

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 56

WCC No. 9604-7528

STEVEN J. GERHARDT

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

DON FRANZ CONTRACTOR, INCORPORATED

Employer.

ORDER DENYING MOTION TO DISMISS

Summary: After petition was filed alleging failure to pay medical expenses and demanding penalty and attorney's fees, State Fund paid the medical bills at issue. It then moved to dismiss the claims for penalty and fees.

Held: Under 1980 version of relevant statutes, the motion to dismiss is denied. In *Mintyala v. State Compensation Insurance Fund*, 917 P.2d 442 (1996), the Court held the 1987 version of the penalty statute, which is similar in relevant part to the 1980 statute, made penalty available from the moment the insurer's delay became unreasonable. *Mintyala* also held the Court was to consider attorney's fees.

Topics:

Penalties: Insurers. Under 1980 version of penalty statute, insurer's motion to dismiss claim for penalty after medical benefits were paid is denied. In *Mintyala v. State Compensation Insurance Fund*, 917 P.2d 442 (1996), the Court held the 1987 version of the penalty statute, which is similar in relevant part to the 1980 statute, made penalty available from the moment the insurer's delay became unreasonable.

The petition in this case alleges that the respondent, State Compensation Insurance Fund (State Fund), has refused to pay medical expenses incurred by petitioner as a result of a 1980 industrial accident. In addition to requesting the Court to order payment of those expenses, the petitioner asks the Court to award attorney fees and a penalty.

Following the filing of the petition the State Fund paid the medical bills at issue. It then moved to dismiss the petition, arguing that the Court lacks jurisdiction to award a penalty or attorney fees.

In *Mintyala v. State Compensation Ins. Fund*, 917 P.2d 442 (Mont. 1996), the Montana Supreme Court addressed the same contentions advanced by the State Fund herein and rejected them. While State Fund argues that the penalty statute considered by the Court in *Mintyala* was an earlier, different version than the one at issue in this case, the Court's discussion shows that the later amendments did not divest the Workers' Compensation Court of jurisdiction to award a penalty in cases where liability is conceded prior to trial. Quoting language from its prior decision in *Handlos v. Cyprus Industrial Minerals*, 243 Mont. 314, 794 P.2d 702 (1990), which involved the 1987 version of the penalty statute, the Court said, "In other words, the penalty provision is available to the claimant *from the moment the insurer's **delay** in payment becomes unreasonable.*" 917 P.2d at 445-446 (italics and emphasis added). The 1987 version of the penalty statute, § 39-71-2907, MCA (1987), is identical in relevant part to the 1980 version. Moreover, the Court went on to say:

Throughout the many revisions to the penalty statute, the language regarding "unreasonable delay" has remained basically the same. *Regardless of what version of the statute* this Court has interpreted we have concluded that the penalty statute should be made available "where an insurer acts unreasonably to deny benefits to which a claimant is legally entitled the statutory penalty should be imposed." Furthermore, this Court consistently held that the determination of whether there was an unreasonable delay in payments of benefits by the insurer is a factual question.

917 P.2d at 446 (italics added; cites omitted).

Finally, without discussion, the Court in *Mintyala* held that on remand this Court was also to consider an award of attorney fees.

The motion is **denied**. The penalty and attorney fee issues shall be tried in Great Falls during the week of October 7, 1996, as scheduled.

SO ORDERED.

DATED in Helena, Montana, this 1st day of August, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Jack R. Stone

Mr. Charles G. Adams

Submitted: July 30, 1996