

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 66

WCC No. 2000-0201

ANN BUSTELL

Petitioner

vs.

**AIG CLAIMS SERVICE, INCORPORATED and
THE INSURANCE COMPANY OF PENNSYLVANIA**

Respondents/Insurers.

DECISION AND JUDGMENT FOR ATTORNEY FEES

AFFIRMED 12/21/04 in

[Bustell v. AIG Claims Service Inc., 2004 MT 362 \(No. 04-124\)](#)

Summary: The Court previously held that claimant's attorney is entitled to attorney fees. Claimant's attorney requested that the fee award be based on his contingent fee agreement with the claimant or for 477 hours worked at a rate of \$225 an hour.

Held: The Court is bound by the attorney fee regulations of the Department of Labor and Industry. § 39-71-714(2), MCA. While those regulations provide for a standard hourly fee of \$75 an hour, they also allow the Court to deviate from that amount if ten factors set out in the rule favor such deviation. In this case the factors clearly cut in favor of an increased award of \$140 an hour for the 477 hours claimed by the claimant's attorney.

Topics:

Attorney Fees: Amount. Attorney fees which can be awarded by the Court must be based on the hours worked by the claimant's attorney at either his usual and customary hourly rate or the rate established by the Department of Labor and Industry, whichever is less. § 39-71-614(2), MCA (1999).

Attorney Fees: Amount. While the attorney fee regulation of the Department of Labor and Industry, ARM 24.29.3802, was expressly enacted under section 39-71-613, MCA (1999), subsection (2), of that section generally authorizes it to establish attorney fees. The provision in section 39-71-614(2), MCA (1999), limiting the Court to the Department's schedule when awarding attorney fees, is mere recognition of the Department's authority

under section 39-71-613, MCA. The claimant's attorney therefore had fair notice of the limitation and was not denied due process of law by application of the fee schedule.

Attorney Fees: Amount. While the Department of Labor and Industry rule regarding attorney fees initially fixes a maximum fee of \$75 an hour, the rule also allows for an increase of the hourly fee based upon consideration of ten factors. Giving consideration to those factors in this case, the Court awards the claimant's attorney fees at a \$140 hourly rate, which it finds is a reasonable rate for his services.

Attorney Fees: Amount. Attorney fees awarded against the insurer must be based on documented hours of the attorney. No fees can be awarded where an attorney does not keep track of his or her time.

Constitutional Law: Due Process. While the attorney fee regulation of the Department of Labor and Industry, ARM 24.29.3802, was expressly enacted under section 39-71-613, MCA (1999), subsection (2) of that section generally authorizes it to establish attorney fees. The provision in section 39-71-614(2), MCA (1999), limiting the Court to the Department's schedule when awarding attorney fees is mere recognition of the Department's authority under section 39-71-613, MCA. The claimant's attorney therefore had fair notice of the limitation and was not denied due process of law by application of the fee schedule.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-614, MCA (1999). Attorney fees which can be awarded by the Court must be based on the hours worked by the claimant's attorney and either his usual and customary hourly rate or the rate established by the Department of Labor and Industry, whichever is less. § 39-71-614(2), MCA (1999).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-614, MCA (1999). While the attorney fee regulation of the Department of Labor and Industry, ARM 24.29.3802, was expressly enacted under section 39-71-613, MCA (1999), subsection (2) of that section generally authorizes it to establish attorney fees. The provision in section 39-71-614(2), MCA (1999), limiting the Court to the Department's schedule when awarding attorney fees is mere recognition of the Department's authority under section 39-71-613, MCA.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-613, MCA (1999). While the attorney fee regulation of the Department of Labor and Industry, ARM 24.29.3802, was expressly enacted under section 39-71-613, MCA (1999), subsection (2) of that section generally authorizes it to establish attorney fees. The provision in section 39-71-614(2), MCA (1999), limiting the Court to the Department's schedule when awarding attorney fees is mere recognition of the Department's authority under section 39-71-613, MCA.

¶1 This Court previously determined that claimant's attorney, Mr. Paul E. Toennis (Toennis), is entitled to attorney fees from the respondent/insurer. The matter now before the Court is the amount of attorney fees to be awarded. A hearing regarding attorney fees was held in Billings on May 13, 2003, and the matter is now ready for decision. Findings of fact as pertain to attorney fees are contained in the following discussion and are not separately enumerated.

Decision

¶2 Toennis initially seeks fees based on his contingent fee agreement with the claimant. If the Court rejects that as a basis for fees, he then seeks fees on an hourly basis, \$225 an hour for his own time and \$135 an hour for the time of his associate, Ingrid Gustafson (Gustafson). Toennis presented an accounting of his time. That accounting was kept contemporaneously with his work and shows 477.1 hours of work. Gustafson did not keep her time but Toennis estimates she spent 50 hours of her time working on the case.

¶3 Respondent urges that Toennis should be limited to \$70 an hour. It does not contest 310.6 of hours of his time but disputes the remaining 166.5 hours. It also disputes the fees claimed for Gustafson.

¶4 The fee dispute is governed by statute. Section 39-71-614, MCA (1999), fixes the amount of fees that may be awarded against an insurer, providing:

39-71-614. Calculation of attorney fees -- limitation. (1) The amount of an attorney's fee assessed against an insurer under 39-71-611 or 39-71-612 must be based exclusively on the time spent by the attorney in representing the claimant on the issues brought to hearing. The attorney must document the time spent, but the judge is not bound by the documentation submitted.

(2) The judge shall determine a reasonable attorney fee and assess costs. The hourly rate applied to the time spent must be based on the attorney's customary and current hourly rate for legal work performed in this state, subject to a maximum established by the department.

(3) This section does not restrict a claimant and an attorney from entering into a contingency fee arrangement under which the attorney receives a percentage of the amount of compensation payments received by the claimant because of the efforts of the attorney. However, an amount equal to any fee and costs assessed against an insurer under 39-71-611 or 39-71-612 and this section must be deducted from the fee an attorney is entitled to from the claimant under a contingency fee arrangement.

The statute is plain and clear on its face. The Court cannot add to it, ignore portions of it, or modify it. §1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.").

¶15 Initially, the statute precludes any award based on Toennis' contingent fee with the claimant. While he may enter into a contingency fee contract with the claimant, the fees which may be awarded against the insurer must be based on an hourly fee basis. Toennis' request for a contingency fee award is therefore denied.

¶16 The statute also requires the attorney to "document the time spent" on the case. By necessary implication, fees cannot be awarded with respect to undocumented time. Since Gustafson did not document her time, the request for fees with respect to her time must be disallowed.

¶17 Toennis documented 477.1 hours of work. As set forth in section 39-71-614(1), MCA, I am not bound by that documentation. Although the subsection sets forth no standards for deviating from the documentation, a reasonableness standard is implied. Thus, the Court must review the hours to determine if they are reasonably related to the case and if they are reasonable in relation to the work performed. Attorney fees must be limited to work reasonably connected to the case. Having reviewed Toennis' itemization of hours and his testimony at the attorney fee hearing, I find that all 477.1 hours were reasonably connected to the claimant's case and were reasonable with respect to the actual work performed. He is therefore entitled to fees for those 477.1 hours of work.

¶18 The final question is the hourly rate for Toennis' time. He urges \$225 an hour. That figure is not a rate he charges clients as all his work is on a contingent fee basis. Rather, it is the amount of his contingency earnings in 2001 divided by the number of hours he worked that year. That figure does not represent a "customary and current hourly rate for legal work performed in this state." It is also a volatile figure which could dramatically change year-to-year based on his recoveries for his clients. Most importantly, it exceeds the maximum amount prescribed by the Department of Labor and Industry (Department).

¶19 A maximum fee of \$75 an hour is prescribed by the Department in Rule 24.29.3802, which provides in relevant part:

24.29.3802 ATTORNEY FEE REGULATION (1) This rule is promulgated under the authority of 39-71-20339-71-203 and 39-71-61339-71-613, MCA, to implement regulation of the fees charged to claimants by attorneys in workers' compensation cases as provided in 39-71-61339-71-613, MCA.

(2) An attorney representing a claimant on a workers' compensation claim shall submit to the division within thirty days of undertaking representation of the claimant, in accordance with 39-71-61339-71-613, MCA, on forms supplied by the division, a contract of employment stating specifically the terms of the fee arrangement. An attorney substituting for another attorney previously representing a claimant must submit a new contract conforming with this rule within thirty days of undertaking representation of the claimant. The contract of employment shall be signed by the claimant and the attorney, and must be

approved by the administrator of the division of workers' compensation or his designee. The administrator or his designee shall return the contract to the attorney along with a notification that the contract has been approved or disapproved.

(3) Except as provided in subsection (7), an attorney representing a claimant on a workers' compensation claim who plans to utilize a contingent percentage fee arrangement to establish the fee with the claimant, may not charge a fee above the following amounts:

(a) For cases that have been settled without an order of the workers' compensation judge or the supreme court, twenty percent (20%) of the amount of compensation payments claimant receives due to the efforts of the attorney.

(b) For cases that go to a hearing before the workers' compensation judge or the supreme court, twenty-five percent (25%) of the amount of additional compensation payments the claimant receives from an order of the workers' compensation judge or the supreme court due to the efforts of the attorney.

(4) The fee schedule set forth in subsection (3) does not preclude the use of other attorney fee arrangements, such as the use of a fee system based on time at a reasonable hourly rate not exceeding \$75.00 per hour, but the total fee charged may not exceed the schedule set forth in subsection (3) except as provided in subsection (7). When such fee arrangement is utilized, the contract of employment shall specifically set forth the fee arrangement, such as the amount charged per hour.

....

(7) For good cause shown, the division may approve a variance providing for fees in excess of the guidelines of fees as set forth in subsections (3) and (4).

(a) To obtain approval of a variance, an attorney has the burden of providing clear and convincing evidence of entitlement to a greater fee by documenting the following factors in regard to the specific claimant and the specific case:

(i) The anticipated time and labor required to perform the legal service properly.

(ii) The novelty and difficulty of legal issues involved in the matter.

(iii) The fees customarily charged for similar legal services.

(iv) The possible total recovery if successful.

(v) The time limitations imposed by the client or circumstances of the case.

(vi) The nature and length of the attorney-client relationship.

(vii) The experience, skill and reputation of the attorney.

(viii) The ability of the client to pay for the legal services rendered.

(ix) The risk of no recovery.

(x) The market value of the lawyer's services at the time and place involved.

(b) If a variance requested under (7) (a) is not approved, an attorney may request that the administrator or his designee review the matter and issue his order of determination pursuant to procedures set forth in ARM. [Emphasis added.]

¶10 Toennis argues that the \$75 an hour limitation does not apply because the rule was expressly promulgated under section 39-71-613, MCA, not section 39-71-614, MCA. He further argues that if the \$75 limit applies he is deprived of due process because the rule does not provide him notice of the limitation. That argument is in turn based on the fact that the rule was expressly promulgated under section 39-71-613, MCA, and Toennis' claim that he lacked notice of the applicability of the limit under section 39-71-614, MCA. I am unpersuaded by the arguments.

¶11 Section 39-71-614(2), MCA, expressly provides that the attorney fees awarded by the Court are subject to an hourly "maximum established by the department." While the authority cited by the Department as authorizing it to establish such maximum was section 39-71-613, MCA, its authority under that section is broad. Section 39-71-613(2), MCA, provides in relevant part, "(2) The department may regulate the amount of the attorney fees in any workers' compensation case." Thus, section 39-71-614(2), MCA, merely confirms what is already provided in section 39-71-613(2), MCA, to wit: the Department, not the Court, has the authority to regulate attorney fees in workers' compensation cases. Thus, the Department's exercise of its authority under section 39-71-613, MCA, was sufficient for purposes of section 39-71-614(2), MCA, and provided Toennis with adequate notice under the latter section. Since there was adequate notice, Toennis' due process argument fails for lack of a predicate, the predicate being a lack of notice.

¶12 As set forth in subsection (4), the maximum allowable hourly fee under the rule is \$75 an hour, however, ARM 24.29.3802(7) expressly allows the Department to deviate from that amount under unusual circumstances. Since the Court, rather than the Department, must, subject to the rule, fix the fee in a litigated case, § 39-71-614(2), by implication the Court must have the same authority to apply the exception. I must therefore determine whether the criteria established by ARM 24.29.3802(7) justifies deviation from the \$75 rate in this case.

¶13 Toennis must prove by "clear and convincing evidence" that he is entitled to a fee higher than \$75 an hour. He has carried his burden. Applying the factors set forth in ARM 24.29.3802(7), he has shown:

(i) The anticipated time and labor required to perform the legal service properly.

This case involved an accident occurring in Indiana, a jurisdictional dispute, and a significant dispute over employment status. Out-of-state depositions were required. As shown by the actual hours Toennis worked, the case required more time and effort than many other workers' compensation cases. Assuming Toennis had six billable hours a day

and worked 2080 hours a year, the time spent on this case amounted to nearly one-third of a billable year. That in turn amounts to a significant part of his practice which is even more significant given the risk of no recovery. This factor favors Toennis' request for an increase in the hourly rate.

(ii) The novelty and difficulty of legal issues involved in the matter.

The issues were both novel and difficult. Initially, there was a jurisdictional dispute, a dispute which was complicated by the insurer's initial indication that Montana was the proper jurisdiction for the claim and its later repudiation of that indication and its insistence that Indiana had jurisdiction. There was also a significant dispute over employment status, a dispute complicated by the particular facts and circumstances of this case and the nature of the interstate trucking industry. This factor favors Toennis' request for an increase in the hourly rate.

(iii) The fees customarily charged for similar legal services.

Testimony by the insurers' expert attorney witness established that the usual and customary fee in Billings for workers' compensation litigation is between \$125 and \$150 an hour. The testifying attorney (Geoffrey R. Keller), like Toennis, has extensive experience and expertise in workers' compensation matters and typically charges \$140 an hour. I find that \$140 an hour is a reasonable fee for the work Toennis performed. This factor therefore favors Toennis' request for an increase in the hourly rate.

(iv) The possible total recovery if successful.

This case involves a relatively young quadriplegic. The potential total recovery over her lifetime is in the millions of dollars, encompassing not only compensation benefits but significant medical expenses and domiciliary care. Toennis estimates that benefits will be in the range of \$6 million over the claimant's life. This factor favors Toennis' request for an increase in the hourly rate.

(v) The time limitations imposed by the client or circumstances of the case.

There were no unusual time limitations imposed in this case.

(vi) The nature and length of the attorney-client relationship.

The facts do not establish a long-term attorney-client relationship or a relationship that is unusual for a workers' compensation case.

(vii) The experience, skill and reputation of the attorney.

The facts, as well as my own experience with Toennis in litigated matters, establish that Toennis is highly skilled in workers' compensation matters. Indeed, his practice is almost

exclusively devoted to workers' compensation. This factor therefore favors Toennis' request for an increase in the hourly rate.

(viii) The ability of the client to pay for the legal services rendered.

Toennis' testimony established that claimant was financially unable to pay for his services on an hourly rate and that a contingent fee contract was necessary. Indeed, claimant was confronted not only with the necessity of securing and paying for counsel but with a total loss of income and catastrophic expenses for medical and domiciliary care. This factor favors Toennis' request for an increase in the hourly rate.

(ix) The risk of no recovery.

There was a significant risk of no recovery based on the jurisdictional and employment issues. Indeed, this case was vigorously defended by able counsel for the insurer. This factor favors Toennis' request for an increase in the hourly rate.

(x) The market value of the lawyer's services at the time and place involved.

Again, based on the testimony of Geoffrey R. Keller, I find that the market value of Toennis' services was \$140 an hour. (See factor (iii).) This factor favors Toennis' request for an increase in the hourly rate.

Cumulatively, the ten factors clearly and convincingly support a higher rate than \$75 an hour. I find that they support a \$140 an hour rate. I therefore find that Toennis is entitled to attorney fees in the amount of \$66,794.

JUDGMENT FOR ATTORNEY FEES

¶14 For the reasons set forth above, judgment is entered finding Mr. Paul E. Toennis is entitled to attorney fees in the sum of \$66,794, which shall be paid by respondent, The Insurance Company of Pennsylvania.

¶15 This Judgment is certified as final for all purposes.

DATED in Helena, Montana, this 14th day of November, 2003.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Paul E. Toennis
Ms. Melanie S. Pfeifer
Submitted: May 13, 2003