

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 55

WCC No. 9410-7160

BRETT BRINEY

Petitioner

vs.

PACIFIC EMPLOYERS INSURANCE COMPANY

Respondent/Insurer for

STAUFFER CHEMICAL COMPANY

Employer.

ORDER DENYING PENALTY AND SETTING SCHEDULE FOR AWARDING ATTORNEY FEES

Summary: On remand from the Supreme Court, the Workers' Compensation Court was called upon to determine whether a penalty should issue and to set attorneys fees.

Held: Where either the material facts or the law applicable to a case are reasonably debatable, the parties are entitled to present the case to the WCC and no penalty shall attach to that presentation. A penalty may also be appropriate when the evidence at trial is such that a reasonable insurer would accept liability and pay the benefits requested without awaiting decision of the WCC. In this case, the evidence before and after trial were not so neatly framed in the claimant's favor so as to make continued dispute by the insurer unreasonable.

Topics:

Penalties: Insurers. Where either the material facts or the law applicable to a case are reasonably debatable, the parties are entitled to present the case to the WCC and no penalty shall attach to that presentation. A penalty may also be appropriate when the evidence at trial is such that a reasonable insurer would accept liability and pay the benefits requested without awaiting decision of the WCC. In this case, the evidence before and after trial were not so neatly framed in the claimant's favor so as to make continued dispute by the insurer unreasonable.

This case is on remand from the Supreme Court following reversal of this Court's decision denying claimant's request for permanent partial disability benefits with respect to a 1981

back injury. Relying on testimony which I construed as proving that claimant suffered a number of subsequent aggravations to his back condition, I held that the insurer correctly attributed his current condition to an occupational disease (repetitive trauma) rather than his 1981 injury. Citing *Walker v. United Parcel Service*, 262 Mont. 450, 865 P.2d 113 (1993), the Supreme Court disagreed, holding that the insurer failed to sustain its burden of proving that subsequent injuries materially aggravated his original condition.

Since this case involves a pre-1987 injury, the Supreme Court determined that claimant is entitled to attorney fees and remanded for this Court to fix the amount of the fees. With respect to claimant's request for a penalty, it concluded as follows:

Although we hold that, after presentation of all the evidence, the defendant in this case has not satisfied its burden of proving by a preponderance of evidence that Briney's injury was caused by some event other than the accident he was involved in on May 24, 1981, *the facts in this case were not beyond dispute prior to presentation of evidence by both parties*. Whether, based on the facts in this case, Briney is entitled to a statutory penalty is a question to be decided, in the first instance, by the Workers' Compensation Court pursuant to the plain language of § 39-71-2907, MCA (1979). *We are aware, as a practical matter, that the same Workers' Compensation Court, which previously decided in favor of the insurer on the merits of this case, is unlikely to find, following our remand, that the insurer acted unreasonably, in spite of our conclusion that no substantial evidence supported the insurer's theory*. However, we cannot conclude as a matter of law, based on the posture of this case at the time the trial commenced, that there was no dispute regarding Briney's entitlement to benefits and that his right to statutory penalty is, therefore, controlled by *Holton*.

For these reasons, we conclude that pursuant to § 39-71-611, MCA (1979), Briney is entitled to an award of attorney fees and costs in amounts to be determined by the Workers' Compensation Court. Furthermore, following remand, the Workers' Compensation Court is to determine, based on the entire record, whether the insurer acted unreasonably when it denied Briney's claim for partial disability benefits and whether he is, therefore, entitled to a statutory penalty pursuant to § 39-71-2907, MCA (1979). [Italics added.]

(June 24, 1997 Slip Op. 95-449 at 15.)

The foregoing sets out the task for the Court upon remand.

Initially, I feel compelled to comment on the Supreme Court's view that I should decide whether a penalty is appropriate even though it is expressly skeptical that I will award a penalty. If I for an instant believed that I could not be objective in making such decision, I would not hesitate to recuse myself and call in a district judge to decide the matter. In a

prior case, I awarded a penalty despite the fact that I decided the case in the insurer's favor and was then reversed by the Supreme Court. *Caekaert v. State Compensation Ins. Fund*, 268 Mont. 105, 885 P.2d 495 (1994). I recused myself in *Kuzara v. State Fund*, WCC No. 9502-7246R1, following reversal of my decision granting a directed verdict because I had made a credibility determination in granting the motion and believed that it would be difficult for me to objectively consider opposing evidence upon a retrial of the case. *Kuzara v. State Fund*, 279 Mont. 223, 928 P.2d 136 (1996). I have invoked the phrase "*mea culpa*" in response to a motion which correctly pointed out that I had overlooked a critical matter. *Burglund v. Liberty Mutual Northwest Ins. Co.*, WCC No. 9303-6721, Order Withdrawing Findings of Fact, Conclusions of Law and Judgment, decided March 1, 1995. I have written draft opinions finding for one party, then upon further reflection reached a different result.

While courts are "institutions", they are staffed by women and men who are not only fallible but who may reasonably disagree among themselves. I take pride in my ability to admit my mistakes and to change my mind when logic, further reflection, and/or Supreme Court decisions persuade me I should do so.

Now to the matter at hand.

As I read the decision on appeal, the Supreme Court agrees that *prior* to the trial the "facts in this case were not beyond dispute." I have previously held that where either the material facts or the law applicable to the case is reasonably debatable, the parties are entitled to present the case to this Court and no penalty shall attach to that presentation. *Connery v. Liberty Northwest Ins. Corp.*, WCC No. 9602-7507, Findings of Fact, Conclusions of Law and Judgment, (7/22/96); *Kuykendall v. Liberty Northwest*, WCC No. 9611-7646, Findings of Fact, Conclusions of Law and Judgment, (3/17/97). I agree with the Supreme Court that the facts in this case were "not beyond dispute" prior to trial. Thus, a penalty is unwarranted up to the point of trial.

The decision on appeal suggests that a penalty may be appropriate when the evidence at trial is such that a reasonable insurer would accept liability and pay the benefits requested by the claimant without awaiting a decision of this Court. I have no hesitancy in embracing that suggestion. Whenever an insurer is presented with facts demonstrating it is clearly liable for benefits, and that its liability for such benefits is not reasonably debatable, it has a duty to pay the benefits. Its duty is not forestalled by a trial in this Court.

Thus, the question that must be answered on remand is whether the facts presented at trial were such that a reasonable insurer could not reasonably continue to deny liability. I do not think that they were.

The issue presented in this case was whether claimant's current disability was due to his 1981 injury. The insurer asserted that it was not. It noted a number of subsequent events that it believed aggravated claimant's condition and argued that his condition was a

product of multiple events and should therefore be considered an occupational disease. Relying on medical testimony that claimant's disability was the cumulative result of repetitive injuries, and that absent the subsequent events the claimant would have been able to continue working (Finding of Fact 19a; Dr. Canty Dep. at 40-45) , I found for the insurer. Other testimony indicated that claimant's back condition deteriorated as a result of subsequent events. (Findings of Fact 19b, c, and d.) I noted Dr. Cooney's opinion: "No, I don't think you can refer to any specific injury as the cause that he was unable to return to work in September of '93" and his testimony that claimant's condition was "likely related to previous traumatic events which had occurred over the past 10 to 12 years" (Finding of Fact 19c; Cooney Dep. at 16, 46.)

In a subsequent case decided on October 10, 1997, the Supreme Court affirmed a decision of this Court which held that a claimant suffered from a subsequent occupational disease relieving the insurer for a prior injury from further liability. In *Liberty Northwest Ins. Corp. v. Stimson Lumber Co.*, (Slip Op. 96-368, October 10, 1997), the court affirmed my determination that the insurer for a 1992 back injury was relieved from further liability where a preponderance of the evidence showed that post-injury the claimant was able to perform his job duties and that he became disabled only after he was subjected to additional, significant cumulative work-related stress on his back. I found that the post-injury, cumulative trauma materially aggravated claimant's pre-existing back condition and that his post-injury employer was therefore liable for his condition under the Occupational Disease Act, Title 39, chapter 72, MCA.

The issues and facts in this case were not as neatly framed as in *Liberty Northwest*. Nonetheless, there is some similarity between the two cases, and I am unable to say that the insurer herein was unreasonable in contesting liability.

ORDER

For the reasons set forth in the foregoing discussion, the claimant's request for a penalty is **denied**. He is entitled to attorney fees, but the amount of the fees must be determined. Therefore, claimant shall submit his claim for attorney fees, and any documentary evidence supporting his claim, by November 3, 1997. Pacific Employers Insurance Company shall reply to the claim by November 17, 1997. The parties shall inform the Court whether an evidentiary hearing is necessary. If so, the Court will then schedule a hearing.

DATED in Helena, Montana, this 17th day of October, 1997.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Andrew D. Huppert
Mr. Brendon J. Rohan
Submitted: July 16, 1997