IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 26A

WCC No. 2000-0201

ANN BUSTELL

Petitioner

vs.

AIG CLAIMS SERVICE, INCORPORATED

and

THE INSURANCE COMPANY OF PENNSYLVANIA

Respondents/Insurers for

NORTH AMERICAN VAN LINES

and

J-TABS, INCORPORATED

Employers.

ORDER CLARIFYING PENALTY AND AMENDING FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

¶1 In its Findings of Fact, Conclusions of Law and Judgment, this Court previously found the respondent insurer liable for claimant's December 2, 1999 injury and held that respondent Insurance Company of Pennsylvania is further liable for attorney fees and a penalty. Following that decision, the respondent moved for reconsideration or clarification of the award of the penalty. It noted that it has been paying benefits since September 8, 2000, under a reservation of rights and that the penalty award did not address those payments or provide other guidance concerning calculation of the penalty. Acknowledging that I did not provide sufficient guidance regarding the penalty, I ordered further briefing on the matter.

¶2 The penalty in this case is governed by section 39-71-2907, MCA (1999). That section provides:

39-71-2907. Increase in award for unreasonable delay or refusal to pay.

(1) The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

¶3 The respondent denied all liability for the claim in this case, however, following mediation held on September 8, 2000, it agreed to pay benefits commencing September 8, 2000, under a reservation of rights pending a final determination of liability by this Court. Both parties agree that the penalty applies to all benefits -- compensation, medical, and domiciliary -- due prior to September 8, 2000.

¶4 Claimant urges that the penalty applies to some benefits paid for the periods on and after September 8, 2000, because they were "unduly delayed." Specifically, she urges that the penalty should apply (1) to compensation benefits paid for the period from September 8, 2000 to October 15, 2000, since payment of those benefits was not made until early November 2000 and not received by claimant until November 20, 2000, and (2) to domiciliary care benefits paid for the period from September 8, 2000 to January 31, 2001, since the benefits for that period were not paid until February 28, 2001.

¶5 The respondent urges that it did not unreasonably delay the benefits paid for the periods after September 7, 2000. It states that it decided to institute benefits under a reservation of rights after it received the mediation report. That report was received by respondent on September 28, 2000, and on October 11, 2000, it decided to pay benefits retroactive to the date of mediation (September 8, 2000) under a reservation of rights. (Respondent/Insurer's Second Reply Brief Regarding Motion for Reconsideration at 2-3.) It prepared a stipulation to that effect and forwarded it to claimant for her signature. (*Id.* at 3.) According to respondent, the first benefits were paid within two weeks after it received the signed stipulation back from claimant. (*Id.*)

¶6 Based on the foregoing facts, I find and determine that the penalty applies to compensation and domiciliary benefits accruing through October 10, 2000. The denial of liability did not become reasonable on the date of mediation or on the date the insurer received the mediator's recommendation, rather it continued to be unreasonable until the insurer's decision to commence paying benefits. I am satisfied, however, that the further delay between October 11th and the first check issued to claimant was reasonable in light of the insurer's need to obtain information to determine the amount of benefits and execute the stipulation.

¶7 The only remaining question is whether respondent is liable for a penalty on domiciliary benefits payable between October 11, 2000 and January 31, 2001. Those benefits were not paid until February 28, 2001.

¶8 Respondent states that the delay in payment of domiciliary benefits was not unreasonable because claimant did not specifically request domiciliary care benefits until December 22, 2000. Upon receipt of the request, the insurer promptly requested submission of a written prescription for domiciliary care as required by section 39-71-1107(1)(c), MCA, and further requested information regarding the medicaid reimbursement for care in a nursing home since the domiciliary care being provided claimant was by family members, § 39-71-1107(3), MCA.

¶9 Domiciliary care benefits are governed by section 39-71-1107, MCA (1999), which provides:

> **39-71-1107. Domiciliary care -- requirements -- evaluation.** (1) Reasonable domiciliary care must be provided by the insurer:
>
> (a) from the date the insurer knows of the employee's need for home medical services that results from an industrial injury;
>
> (b) when the preponderance of credible medical evidence demonstrates that nursing care is necessary as a result of the accident and describes with a reasonable degree of particularity the nature and extent of duties to be performed;
>
> (c) when the services are performed under the direction of the treating physician who, following a nursing analysis, prescribes the care on a form provided by the department;
>
> (d) when the services rendered are of the type beyond the scope of normal household duties; and
>
> (e) when subject to subsections (3) and (4), there is a means to determine with reasonable certainty the value of the services performed.
>
> (2) When a worker suffers from a condition that requires domiciliary care, which results from the accident, and requires nursing care as provided for in Title 37, chapter 8, a licensed nurse shall provide the services.
>
> (3) When a worker suffers from a condition that requires 24-hour care and that results from the accident but that requires domiciliary care other than as provided in Title 37, chapter 8, the care may be provided by a family member. The insurer's responsibility for reimbursement for the care is limited to no more than the daily statewide average medicaid reimbursement rate for the current fiscal year for care in a nursing home. The insurer is not responsible for respite care.

(4) Domiciliary care by a family member that is necessary for a period of less than 24 hours a day may not exceed the prevailing hourly wage, and the insurer is not liable for more than 8 hours of care per day.

As set forth above, the section sets out specific requirements that must be met to entitle claimant to domiciliary care benefits. Even though claimant's need for 24-hour domiciliary care should have been obvious to the insurer, it has correctly pointed out that the care must be prescribed "on a form provided by the department," § 39-71-1107(1)(c), MCA (1999), and that reimbursement for 24-hour care is limited to the medicaid reimbursement rate for nursing homes. Upon respondent's agreement to pay her benefits under a reservation of rights, claimant, who was represented by counsel, had some responsibility to establish her entitlement to domiciliary care benefits. Upon receiving the request for benefits, the insurer acted promptly to gather the documentation and information necessary to commence the benefits. Under the circumstances described by the respondent, I am unpersuaded that the further delay in commencing domiciliary care benefits was unreasonable.

¶10 Accordingly, I conclude that the penalty applies to all compensation, medical, and domiciliary care benefits due or accrued prior to October 11, 2000.

¶11 This Order shall amend and be incorporated as a part of the Court's May 15, 2002 Findings of Fact, Conclusions of Law and Judgment.

SO ORDERED.

DATED in Helena, Montana, this 9th day of October, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Paul E. Toennis
Ms. Melanie S. Pfeifer
Submitted: July 2, 2002