

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 24

WCC No. 9709-7821

RANGER INSURANCE COMPANY

Appellant

vs.

VELLEDA BATES

Respondent.

ORDER AFFIRMING ORDER OF THE DEPARTMENT OF LABOR AND INDUSTRY WITH
MODIFICATIONS

Summary: Insurer appealed from summary judgment entered by Department of Labor hearing officer determining insurer was liable for "add on" attorneys fees relating to benefits paid to respondent/claimant. Insurer challenged DOL's authority to issue summary judgment, complained that the DOL did not require claimant to shoulder her burden of proof, and argued attorneys fees were not properly awarded.

Held: While the Montana Administrative Procedures Act (MAPA) requires an evidentiary hearing in contested cases (§2-4-601, MCA), it does not prohibit summary rulings where there are no evidentiary facts of consequence in dispute. Where the facts proffered by claimant in support of the motion were not contested by appellant, the argument regarding burden of proof is meaningless. Under *Madill v. State Compensation Ins. Fund*, 280 Mont. 450, 930 P.2d 665 (1997) and section 39-71-612, MCA (1981), attorney fees were properly awarded to claimant with respect to all PTD benefits payable after the date on which she filed her petition for those benefits, even though hearing was not necessary. As in *Madill*, claimant demanded PTD benefits, her demand was refused, and the insurer ultimately conceded liability for those benefits. However, attorney fees are not properly awarded with respect to benefits which the insurer attempted to reduce through petition to the Court. Those benefits had already been paid, thus did not meet statutory criteria for allowing an award of attorneys fees. Although the hearing officer requested information under *Wight v. Hughes Livestock Co.*, 204 Mont. 98, 664 P.2d 303 (1983) in order to set fees, the fee agreement between counsel and claimant presumptively sets the amount of fees and reference to the Wight standards is not necessary. Finally, claimant's counsel is not entitled to an add-on of 33 1/3% of benefits as attorneys fees under the theory the case

went to hearing. What went to hearing were issues of attorney fees, not benefits for claimant. Under the fee agreement, the lesser amount of 25% is appropriate.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 2-4-601, MCA (1981). While the Montana Administrative Procedures Act (MAPA) requires an evidentiary hearing in contested cases (§2-4-601, MCA), it does not prohibit summary rulings where there are no evidentiary facts of consequence in dispute.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-612, MCA (1981). Under *Madill v. State Compensation Ins. Fund*, 280 Mont. 450, 930 P.2d 665 (1997) and section 39-71-612, MCA (1981), attorney fees were properly awarded to claimant with respect to all PTD benefits payable after the date on which she filed her petition for those benefits, even though hearing was not necessary. As in *Madill*, claimant demanded PTD benefits, her demand was refused, and the insurer ultimately conceded liability for those benefits. However, attorney fees are not properly awarded with respect to benefits which the insurer attempted to reduce through petition to the Court. Those benefits had already been paid, thus did not meet statutory criteria for allowing an award of attorneys fees.

Administrative Procedure: Contested Case Hearing: Evidence. While the Montana Administrative Procedures Act (MAPA) requires an evidentiary hearing in contested cases (§2-4-601, MCA), it does not prohibit summary rulings where there are no evidentiary facts of consequence in dispute.

Cases Discussed: *Madill v. State Compensation Insurance Fund*. Under *Madill v. State Compensation Ins. Fund*, 280 Mont. 450, 930 P.2d 665 (1997) and section 39-71-612, MCA (1981), attorney fees were properly awarded to claimant with respect to all PTD benefits payable after the date on which she filed her petition for those benefits, even though hearing was not necessary. As in *Madill*, claimant demanded PTD benefits, her demand was refused, and the insurer ultimately conceded liability for those benefits. However, attorney fees are not properly awarded with respect to benefits which the insurer attempted to reduce through petition to the Court. Those benefits had already been paid, thus did not meet statutory criteria for allowing an award of attorneys fees.

Attorney Fees: Cases Awarded. Under *Madill v. State Compensation Ins. Fund*, 280 Mont. 450, 930 P.2d 665 (1997) and section 39-71-612, MCA (1981), attorney fees were properly awarded to claimant with respect to all PTD benefits payable after the date on which she filed her petition for those benefits, even though hearing was not necessary. As in *Madill*, claimant demanded PTD benefits, her demand was refused,

and the insurer ultimately conceded liability for those benefits. However, attorney fees are not properly awarded with respect to benefits which the insurer attempted to reduce through petition to the Court. Those benefits had already been paid, thus did not meet statutory criteria for allowing an award of attorneys fees.

¶11 Ranger Insurance Company (Ranger) appeals from a summary judgment of the Department of Labor and Industry (Department). The Department determined that Ranger is liable for attorney fees for benefits paid to respondent, Velleda Bates (Bates). It further directed claimant's attorney to provide Ranger with an accounting addressing the Wright⁽¹⁾ factors and reserved "continuing jurisdiction" to determine the amount of fees and costs in the event the parties are unable to do so.

Procedural and Factual Background

¶12 On February 24, 1997, Bates petitioned the Department for an award of attorney fees with respect to benefits her attorney had previously secured for her. The petition followed on the heels of the Supreme Court's decision in *Madill v. State Compensation Ins. Fund*, 280 Mont. 450, 930 P.2d 665 (1997)⁽²⁾, decided less than two months prior to Bates' petition. In *Madill* the Supreme Court held that under section 39-71-612, MCA (1979), a claimant is entitled to an award of attorney fees with respect to disputed benefits recovered by way of settlement or by way of concession if the insurer initially resisted payment of the benefits.

¶13 In her petition to the Department, Bates sought a determination that she is entitled to "add-on attorney fees" and costs on account of disputes going back to 1988 and 1989. The petition did not specifically ask the Department to determine the amount due.

¶14 Ranger responded to the petition with a Motion to Dismiss. Orders issued by the Department's hearing officer on March 25 and 28, 1997, indicate that during a March 24, 1997 telephone conference call, counsel for Bates and Ranger agreed to submit the case for decision via a motion for summary judgment. On March 25 the hearing officer issued a Submission Schedule, which read as follows:

Based upon agreement of the parties reached in a Status Telephone Call conducted on March 24, 1997, the following Submission Order is hereby established:

Ten (10) days following Motion for Summary Judgment, Respondent/Defendant response, five (5) days thereafter Petitioner/Claimant rebuttal. ***The parties agreed to follow Worker Compensation Court procedures identified and used for Summary Judgment Petitions.*** [Emphasis added.]

On March 28, he issued a Notice Vacating Pre-hearing, which read:

Based upon agreement of the parties to submit this matter for determination based on Motion submission and response, the pre-hearing set for April 2, 1997 is hereby vacated. [Emphasis added.]

¶5 Petitioner's Motion for Summary Judgment was thereafter filed on May 5, 1997. It was supported by a brief, an affidavit, and exhibits attached to and authenticated by the affidavit. Briefly summarized, the factual basis for the requested fees was as follows:

- Bates suffered an industrial injury on October 6, 1982. Ranger was the insurer at risk and accepted liability for her claim.
- On or about October 21, 1988, Ranger filed a petition in Workers' Compensation Court seeking an Order permitting it to convert claimant's benefits from temporary total disability (TTD) benefits to permanent partial disability (PPD) benefits. It urged that claimant had reached maximum medical healing on April 4, 1984, and requested that all TTD benefits paid after that date be credited to any liability it might have respecting PPD benefits. (Affidavit in Support of Petitioner's Motion for Summary Judgment, ¶'s 7-8 and Ex. D.)
- On March 27, 1989, following written discovery and a deposition of Bates, Ranger moved to dismiss its own petition. (Affidavit in Support of Petitioner's Motion for Summary Judgment, ¶ 10 and Ex. E.) In an affidavit supporting the motion, Ranger stated it would "continue paying Claimant temporary total disability benefits until such time as conversion is warranted." (*Id.*)
- On May 24, 1989, the Workers' Compensation Court dismissed Ranger's petition. (Affidavit in Support of Petitioner's Motion for Summary Judgment, ¶ 11.)
- Meanwhile, on April 25, 1989, Bates petitioned the Workers' Compensation Court for a conversion of her benefits from TTD to permanent total disability (PTD) benefits. (Affidavit in Support of Petitioner's Motion for Summary Judgment, ¶12, Ex. F.)
- Following written discovery and a medical deposition, on September 29, 1989, Ranger conceded that claimant was permanently totally disabled. (Affidavit in Support of Petitioner's Motion for Summary Judgment, ¶ 15.) The concession was confirmed in writing. (*Id.* and Exs. G and H.)
- On October 26, 1989, Bates' attorney demanded that Ranger pay a 25% attorney fee on "all benefits paid after April 4, 1984." (Affidavit in Support of Petitioner's Motion for Summary Judgment, ¶ 17, Ex. I.) Ranger refused (Affidavit in Support of Petitioner's Motion for Summary Judgment, ¶ 17, Ex. J), and there the matter languished until the filing of the present proceeding.

- On June 9, 1983, Bates and her attorney executed a contingency fee agreement providing that the attorney receive 25% of any settlement recovered without having to go to hearing. (Affidavit in Support of Petitioner's Motion for Summary Judgment, ¶ 4, Ex. C.)
- In connection with the two petitions to Workers' Compensation Court, Bates incurred costs in the amount of \$332.85.

¶6 On May 20, 1997, Ranger served Insurer's Brief in Opposition to Claimant's Motion for Summary Judgment. Despite the agreement of counsel reflected in the hearing officer's March 25 and 28, 1997 Orders, Ranger questioned the authority of the Department to grant summary judgment:

At the outset, the Insurer would note that by submitting a Brief in Opposition to Claimant's Motion for Summary Judgment before the Department, it is neither conceding that the Department has jurisdiction to render such a determination on the issues in this case, nor that the Department has the ability to render a summary judgment pursuant to its own internal rules.

(*Id.* at 1-2.)

Ranger went on to state that it was nonetheless submitting an opposing brief "for purposes of preserving its objection to the position taken by the Claimant" (*Id.* at 2.)

¶7 With respect to the merits of the motion, Ranger did not take issue with the facts tendered by Bates, nor did it file any counter-affidavits. Rather, it argued that Bates ignored a critical fact, namely that Bates' benefits had never been reduced or terminated by the insurer. It argued that since benefits had not been terminated and no judgment had ever been entered by the Workers' Compensation Court, Bates could not recover attorney fees. Finally, it argued that the claim for attorney fees, coming some eight years after the controversies between the parties had been resolved, was barred by the doctrine of laches.⁽³⁾

Hearing Officer's Decision

¶8 On August 1, 1997, the hearing officer issued Findings of Fact; Conclusions of Law; and Order. Despite its caption, the decision was one granting summary judgment. The hearing officer noted that the parties had expressly agreed to proceed on Petitioner's Motion for Summary Judgment. He then proceeded to the merits and entered findings of fact based on the affidavit supporting Bates' motion.

¶9 In his conclusions of law, the hearing officer determined that the facts pertaining to Bates' 1989 petition were nearly identical to the facts presented in *Madill*, hence Bates is entitled to attorney fees. He went on to reject Ranger's laches arguments based on this

Court's decision in *Klimek v. State Compensation Insurance Fund*, WCC No. 9602-7492, Order and Partial Summary Judgment (October 11, 1996).

¶10 While the hearing officer found that Bates is entitled to attorney fees, he addressed only fees requested with respect to her 1989 petition for PTD benefits; he did not address Bates' contention that she is entitled to attorney fees with respect to Ranger's attempt to cut off TTD benefits retroactively to 1984. The hearing officer also did not determine the amount of the attorney fees, although he reserved continuing jurisdiction to do so in the event Bates and Ranger cannot agree on the amount. The final Order states:

The Claimant is entitled to an award of reasonable add-on attorney fees, both past and future, and reasonable costs pursuant to Section 39-71-612, MCA (1979). Claimant's counsel is directed to provide Insurer's counsel a fee and expense accounting following receipt of which payment as identified shall be made. The accounting provided must include a detailed, itemized statement which also addresses each of the factors identified in *Wight v. Hughes Livestock co. [sic] Inc.*, 204 Mont. 98, 664 P.2d 303 (1980) [sic]. Continuing jurisdiction is retained by this Hearing Officer to address "reasonable fees and costs" under Section 39-71-612, MCA (1979) if an issue or issues develop relating to fees and costs.

(Findings of Fact; Conclusions of Law; and Order at 9.)

Issues On Appeal

¶11 Ranger filed a timely appeal from the hearing officer's decision. In its Notice of Appeal it sets out three contentions, which are summarized as follows:

1. The Department lacks authority to dispose of contested case matters by way of summary judgment.
2. Assuming summary judgment is within the Department's powers, the summary judgment standard applied by the hearing officer was erroneous.
3. The hearing officer failed to place the burden of proof upon Bates.

Discussion

I. Authority of the Department to Grant Summary Judgment

¶12 Ranger's first argument is based on the lack of any express provision for summary judgment by an administrative agency. There is no express provision for summary judgment in the Montana Administrative Procedure Act (MAPA), § 2-4-101 et seq., MCA, nor in the Department's rules.⁽⁴⁾

¶13 Despite the lack of any express rule for summary judgment in contested case hearings, I find that the hearing officer did not err in rendering a decision based on the merits of the summary judgment motion. My determination is based on the following considerations.

A.

¶14 While MAPA requires an evidentiary hearing in contested cases, § 2-4-601, MCA, it does not prohibit summary rulings where there are no evidentiary facts of consequence in dispute. With regard to the hearing to be conducted, MAPA provides:

2-4-612. Hearing -- rules of evidence, cross-examination, judicial notice. (1)

Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

....

On its face, the section provides for an evidentiary hearing "**on all issues involved.**" It does **not** preclude the agency from limiting evidence to **legitimate factual issues**. If the statute is read as a right to present **any** evidence which a party wishes to present, the whole process will fall apart. Under such reading, Ranger could present evidence regarding the nutritional value of SPAM even though it conceded every other fact relevant to the issue in this case. I read the provision as providing a right to evidentiary hearing only with respect to controverted facts material to the issue presented.

B.

¶15 The provision for a contested case hearing is similar to the right to jury trial. The right to jury trial does not guarantee a jury trial in every case. It does not preclude courts from issuing summary judgments and directed verdicts.

C.

¶16 The law does not require "idle [useless] acts." § 1-3-223, MCA. If there is no dispute over any facts of consequence, an evidentiary hearing is an idle and useless act.

D.

¶17 Where appropriate, this Court has borrowed from the Montana Rules of Civil Procedure. The Supreme Court has expressly approved this Court's borrowing practice. *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 436, 849 P.2d 1036, 1037 (1993). There is no logical reason precluding administrative agencies from following a similar practice. In the proceeding below, the hearing officer invoked this Court's summary judgment procedures.

E.

¶18 In *Gilpin v. Board of Nursing*, 254 Mont. 308, 837 P.2d 1342 (1992), the Montana Supreme Court affirmed a summary judgment of the Board of Nursing revoking the appellant's nursing license. The revocation was based upon appellant's criminal convictions for molesting two pre-teen girls. The appellant had stipulated to the

convictions but argued on appeal that he should have nonetheless been granted an evidentiary hearing. 254 Mont. at 311, 837 P.2d at 1344. The Supreme Court rejected his argument and affirmed the Board's summary judgment revoking his license:

The material facts of this case were stipulated--that Gilpin stands convicted of sexually molesting two pre-teen girls. The results which were forecast if disciplinary proceedings were halted did not create material issues of fact. Gilpin was afforded a hearing before the Board at which he presented his arguments in opposition to the hearing examiner's findings and conclusions. We hold that Gilpin's criminal conviction and the facts to which he stipulated were a sufficient basis for summary judgment and that Gilpin was not entitled to any hearings in addition to those which he was given.

Id.

F.

¶19 In his treatise on Administrative Law, Professor Davis states the general rule regarding a statutory or constitutional requirement for an evidentiary hearing:

Even when an agency is required by statute or by the Constitution to provide an oral evidentiary hearing, it need do so only if there exists a dispute concerning a material fact. An oral evidentiary hearing is *never* required if the only disputes involve issues of law or policy. . . .

Davis, Administrative Law, § 8.3 at 389 (3rd ed., 1994).

¶20 In *Puerto Rico Aqueduct & Sewer Authority v. U.S. E.P.A.*, 35 F.3d 600, 606 (1994), the United States Court of Appeals for the First Circuit considered various challenges to a summary judgment issued by United States Environmental Protection Agency. The Court rejected a due process challenge to the judgement, as follows:

Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way. It follows that administrative summary judgment, properly configured, is an acceptable procedural device. [Citation omitted.]

35 F.3d at 606. The Court of Appeals also addressed contentions that the administrative adjudicatory process required a hearing:

To force an agency to fully adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be **mindless** [Emphasis added.]

Id. at 605. Regarding the role of summary judgment in an administrative proceeding, the Court said:

The choice between summary judgment and full adjudication - in virtually any context - reflects a balancing of the value of efficiency against the values of accuracy and fairness. Seen in that light, summary judgment often makes especially good sense in an administrative forum, for, given the volume of matters coursing through an agency's hallways, efficiency is perhaps more central to an agency than to a court. . . .

Id. at 606. The Court found, "Administrative summary judgment is not only widely accepted, but also intrinsically valid." *Id.*

¶21 In *City of Hackensack v. Winner*, 410 A.2d 1146 (N.J. 1980), the New Jersey Supreme Court discussed at length the differences between quasi-judicial determinations by administrative agencies and determinations by courts. After noting the differences in the forums, it concluded,

[I]n practice, since there are pronounced similarities in the exercise of judicial and quasi-judicial powers, it has been recognized that court-fashioned doctrines for the handling of litigation do in fact have some genuine utility and relevance in administrative proceedings.

410 A.2d at 1160.

G.

¶22 Ranger does not contest the facts upon which the hearing officer made his decision and, in any event, the essential facts are a matter of record.

H.

¶23 Ranger agreed, in the first place, to the hearing officer considering a motion for summary judgment. In its answer brief filed a month and a half after the telephone conference in which the agreement was struck, it reserved an objection to the authority of the hearing officer to grant summary judgment. However, it did not then, and does not on appeal, contest the hearing officer's statement that it agreed he should consider the motion for summary judgment. I must therefore find that Ranger indeed agreed to the summary judgment procedure. It is bound by its agreement and waived any objection to the authority of the Department to grant summary judgment.

II. Burden of Proof

¶24 In its brief on appeal, Ranger argues that the hearing officer failed to require Bates to shoulder her burden of proof. I am bewildered by the argument.

¶25 Ranger does not contest any facts tendered by Bates. The only additional fact it tendered in its briefs below is that since 1989 it has continuously paid total disability benefits to Bates. That fact is a representation of counsel and is not supported by affidavit or other admissible evidence. If facts presented by the moving party would entitle it to summary judgment, the party opposing a motion for summary judgment cannot stand on mere allegations or upon conclusory or speculative statements; it must come forward with admissible evidence showing that there are controverted material facts precluding summary judgment. *Morton v. M-W-M, Inc.*, 263 Mont. 245, 250, 868 P.2d 576, 579 (1994). Ranger's allegation concerning continuing payments of benefits should therefore be dismissed out of hand. More importantly, however, assuming the fact to be true, it is not a material fact affecting Bates' right to summary judgment. ⁽⁵⁾

¶26 Moreover, any error by the hearing officer in applying summary judgment standards is harmless in light of the scope of review on appeal. The scope of review on appeal is plenary. The reviewing court must review the motion for summary judgment utilizing the same criteria applicable to the lower court or agency. *Neset v. Fifer*, 283 Mont. 527, 529, 942 P.2d 712, 713 (1997).

III. Summary Judgment Merits

¶27 Finally, Ranger contends that Bates was not entitled to summary judgment. Its contention is rooted in its interpretation of *Madill* rather than any factual dispute.

¶28 As in *Madill*, this case involves section 39-71-612, MCA, which authorizes an add-on award of attorney fees in cases where the amount of benefits are in dispute and the claimant ultimately obtains more than the amount tendered or paid by the insurer. The section has been amended over the years; however, the version in effect at the time of Bates' injury is controlling. *Madill*, 280 Mont. at 450, 930 P.2d at 670; *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶29 Bates was injured in 1982. Thus, the 1981 version of section 39-71-612, MCA, applies. The 1981 version reads:

39-71-612. Costs and attorneys' fees payable based on difference between amount paid by insurer and amount later found compensable. (1) If an employer or insurer pays or tenders payment of compensation under chapter 71 or 72 of this title, but controversy relates to the amount of compensation due and the settlement or award is greater than the amount paid or tendered by the employer or insurer, a reasonable attorney's fee as established by the division or the workers' compensation judge if the case has gone to a hearing, based solely upon the difference between the amount settled for or awarded and the amount tendered or paid, may be awarded in addition to the amount of compensation.

(2) When an attorney's fee is awarded against an employer or insurer under this section there may be further assessed against the employer or insurer reasonable costs, fees, and mileage for necessary witnesses attending a hearing on the claimant's behalf. Both the necessity for the witness and the reasonableness of the fees must be approved by the division or the workers' compensation judge.

The 1981 version is the same as the 1979 statute interpreted in *Madill*. Therefore, *Madill* governs the request for attorney fees in this case.

¶30 Prior to *Madill*, section 39-71-612, MCA, had been interpreted as permitting attorney fees only in cases going to trial in the Workers' Compensation Court. *Lasar v. E.H. Oftedal & Sons*, 222 Mont. 251, 721 P.2d 352 (1986); *Komeotis v. Williamson Fencing*, 232 Mont. 340, 756 P.2d 1153 (1988); and *Field v. Sears, Roebuck & Co.*, 257 Mont. 81, 847 P.2d 306 (1993). In each of the cited cases, the Supreme Court affirmed decisions of the Workers' Compensation Court denying attorney fees under section 39-71-612, MCA, where the insurer conceded liability after the filing of a petition but prior to trial.

¶31 In *Madill* the Supreme Court reconsidered its decisions in the three cited cases. It determined that the prior decisions overlooked critical language in the statute, specifically the statute's reference to "settlement." The Court interpreted the term "settlement" broadly, rejecting the State Fund's contention that the term encompassed only "a final resolution of all rights as between the parties." 280 Mont. at 459, 930 P.2d at 671.

¶32 The Supreme Court then went on to find that there were three separate controversies which were resolved by "settlement." They were:

- On May 31, 1988, the State Compensation Insurance Fund (State Fund) terminated claimant's temporary total disability (TTD) benefits and began paying him permanent partial disability (PPD) benefits. Thereafter, on August 30, 1989, the State Fund retroactively placed claimant back on TTD benefits. The reinstatement of benefits constituted a settlement for purposes of awarding attorney fees.
- At the time it placed claimant back on TTD benefits (August 30, 1989), the State Fund rejected claimant's request that he be placed on permanent total disability (PTD) benefits. Thereafter, in January 1991, the State Fund conceded that claimant was PTD and converted his benefits to PTD benefits. The concession of PTD constituted a settlement for purposes of awarding attorney fees.
- On January 29, 1991, claimant requested a lump-sum conversion of his future benefits. The State Fund responded with an offer of a partial lump sum and an annuity based on claimant's lifetime benefits. The total of the offer reflected a reduction of claimant's projected lifetime benefits to present value. The claimant rejected the proposal and thereafter petitioned the Workers' Compensation Court for a partial lump sum. On the day the matter was to be heard, the State Fund and

claimant reached an agreement for a partial lump-sum advance for which no reduction to present value was taken. However, no separate attorney fee was awarded on the advance.

¶133 The Supreme Court viewed each of the three events as triggering an entitlement to add-on attorney fees. However, it awarded a single attorney fee covering all three events. Specifically, it held that claimant was entitled to a fee based on the difference between the 300 weeks of PPD the State Fund agreed to pay on May 31, 1988, and the amount of "total disability benefits to which Madill has been entitled since May 31, 1988, and to which he will be entitled during the remainder of his life expectancy." 280 Mont. at 463, 930 P.2d at 673. Since the attorney fee had already attached to all future PTD benefits, the partial lump summing of future PTD benefits did not result in an additional attorney fee

¶134 *Madill* plainly requires that attorney fees be awarded to Bates with respect to all permanent total disability benefits payable after April 25, 1989, the date on which she filed her petition for PTD benefits. As in *Madill* claimant demanded PTD benefits, her demand was refused, and the insurer ultimately conceded liability for PTD benefits. The cases are indistinguishable, and the hearing officer did not err in determining that Bates is entitled to an add-on attorney fee with respect to all PTD benefits she receives after April 25, 1989.

¶135 The more difficult question is whether Bates is entitled to fees based on Ranger's 1988 petition to the Workers' Compensation Court requesting permission to reduce her benefits retroactively to April 4, 1984, to PPD benefits. That contention is not addressed in *Madill*, however, the plain language of section 39-71-612, MCA (1981), provides that the attorney fee must be based on the "difference between the amount settled for or awarded and the amount tendered or **paid**" Ranger had already paid the benefits in question. Thus, there is no "difference" to which the attorney fee provision can apply.

¶136 The hearing officer did not specifically address whether Bates is entitled to add-on attorney fees with respect to benefits at issue in Ranger's 1988 petition. However, it is unnecessary to remand the case for such determination since, as a matter of law, I have concluded that she is not.

IV. Amount of Attorney Fees and Costs

¶137 Bates argues that this matter should be remanded to the hearing officer for a determination of the amount of fees. The request raises two issues. First, is the decision below a *final* order reviewable on appeal? Second, if so, did the hearing officer err in not awarding a specific amount to Bates?

¶138 As a general rule, only final orders of a court or agency are appealable. See *In re Marriage of Adams*, 183 Mont. 26, 598 P.2d 197 (1979).

¶39 Unlike actions in district court, the issues raised in workers' compensation cases may not require an ultimate determination as to the specific amounts due a claimant. Often the amounts due are arithmetical computations or can be determined by the parties following a determination as to the claimant's entitlement to benefits. Thus, many petitions filed with this Court ask only that the Court determine the claimant's entitlement to benefits and do not seek a specific determination as to the actual amounts due. It is rare in such cases that the parties come back to the Court for a determination of the actual amounts due. In these sorts of cases, this Court has often retained "continuing jurisdiction" to determine the actual amounts due in the event the parties are unable to do so. It has done so as a practical matter. Continuing jurisdiction promotes judicial economy by avoiding the necessity of a new petition and the opening of a new court file.

¶40 The reservation of continuing jurisdiction does not make a decision of this Court less final or interlocutory. The issues presented to the Court are finally decided.

¶41 In the case under review, Bates she did not specifically ask the Department to fix the amount of fees and costs due her. Her prayer for relief reads:

WHEREFORE, the Petitioner respectfully requests a contested case hearing in the premises, ⁽⁶⁾ pursuant to the provisions of Sections [sic] 24.29.207, ARM; and that the Department find and rule that the Petitioner is entitled to an award of reasonable add-on attorney fees, both past and future, and to an award of her reasonable costs pursuant to Section 39-71-612, MCA.

(Petition for Hearing Regarding Attorney Fees at 4.)

¶42 The hearing officer did not determine the fees due Bates. He did, however, as this Court has done, reserve jurisdiction to do so. In the final sentence of his Order, he said: "Continuing jurisdiction is retained by this Hearing Officer to address 'reasonable fees and costs' under Section 39-71-612, MCA (1979) [sic] if an issue or issues develop relating to fees and costs." In light of the fact that Bates did not ask for a determination of the fees due her, I find that the hearing officer's reservation of jurisdiction is no different from the practice of this Court in such cases and that such reservation does not render his decision *non-final* for purposes of judicial review.

¶43 Moreover, as shown by the following discussion, the amount of attorney fees due in this particular case is a sum certain capable of arithmetical calculation. The contingent amount specified in the agreement between Bates and her attorney presumptively governs the amount of the attorney fees due. *Madill*, 280 Mont. at 463, 930 P.2d at 673. *Wight* allows for an award of attorney fees in excess of the presumptive amount. However, nowhere in the pleading or briefs has the claimant urged that attorney fees should be based on any thing other than the contingent fee specified in the fee agreement, and on appeal Bates invokes the contingent fee as the basis for her attorney fee request. The hearing officer

therefore erred in ordering Bates to provide information regarding the *Wight* factors.

¶44 There is one final matter to be resolved. Bates urges that since she has had to litigate her entitlement to attorney fees, she is entitled to the amount specified for the case going to hearing (33 %) rather than the amount provided for a settlement of her claims prior to hearing (25%). That part of her argument is without merit. The fee agreement provides in relevant part:

As compensation for legal services, the client agrees to the following fee schedule:

1) For any settlement recovered without having to go to hearing before the Workers' Compensation Court, the Law Firm will receive twenty-five percent (25%) of the settlement amount.

2) If the case goes to hearing before the Workers' Compensation Court, the Law Firm will receive thirty-three percent (33%) of the amount of compensation the client receives from an order of the Workers' Compensation Court, or from a settlement after hearing proceedings have commenced.

(Affidavit in Support of Petitioner's Motion for Summary Judgment, Ex. C.) The agreement is plain on its face. It applies to the amount recovered **for claimant** either by settlement or by hearing. No hearing regarding claimant's entitlement to benefits was ever held, thus the attorney fee is limited to 25%. The proceedings in this case involve the **attorney's** entitlement, not the claimant's entitlement. The hearing provision does not apply.

ORDER

¶45 1. Claimant is entitled to attorney fees in the amount of 25% of all permanent total disability benefits paid to her since October 4, 1988, and with respect to all future permanent total disability benefits she may receive. She is also entitled to her costs in connection with the 1988 and 1989 petitions to this Court, amounting to \$332.85.

¶46 2. This matter is remanded to the Department for entry of an order consistent with the foregoing ruling.

¶47 3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this Decision.

DATED in Helena, Montana, this 16th day of March, 1998.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Jason Dykstra

Mr. Andrew J. Utick

Date Submitted: December 30, 1997

1. *Wight v. Hughes Livestock Co.*, 204 Mont. 98, 664 P.2d 303 (1983).
2. The Supreme Court reversed a decision of this Court denying attorney fees.
3. Ranger does not argue laches on appeal.
4. There is also no express provision for any motion to dismiss; nonetheless, Ranger filed such a motion upon commencement of the petition below.
5. The Court is aware from another proceeding involving these parties, *Bates v. Ranger Ins. Co.*, WCC No. 9703-7718, that the allegation is true. However, since the fact is deemed irrelevant, I need not address whether I can consider such fact in this appeal.
6. The term "premises" is archaic. I urge practitioners to avoid such archaic terminology.