IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 44

WCC No. 9803-7941

HERMAN GONZALES, FAWN LYONS AND KEN LAUDATO

Petitioners

vs.

MONTANA POWER COMPANY

Respondent/Insurer/Employer.

ORDER REGARDING CLAIMANTS REPRESENTED BY ATTORNEYS

Summary: A Special Settlement Master appointed by the Court is reviewing claims files of Montana Power Company to identify claimants entitled to impairment awards which have not been paid. He requests instructions concerning whether he should review files of claimants who were represented by counsel.

Held: The Court's prior order exempting files of represented claimants is reaffirmed. While the Special Settlement Master should confirm that a written notice of representation or a settlement agreement indicating claimant was represented by counsel is in the claim file, once the fact of representation is confirmed he should go no further.

Topics:

Class Actions: Class. In a class action or quasi-class action, where the potential class of claimants consists of claimants who have not been paid impairment awards to which they were entitled, that class does not include claimants who are or were individually represented by attorneys since it is presumed that their attorneys were competent and aware of their clients' potential entitlement to impairment awards. Review of such cases would in essence be an undertaking to find incompetence or malpractice. Such an undertaking is not legitimately related to the protection and redress of the class of claimants identified in this case since the interests of represented claimants were protected by their personal attorneys.

Attorneys: Rules of Professional Conduct. An attorney representing an individual workers' compensation claimant is duty bound to identify and seek any impairment award and other benefits due that claimant and it is presumed he or she did so. Thus, in a class action or quasi-class action, where the potential class of claimants

consists of claimants who have not been paid impairment awards to which they were entitled, that class does not include claimants who are or were individually represented by attorneys since it is presumed that their attorneys were competent and aware of their clients' potential entitlement to impairment awards. Review of such cases would in essence be an undertaking to find incompetence or malpractice. Such an undertaking is not legitimately related to the protection and redress of the class of claimants identified in this case since the interests of represented claimants were protected by their personal attorneys.

¶1 This action was commenced by three former or present Montana Power Company (MPC)[(1)] employees seeking impairment awards on behalf of themselves and other similarly situated MPC employees. MPC was self-insured under the Montana Workers' Compensation Act, hence it was responsible for adjusting and paying claims by its injured employees.

¶2 Expert deposition and trial testimony indicated that MPC owed a duty to advise claimants suffering from injuries which typically result in impairment that they should obtain impairment ratings and that they might be entitled to impairment awards. Deposition and trial testimony further indicated that MPC failed in a number of cases to advise claimants regarding impairment ratings and impairment awards. However, the trial never concluded and the Court never reached the merits of the claim. Instead, the parties entered into a settlement agreement which provides for the appointment of a Special Settlement Master to identify MPC claimants entitled to impairment awards. The agreement also provided for the Special Settlement Master to resolve, at least initially, "all procedural, factual and legal issues." Professor David J. Patterson was appointed the Special Settlement Master.

¶3 As I noted in an earlier Order in this case, under the settlement agreement the parties agreed *in general terms* that MPC had a duty to notify its injured workers of their potential entitlement to impairment awards, however, they disagreed "as to the scope and circumstances of that duty." (Order Adopting Special Master's Duty Decision, ¶ 3.) More specifically, they disagreed as to the subclasses of claimants to whom the duty was owed. The disagreement ranged from whether the duty extended to claimants represented by attorneys to whether it extended to claimants injured after July 1, 1993. *See, generally,* Order Adopting Special Master's Duty Decision.

¶4 In my Order Adopting Special Master's Duty Decision, entered May 4, 2001, I addressed the duty issue. As already noted, one of the issues concerned claimants represented by attorneys. In my Order, I affirmed Professor Patterson's determination that MPC had no duty to advise claimants represented by attorneys. Nonetheless, the question is again presented in connection with Professor Patterson's ongoing review of MPC files. Professor

Patterson recommends that he not be required to review files of claimants who were represented by counsel. I agree.

Discussion

¶5 As set forth in my earlier Order Adopting Special Master's Duty Decision, attorneys representing claimants in workers' compensation matters are required to provide competent representation to their clients. Rule 1.1, Rules of Professional Conduct. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id*.

¶6 The right to an impairment award is notorious. In 1981 the Supreme Court in *Holton v. F.H. Stolze Land and Lumber Co.,* 195 Mont. 263, 269, 637 P.2d 10, 13-14, held that the claimant is entitled to prompt payment of an impairment award. As I noted in my earlier Order:

Entitlement to an impairment award has remained constant over the years despite legislative changes in benefits. Indeed, entitlement to an impairment award has been more specifically spelled out. § 39-71-703, MCA (1987-1999).

(Order Adopting Special Master's Duty Decision, ¶ 12.) Competent counsel representing MPC claimants since 1981 could not have been unaware of the *Holton* decision and the right to an impairment award, thus they had a duty to identify and seek any impairment award, along with any other benefits due the claimant, and it is presumed they did so.

¶7 I therefore conclude that in a class action or quasi-class action where the class of claimants consists of claimants who have not been paid impairment awards to which they were entitled, the potential class does not include claimants who are or were represented by attorneys since it is presumed that the attorneys were competent and aware of their clients' potential entitlement to impairment awards. Review of such cases would in essence be an undertaking to find incompetence or malpractice. Such an undertaking is not legitimately related to the protection and redress of the class of claimants identified in this case since the interests of represented claimants were protected by their personal attorneys. The attorneys in this case cannot force themselves upon claimants who chose other attorneys to represent them.

¶8 Petitioners nonetheless urge that some review of cases involving attorneys is necessary. First, they urge that review is necessary to determine that the claimant was in fact represented by an attorney with respect to his workers' compensation claim. Second, they argue that attorney represented claimants should be notified of the current action so that they can claim a 20% penalty or opt to have their attorney fees paid by MPC as provided in the settlement agreement. They go on to say that any such claimant "should also know he can avoid a claim for a common fund attorney fee on the Holton award, by opting in." [Sic.] (Petitioners' Objection to Procedure at 3 (July 20, 2002).)

¶9 Petitioners' first argument has some merit. The fact of representation must be established for the file to be exempted from the review that is otherwise contemplated by the settlement agreement. An attorney's written notice of representation of the claimant, unless expressly limited to non-workers' compensation matters, is sufficient to establish representation. Similarly, a petition for settlement or lump-sum advance stating that the claimant is represented is sufficient. In those cases where such notice or statement is in the file, no further review or notice is necessary or authorized. However, the Court has discussed this matter with the Special Settlement Master and is informed that he has in fact been confirming representation. Indeed, all of the cases involving attorney representation which he has identified to date have also involved settlements.

¶10 The penalty and attorney fee arguments are without merit. Penalty and attorney fee provisions have long been present in the Montana Workers' Compensation Act. As with the impairment award, the provisions are notorious. Counsel who have represented MPC claimants presumably were aware of the possibility of penalties and attorney fees took it into consideration.

¶11 The only interest the attorneys for the present petitioners have with respect to represented claimants is their potential claim for common fund fees, *see Murer v. State Compensation Mut. Ins. Fund,* 283 Mont. 210, 222-23, 942 P.2d 69, 76 (1997). Their potential entitlement to common fund fees arose at the earliest on the date the settlement agreement was approved; prior to that time there was no precedent established, thus impairment awards paid prior to that time were not a consequence of a precedent established in this case. I therefore conclude that even if the common fund doctrine applies, claimants who were paid impairment awards prior to September 13, 2000 -- the date on which I approved the settlement agreement (Order Approving Settlement Agreement and Appointing Master) -- are not liable to petitioners' attorneys for fees.

¶12 With respect to any potential claim for common fund attorney fees, any necessary information can be obtained directly from MPC without the need for review by the SSM. Specifically, should it become necessary, MPC can provide petitioners' attorneys with the names and addresses of claimant's to whom it has paid impairment awards since September 13, 2000, for injuries arising prior to March 24, 1998.

ORDER

¶13 Once the fact of attorney representation is established to the Special Settlement Master's satisfaction, the Special Settlement Master shall conduct no further examination or review of any file of a represented claimant and the represented claimant shall be excluded from the potential class.

DATED in Helena, Montana, this 4th day of October, 2002.

(SEAL)

Mike McCarter
JUDGE

c: Mr. Chris J. Raga
Mr. Lon J. Dale
Mr. W. Wayne Harper
Professor David J. Patterson
Submitted: August 15, 2002

1. Montana Power Company's operations have since been purchased by NorthWestern Energy, LLC. *See* MPC's Objections/Comments to the Duty Issue Ruling at 2 (August 2, 2002). Apparently, it has presumed NorthWestern has assumed liability for MPC's workers' compensation liabilities. However, for present purposes, the Court will continue to refer to the company as Montana Power Company or MPC.