IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 56

WCC No. 2003-0752

LAVERN BUCKLEY

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

COMMON FUND ATTORNEY FEE ORDER

Summary: After establishing that additional benefits were due certain claimants receiving social security disability benefits, the claimant's attorney sought common fund attorney fees.

Held: The claimant's attorney is entitled to common fund fees in the amount of 25% of the benefits payable as a result of his efforts in the present litigation. The 25% is reasonable in light of the relatively small amount of benefits due each individual claimant and in light of the attorney's fee agreement with his own client.

Topics:

Attorney Fees: Common Fund. Where there is no evidence upon which the Court could conclude that the insurer acted unreasonably, and where the claimant establishes not only his own right to additional benefits but also the right of other similarly situated, identifiable claimants to additional benefits, the claimant's attorney is entitled to attorney fees out of the additional benefits which are paid as a result of his efforts.

Attorney Fees: Common Fund. Where an attorney's approved fee agreement provides for a 25% contingent fee and the average amount of benefits secured for other nonparticipating claimants is small relatively speaking (here $4,000), assessment of a 25% fee against the benefits obtained for the other nonparticipating claimants is reasonable.

¶1 This matter came on for hearing on July 14, 2004, to determine the amount of the common fund attorney fees. Mr. Lawrence A. Anderson appeared on behalf of the

claimant. Mr. Thomas E. Martello appeared on behalf of the Montana State Fund (State Fund).

¶2 The claimant in this case sought additional benefits due to him on account of the State Fund's failure to reduce the social security offset when auxiliary social security benefits ceased. He sought the additional benefits on his own behalf and on behalf of other similarly situated claimants. The parties determined that in fact the State Fund had in some cases continued to offset auxiliary benefits after such benefits had ceased. In a cooperative endeavor, they then determined which claimants were affected and have now determined the amounts of additional benefits due those claimants. The cooperation in this case has been exemplary and has resulted in the identification of approximately $250,000 in additional benefits due the identified claimants.

¶3 Where litigation by a single individual entitles other claimants to additional benefits, a "common fund is created." And, where a common fund exists, "the common fund doctrine 'authorizes the spread of fees among those individuals benefitting from the litigation which created the common fund.'" *Rausch v. State Compensation Ins. Fund,* 2002 MT 203, ¶ 45, 311 Mont. 210, ¶ 45, 54 P.3d 25, ¶ 45.

¶4 In determining whether common fund attorney fees are appropriate, the Court must consider three factors. Those factors are as follows:

> First, a party (or multiple parties in the case of a consolidated case) must create, reserve, increase, or preserve a common fund. This party is typically referred to as the active beneficiary. Second, the active beneficiary must incur legal fees in establishing the common fund. Third, the common fund must benefit ascertainable, nonparticipating beneficiaries.

Id., ¶ 46.

¶5 All three factors are met in the present case. Through the present litigation, the claimant established the right of other claimants whose benefits were improperly reduced to additional benefits. Second, pursuant to the fee agreement with his attorney, the claimant incurred legal fees in establishing the common fund. Finally, the litigation has benefitted ascertainable, nonparticipating beneficiaries; indeed, those beneficiaries have been identified and the amounts due to them have been computed and are ready to be paid. I therefore determine that the claimant's attorney is entitled to common fund attorney fees to be paid out of the benefits due each of the benefitted claimants.

¶6 The claimant's attorney has requested that the common fund fee be fixed at 25% of the benefits paid out as a result of this litigation. That is the same percentage due the claimant's attorney under the attorney fee agreement with his client, an agreement which was approved by the Department of Labor and Industry. The State Fund has no objection to the fee and I find the requested fee reasonable. I note that approximately sixty claimants were benefitted by the present litigation. On average, each claimant will receive approximately an additional $4,000 in benefits. A 25% attorney fee on $4,000 amounts to $1,000, an amount that is woefully insufficient to persuade most attorneys to litigate.

¶7 The only claimant to object to an award of attorney fees in this case urged that the fee should be paid by the insurer and not the benefitted claimants. He does not object to the amount of the fee sought by the claimant's attorney.

¶8 Attorney fees can be awarded against an insurer only where the insurer's conduct has been unreasonable. §§ 39-71-611 and -612, MCA. In the present case, the precise time when auxiliary benefits terminate is not always determinable in advance. There is no evidence or even an accusation that the State Fund was aware that auxiliary benefits had terminated, only that it was unaware of the termination. There was no showing that the Social Security Administration or the affected claimants informed the State Fund of the reduction in benefits. There is therefore no basis for a finding of unreasonableness on the part of the State Fund.

¶9 On the other hand, as discussed above, the common fund doctrine expressly provides that attorney fees are to be paid out of the benefits which are paid as a result of the efforts of the individual claimant's attorney. I therefore find that an award of common fund attorney fees is appropriate and that a 25% fee is reasonable.

ORDER

¶10 The claimant's attorney is entitled to a 25% attorney fee on all additional benefits paid to the benefitted claimants as a result of this litigation. The State Fund shall withhold and remit to the claimant's attorney the 25% from the additional benefits it has determined are due. It shall pay the remaining 75% directly to the benefitted claimants.

DATED in Helena, Montana, this 21st day of July, 2005.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Lawrence A. Anderson
Mr. Thomas E. Martello
Mr. Kelly M. Wills
Mr. Wess Kuhnhausen - Courtesy Copy
Submitted: July 14, 2004