

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 12

WCC No. 2000-0201

ANN BUSTELL

Petitioner

vs.

AIG CLAIMS SERVICE, INCORPORATED/

THE INSURANCE COMPANY OF PENNSYLVANIA

Respondents/Insurers.

ORDER FOR HEARING ON ATTORNEY FEE REQUEST

Summary: Petitioner indicated the possible need for an evidentiary hearing in his initial request for attorney fees based on his contingency fee or, alternatively, a \$225 an hour hourly rate. Immediately after receiving an objection to awarding attorney fees based on a contingency or \$225 an hour rate, the Court ordered petitioner to file an accounting of his hours and a brief regarding the hourly rate. Following those filings, the respondent objected to the accounting of hours and hourly rate. Within two days of the objection, the petitioner requested a hearing.

Held: The request for hearing was timely under Rule 24.5.343(c), which requires that an evidentiary hearing be requested within ten days of an objection to a request for attorney fees. Claimant made an anticipatory request for a hearing. Moreover, the Court ordered further submissions and briefings, with which petitioner complied. The request for hearing following submission of an hourly accounting was within two days.

Topics:

Attorney Fees: Hearing. Where petitioner indicates in her initial request for attorney fees that a hearing may be required, and she requests a hearing within two days after the respondent objects to the hourly accounting of her attorney, the request for hearing was made within ten days of respondent's objection and is timely under Rule 24.5.343(c).

Constitutions, Statutes, Rules, and Regulations: Workers' Compensation Court Rules: Rule 24.5.343(c). Where petitioner indicates in her initial request for attorney fees that a hearing may be required, and she requests a hearing within two days after the respondent

objects to the hourly accounting of her attorney, the request for hearing was made within ten days of respondent's objection and is timely under Rule 24.5.343(c).

Attorney Fees: Hearing. Where respondent objects to an hourly accounting by petitioner's attorney and to the attorney's hourly rate, a hearing is warranted.

¶1 Petitioner has requested an evidentiary hearing with respect to her request for attorney fees. Respondent objects to the request on the grounds it is untimely and without good cause. Respondent cites Rule 24.5.343 (c) and (d), which provides:

(c) If an objection is made to the reasonableness of the attorney fee claim, any party may request an evidentiary hearing, stating specifically the reasons a hearing is needed. The request for hearing must be made at the same time an objection is filed if by the objecting party, or within 10 days of the filing of the objection if requested by claimant's attorney.

(d) The court will determine if an evidentiary hearing is required. If a hearing is deemed necessary, it will be scheduled at the court's earliest convenience and the court will issue its decision following the hearing. Evidentiary hearings will generally be set in Helena unless good cause to the contrary can be demonstrated by a party. If the court determines that no hearing is necessary, the court will determine attorney fees based on the claim and objections. No additional pleadings will be allowed unless requested by the court.

¶2 Initially, the request for hearing is timely. Petitioner's attorney filed his initial request for attorney fees on November 21, 2002, arguing that fees should be awarded based on his contingent fee agreement with petitioner. In the alternative he requested attorney fees based on \$225 per hour for his time and \$135 an hour for an associate's time. He submitted affidavits respecting the contingent fee agreement and the hourly rates but not the actual hours worked. Anticipating the possible need for an evidentiary hearing, he said:

Counsel anticipates evidence may be necessary under one or more of the alternative requests for the attorney fees.

(Motion for Calculation of Attorney's Fees and Order on Application of the Attorney Fee Lien Per *Lockhart*, p. 1.)

¶3 On December 10, 2002, respondent filed a response to the attorney fees request, urging that an award of fees based on a contingent fee is improper and arguing for a \$75 an hour maximum for hours actually worked.

¶4 After reading the response, the Court on December 12, 2002, held a telephone conference with counsel and advised them that it will find the statutory limitation of attorney fees to an hourly basis to be constitutional. (December 12, 2002 Minute Book Hearing # 3482.) I ordered petitioner's attorney to file an affidavit regarding the hours he worked on the case. (*Id.*) I also directed him to file a brief regarding the hourly rate. That

brief was due within two weeks and respondent then had until January 10, 2003, to file a reply. (*Id.*)

¶15 Petitioner's attorney filed an affidavit and record of his time on December 13, 2002. On December 24, 2002, he filed his brief. On January 13, 2003, respondent filed its reply in which it argued, among other things, that the time records of petitioner's attorney are deficient. Two days later, on January 15, 2003, petitioner's attorney formally requested an evidentiary hearing regarding attorney fees.

¶16 Plainly, under these facts, the request for an evidentiary hearing was timely. The need for hearing was initially indicated pre-emptively before the ten-day period set out in Rule 24.5.343 (c) had even been triggered. Within two days of claimant's initial request for attorney fees, the Court notified counsel that petitioner's attorney will be limited to payment on an hourly basis, ordered petitioner's attorney to file an affidavit concerning his hours, along with a brief concerning the hourly rate, and allowing respondent to file a reply concerning those matters. The respondent's reply, with its objections to hours and rate, was filed on January 13, 2003, and within two days the petitioner requested an evidentiary hearing. No matter how I look at this, the request for an evidentiary hearing was timely.

¶17 After reading the supplementary briefs regarding attorney fees, as well as the petitioner's request for an evidentiary hearing on the matter, I find there is good cause for a hearing. The respondent urges that petitioner's attorney's record of time spent on this case lacks sufficient detail. It does not say what time it believes was reasonable - apparently it would have the Court deny the attorney fee request altogether. That view flies in the face of this Court's determination that claimant is entitled to attorney fees and I reject it. The accuracy and sufficiency of the accounting is an appropriate matter for hearing.

¶18 THEREFORE, IT IS ORDERED that an evidentiary hearing regarding attorney fees shall be held in Billings during the trial week of April 21, 2003.

¶19 IT IS FURTHER ORDERED that by April 1, 2003, respondent shall provide the Court and petitioner with a written statement as to what hours and work it does **not** dispute, along with the hourly fee and total fees it contends should be adopted. Respondent is warned that the Court will not look favorably upon a continued contention that claimant should receive nothing for attorney fees.

DATED in Helena, Montana, this 26th day of February, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Paul E. Toennis
Ms. Melanie S. Pfeifer
Submitted: January 24, 2003