, Petitioner took the depositions of four other store employees, all of whom were made available by Liberty to testify. Liberty also took the deposition of Petitioner. During her deposition, Liberty offered the October 13, 2015 and November 16, 2015 notes of Ms. Hegdahl into evidence and Petitioner did not make any objections. See Exhibit C.

As noted above, Ms. Hegdahl is no longer an employee for Super 1 and stopped working there before Petitioner filed her Petition for Trial in this matter. Petitioner was actually the original party to locate Ms. Hegdahl. On August 3, 2017, counsel for Petitioner sent an email to Liberty's counsel providing Ms. Hegdahl's address, employer, and phone number. See Exhibit D. On August 11, 2017, Petitioner's counsel sent another email stating "[w]e intend to notice depositions of Deanne Willard/Hegdahl (subpoena if necessary)..." See Exhibit E. Liberty then did not hear anything from Petitioner about taking Ms. Hegdahl's deposition again until December 11, 2017 at which time Petitioner stated she wanted to take Ms. Hegdahl's deposition, provided available dates, and asked what dates counsel for Liberty would be available.³ See Exhibit F. On December 21, 2017, Liberty responded with an available date. See Exhibit G. Additionally, Liberty asked whether Petitioner was going to serve Ms. Hegdahl with a subpoena to appear at the deposition or if she had agreed to testify. *Id.*

³ It should be noted that on November 6, 2017, Petitioner requested that trial be vacated so she could take Ms. Hegdahl's deposition.

On December 29, 2017, Petitioner issued a Notice of Perpetuation Deposition of Deanne Hegdahl scheduling her deposition on January 8, 2018. See Exhibit H. She did not send the Notice to Ms. Hegdahl. *Id.* On January 3, 2018, Petitioner's counsel sent another email indicating that Petitioner did not intend to subpoena Ms. Hegdahl to appear at her deposition. See Exhibit I. Although Liberty had no duty to do so, contact was made with Ms. Hegdahl regarding the scheduled deposition and she stated that she would need to be served with a subpoena if she was going to appear at a deposition. Mr. Moore was then informed that Ms. Hegdahl would not appear for a deposition unless she was served with a subpoena and that she had to work on the day that Petitioner had scheduled her deposition. See Exhibit I. It was also emphasized that Ms. Hegdahl is no longer an employee of Super 1 and that therefore, Liberty had no duty to make her available for the scheduled deposition. *Id.* Petitioner responded the next day, again declining to serve Ms. Hegdahl with a subpoena. See Exhibit I. She has never provided any explanation as to why she refuses to serve Ms. Hegdahl with a subpoena.

Argument

A. It is Petitioner's responsibility to serve Ms. Hegdahl with a subpoena to appear if she wants to take her deposition.

In her Motion *in Limine*, Petitioner has alleged that it would be prejudicial to allow introduction of Ms. Hegdahl's written statements into evidence without providing her with an opportunity to depose her. She further claims that Liberty did not make her available for her deposition, implying that Liberty had a duty to do so.⁴ Liberty has no such duty and Petitioner has failed to provide any valid authority for the proposition that an insurer is required to force its insured's former employer to testify. Ms. Hegdahl is a non-party and Liberty has no standing to compel her testimony and no duty to even encourage it without a subpoena. Liberty made all of the current employees whose depositions Petitioner wanted to take available to testify. Liberty has no control over former employees and it cannot force a former employee to appear at a deposition.

Because Ms. Hegdahl is not a party to this action, Petitioner needs to serve her with a subpoena to appear pursuant to Mont. R. Civ. Pro. 45 if she wants to take her deposition. She was informed of this prior to January 8, 2018 (the date the deposition was scheduled) and was also told that Ms. Hegdahl had to work on that date, but still refused to serve her with a subpoena and then inexplicably (and at the cost of both parties) went forward with the deposition. The fact that Petitioner has not taken Ms. Hegdahl's deposition is solely her own fault.⁵ Petitioner needs to serve her with a

⁴ Petitioner made a misrepresentation to this Court when she claimed that she made repeated attempts to take Ms. Hegdahl's deposition prior to trial. She made one attempt, which failed because of her own inexplicable decision not to serve Ms. Hegdahl with a subpoena. Again, there is ample time for her to take the deposition if she really wants to so long as she follows the proper process of serving Ms. Hegdahl with a subpoena to appear.

⁵ It is baffling why Petitioner refused to serve Ms. Hegdahl with a subpoena to appear if she wanted to take her deposition. The only conclusion that can be made is that she refused to do so for the sole purpose of filing this Motion in an attempt to exclude even more evidence (there is a mountain of

subpoena if she wants to take her deposition and Liberty should not be punished for her failure to do so.

B. Ms. Hegdahls' statements are not hearsay and therefore, are admissible.

In her Motion *in Limine*, Petitioner has alleged that both of Ms. Hegdahl's written notes are hearsay. This argument is without merit as neither of Ms. Hegdahl's statements are hearsay. Ms. Hegdahl was clearly documenting statements made by Petitioner herself and they are being offered to prove that Petitioner initially offered several other reasons why her shoulder hurt and failed to timely notify her employer of the alleged injury. Mont. R. Evid. 801(d) states that a statement is not hearsay if:

- (1) Prior statement by a witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with the declarant's testimony.
- (2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement,...

Both the October 13, 2015 and November 16, 2015 notes include statements made by Petitioner. According to the notes, on October 13, 2015, Petitioner told Ms. Hegdahl that she hurt her shoulder when she tripped over her dogs. On November 16, 2015, she told her that she hurt her shoulder frying donuts and then acknowledged that she had previously said she hurt it when she tripped over the dogs. In her deposition, Petitioner denied making any of these statements (and presumably she will deny having made these statements at trial) and therefore, they are prior inconsistent statements and should be allowed into evidence.⁶ See Exhibit C. Further, the statements made in these notes (that she hurt her shoulder by tripping over her dog or by cranking donuts) are being offered against her since she now claims that she injured her shoulder and neck at work lifting a bucket of corn syrup and timely notified her employer of the alleged injury. Accordingly, Petitioner's Motion should be denied as the notes are not hearsay pursuant to Mont. R. Evid. 801(d)(1), (2) and are admissible.

C. Even if the statements are hearsay, they fall within several exceptions of the hearsay rule and therefore, they are admissible.

As noted above, Petitioner alleges that neither of Ms. Hegdahl's written notes fall within the hearsay exceptions. Although the statements are not hearsay, even if they were, they are excluded from the hearsay rule by several exceptions. Mont. R. Evid. 803(1) states that the following is not excluded by the hearsay rule even though the declarant is available as a witness:

evidence contradicting her story already) that she did not injure herself at work and failed to timely notify her employer of any alleged injury if it did happen from being introduced at trial.

⁶ If a statement is not offered to prove the truth of its contents, but to show whether the statement was made, the statement is not hearsay. *Jim's Excavating Service, Inc. v. HKM Associates*, 265 Mont. 494, 507, 878 P.2d 248, 255 (1994).

Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

Contemporaneous notes based on personal observations are admissible as recorded present sense impressions. *State v. Hope*, 2001 MT 207, ¶ 14, 306 Mont. 334, 33 P.3d 629. Both written statements from Ms. Hegdahl make clear that she took the notes explaining what Petitioner told her on the dates that Petitioner provided the information. Therefore, the statements are clearly present sense impressions, are excluded from the hearsay rule, and are admissible.

The notes are also excluded from the hearsay rule by Mont. R. Evid. 803(6), which states:

A memorandum, report, record...in any form, of acts, events,...if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record...all as shown by...qualified witness... unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness

The party offering evidence under the business records exception to the hearsay rule must establish two primary foundational facts before the evidence is admissible: (1) the records must have been made or transmitted by a person with knowledge at or near the time of the incident recorded; and (2) the record must have been kept in the course of regularly conducted business activity. *State v. Hardman*, 2012 MT 70, ¶ 31, 364 Mont. 361, 276 P.3d 839. As noted above, the notes were clearly taken on the same day that Petitioner spoke to Ms. Hegdahl.⁷ Further, as Mr. Ridinger and Ms. Brown both testified at their depositions, it was a regular practice in the store to document the type of information that was included in Ms. Hegdahl's two written notes. See Exhibits A and B. Therefore, the statements are excluded from the hearsay rule by the business records exception and should be allowed into evidence.

D. Petitioner failed to object to the admission of the notes into evidence at her own deposition and are therefore they are admissible.

As noted above, both of the written notes which Petitioner is attempting to exclude from evidence were introduced as exhibits in her own deposition. Petitioner did not make any objections, including a hearsay objection, when the exhibits were introduced. A.R.M. 24.5.322(5) states:

Unless otherwise agreed by the parties, all objections must be made at the time of taking the deposition and be included within the transcript of the deposition.

⁷ There is also no reason to question the trustworthiness of the notes as the statement made by Petitioner to Ms. Hegdahl that she hurt her shoulder falling over her dogs was witnessed by Ms. Brown. See Exhibit B (Brown, pgs. 47:21-48:4).

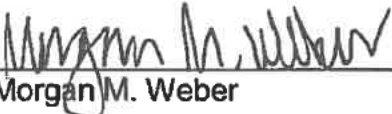
Evidence objected to must be taken subject to the objections. Deposition objections must be briefed. The court may deem the failure to do so a withdrawal of the objections.

Because Petitioner failed to object to the exhibits, she has waived her objections. See *Gohl v. State Compensation Ins. Fund/Liberty Northwest*, 2000 MTWCC 45.

Conclusion

For the foregoing reasons, the October 13, 2015 and November 16, 2015 written notes of Ms. Hegdahl should be deemed admissible and Petitioner's Motion *in Limine* should be denied.

DATED this 21st day of January, 2018.

BY: 
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