

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 25

WCC No. 9403-7015

MICHAEL E. HEISLER

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HINES MOTOR COMPANY

Employer.

**ORDER AND JUDGMENT DENYING ATTORNEY FEES AND PENALTY
AND AWARDING COSTS**

Summary: This matter is on remand from the Supreme Court, following that Court's reversal of the WCC's determination that a regulation requiring prior approval for a change in physicians was not unconstitutional. The matter on remand involves claimant's demand for penalty and attorneys fees. Respondent State Fund argues that penalties and attorneys fees are barred by the Court's prior judgment, which did not award or deny fees.

Held: Based on a review of the litigation of this matter prior to appeal, the Court concludes that judgment was entered in the WCC based on claimant's request that a summary judgment order become the final judgment in the case. Claimant had represented pursuant to that request that "no further evidence or arguments" would be made "regarding the issues raised in this petition." Although issues of attorneys fees and penalty had been raised in the petition and discussed in pretrial conferences, claimant's request for entry of judgment based on his representation that no further evidence or argument would be offered led to a final judgment in the WCC dismissing all claims with prejudice. The Supreme Court decision reversed only the WCC decision on the regulation's constitutionality, leaving the other aspects of dismissal standing. Under the law of the case doctrine, the matters of attorneys fees and penalty may not now be litigated. Costs, however, are awarded.

Topics:

Attorneys Fees: Cases Denied. Following remand from the Supreme Court, which reversed the WCC decision against claimant, claimant sought attorneys fees and a penalty. The insurer argued that request was barred by the WCC judgment, which was entered at claimant's request based on the representation that no further evidence or argument would be offered. The WCC agreed, holding that its order had dismissed all claims with prejudice, including prior claims for penalty and attorneys fees, and that the Supreme Court decision reversed only the WCC order regarding the constitutionality of a regulation. Under the law of the case doctrine, claims for attorney fees and penalty were dismissed.

Judgments: Law of the Case. Following remand from the Supreme Court, which reversed the WCC decision against claimant, claimant sought attorneys fees and a penalty. The insurer argued that request was barred by the WCC judgment, which was entered at claimant's request based on the representation that no further evidence or argument would be offered. The WCC agreed, holding that its order had dismissed all claims with prejudice, including prior claims for penalty and attorneys fees, and that the Supreme Court decision reversed only the WCC order regarding the constitutionality of a regulation. Under the law of the case doctrine, claims for attorney fees and penalty were dismissed.

¶1 This case is on remand from the Supreme Court following a decision striking down an administrative regulation requiring the claimant to obtain approval of the State Compensation Insurance Fund (State Fund) prior to changing his treating physician.

¶2 On remand the claimant, Michael Heisler (Heisler), requests a penalty, attorney fees and costs. (Petition for Assessment of Reasonable Attorney's Fees, Costs and Penalties (June 2, 1997).) Heisler supports his motion with a lengthy brief in which he argues that the State Fund acted unreasonably in defending the unconstitutional regulation. He also argues that the State Fund acted unreasonably in refusing to approve Heisler's request to change his treating physician.

¶3 In support of his arguments, Heisler cites numerous exhibits and depositions. The factual nature of his request for attorney fees is apparent from the following statement in his supporting brief:

The record, thus, demonstrates that the State Fund treated Heisler's claim from first to last in a flatly unreasonable manner. It continually ignored, denied, delayed, or begrudged requests which were made by Heisler and his doctors. The State Fund's actions often were absolutely arbitrary, and gravely delayed Heisler's treatment and recovery.

The State Fund's denial of Heisler's right to choose physicians was part of this larger pattern or arbitrary conduct. The denial had no articulable rationale whatever.

Moreover, it was based on a statute which the Supreme Court held irrational in its decision in this case.

(Brief in Support of Petition to Assess Penalties, Attorney's Fees, and Costs at 7.)

¶14 In its response, the State Fund urges that penalties and attorney's fees are barred by this Court's prior judgment. (Combined State Compensation Insurance Fund Motions; Response to Petition Seeking Fees, Cost, and Penalties; And, Response to the Petition to Declare Certain Sections of Law Unconstitutional at 2.) It also requests an evidentiary hearing with respect to the factual allegations advanced by Heisler. (*Id.*)

¶15 A conference concerning the motion was held with counsel on November 20, 1997. The potential for settlement was discussed and counsel indicated their willingness to engage in settlement negotiations. Based on that willingness, I deferred any ruling on the motion and on whether an evidentiary hearing would be required. However, I indicated that if I were inclined to agree with the State Fund's contention that Heisler is barred from pursuing attorney fees and a penalty, I would probably go ahead with an evidentiary hearing.

¶16 My thought at that time focused on judicial economy. If I held that the request for attorney fees and penalty was barred, there would undoubtedly be a second appeal, which if successful would send the matter back to this Court for yet a third time. As I assessed the problem, at that time, it would be better to go forward with an evidentiary hearing and address all legal and factual contentions of the parties. Thus, on any appeal, the Supreme Court could finally resolve the dispute without any potential for a remand for a third proceeding.

¶17 Thereafter, the parties engaged in settlement negotiations but those negotiations were unsuccessful. I then set the matter for an evidentiary hearing.

¶18 After setting an evidentiary hearing, the Court received two motions regarding on-going discovery. The first motion was filed by the State Fund to quash certain depositions noticed by Heisler, including the deposition of a doctor. (Motion and Support Memorandums to (1) Quash Depositions and (2) for Telephone Conference to Discuss Clarification of Issues (2/24/98).) The second was a motion by Heisler to compel discovery and for sanctions. (Petitioner's Motion to Compel Discovery and Impose Sanctions (2/26/98).)

¶19 In the meantime, numerous discovery subpoenas were filed with the Court.

¶10 I scheduled a telephone conference with counsel as provided in ARM 24.5.316.⁽¹⁾ Prior to the telephone conference, I reviewed the motions and supporting briefs. I also went back through the file and reviewed Heisler's original post-remand motion, the briefs filed in support and opposition to the motion, the procedural history of the case, this Court's original judgment, and the Supreme Court's decision on appeal. Heisler's post-remand

motion had been fully briefed and was submitted for decision; however, I had deferred decision.

¶11 After my review, I concluded that the State Fund's objection to Heisler's motion for attorney fees and penalties is meritorious. I further concluded that the prospective discovery and evidentiary hearing promises to be extensive and contentious and will not serve judicial economy. During the conference call with counsel on March 3, 1998, I informed counsel of my determination and stayed all further discovery pending my issuing a written decision.

Discussion: Attorney Fees and Penalty

¶12 Heisler filed his petition on March 9, 1994. He alleged that he had a statutory and constitutional right to choose his treating physician and to thereafter change his choice of physicians without any prior approval of the State Fund. He alleged that he had chosen Dr. Richard Nelson as his treating physician but that the State Fund had refused to recognize Dr. Nelson. Finally, he alleged that the State Fund's refusal to recognize Dr. Nelson as his treating physician was unreasonable. With respect to the last allegation, he sought both attorney fees and a penalty.

¶13 On March 10, 1994, this Court issued a scheduling order fixing pre-trial deadlines and setting the trial for the week of June 27, 1994. On June 6, 1994, Heisler moved for summary judgment based "upon the Petition for Trial in this cause, the Insurer's response to the Petitioner, and the Memorandum of Authorities filed herewith." (Petitioner's Motion for Summary Judgment (June 6, 1994).)

¶14 On June 16, 1994, Heisler's attorney, Mr. Lawrence A. Anderson (Anderson), informed a deputy clerk of the Court that he and Mr. Norman C. Peterson (Peterson), who is counsel for the State Fund, were preparing a stipulation to submit the controversy to the "Court without need for a trial." (June 16, 1994 Letter of Clara Wilson to Mr. Lawrence A. Anderson.) On June 17, 1994, Mr. Anderson wrote a letter to the Court, saying in relevant part:

Norman Clyde Peterson and I are working on a Stipulation to submit this matter on a stipulated set of facts. However, we have not finally arrived at such a stipulation; and there may be some outstanding issues yet to be tried. We should be able to advise the Court at the pre-trial conference scheduled for Tuesday, June 21, whether there are issues to be tried.

(*Id.*)

¶15 On June 21, 1994, the Court's hearing examiner, Clarice V. Beck, held a pretrial conference with Anderson and Peterson. (June 24, 1994 File Memorandum of Clarice V. Beck.) During the conference, counsel agreed that four of six issues, as set forth in Heisler's Proposed Pretrial Order, would be submitted and determined on a summary

judgment motion, while the remaining two issues would be "rescheduled for trial during the fall term of Court." While the Court did not retain a copy of the proposed pretrial order, Beck's additional notes show that the issues reserved for trial were the claims for a penalty, attorney fees and costs. She noted, "A second pretrial conference will be scheduled and new deadlines set for the trial on the remaining issues of attorney fees, costs and the penalty. " She then set a briefing schedule, following which she said, "The trial on the attorney fees and costs will be scheduled during the fall term in Great Falls."

¶16 On June 24, 1994, the Court issued a new scheduling order setting trial for the week of October 3, 1994. The second sentence stated, "Counsel agreed that the trial on attorney fees and costs will be rescheduled during the fall term in Great Falls." (Rescheduling Order at 1.)

¶17 At this point there is arguably some uncertainty regarding the handling of the penalty claim. Beck's first note in her June 24, 1994 File Memorandum indicated that the penalty request would be submitted at trial. However, neither her second note in her June 24, 1994 memorandum nor the Court's June 24, 1994 Rescheduling Order specifically mention the penalty.

¶18 Any possible confusion concerning the status of Heisler's penalty request was cleared up in subsequent correspondence and orders. On July 13, 1994, Peterson wrote to Beck about the scheduling. Part of his letter concerned the handling of the penalty issue:

As you will recall, this matter concerns two issues: a penalty and fees demand, and a constitutional challenge to the medical service rules. The penalty issue was to go on the next fall trial schedule and the constitutional issue was to be submitted on briefs.

The letter went on to inform Beck that Anderson preferred "to resubmit his motion [for summary judgment] with additional citations and argument," and that Peterson had agreed. The letter requested, on behalf of both counsel, that the briefing schedule be vacated until the new summary judgment motion was filed. Anderson was copied with the letter.

¶19 On September 26, 1994, a second pretrial conference took place. Both Anderson and Peterson attended. Beck's written memorandum of the conference reads in relevant part:

MOTIONS: Petitioner's Motion for Summary Judgment was filed on June 6, 1994. It was agreed that the MOTION could be supplemented by Mr. Anderson.

Counsel agree and the Court concurs that the trial which is scheduled for the week of October 3, 1994 will be vacated pending a decision on petitioners' [sic] motion.

The issues of attorney fees and costs and the penalty will be bifurcated, until the final resolution of the motion.

(September 28, 1994 File Memorandum of Clarice V. Beck (emphasis added).) Beck set October 3, 1994, as the deadline for the supplemental motion and brief and for a **final, signed pretrial order**. She also set a deadline of October 24, 1994, for Peterson's answer brief and 10 days thereafter for Anderson's reply brief. A copy of Beck's notes were sent to both counsel.

¶20 On October 12, 1994, the Court received the final, signed Pre-Trial Order. The Order set out stipulated facts and the issues to be decided by the Court. With respect to attorney fees, costs and penalty, the parties specifically stipulated:

3. The parties will submit the penalties and attorney's fees issues after the Court resolves the underlying legal issues on summary judgment

4. The attorney's fees, costs, and penalties issue will be bifurcated from the underlying issues raised in the Claimant's Summary Judgment Motion. Upon the final resolution of the issues raised in the Claimant's Summary Judgment Motion, the issues raised in Claimant's claim for attorney's fees, costs, and penalties will be presented.

(Pre-Trial Order at 7.)

¶21 Meanwhile, on June 13, 1994, 10 days after Heisler filed his initial motion for summary judgment, the State Fund approved Dr. Nelson as Heisler's treating physician and agreed to pay for Dr. Nelson's prior care and for tests he had ordered. (Pre-Trial Order, Uncontested Facts 25-27 at 6-7.)

¶22 On November 7, 1994, Heisler served a second brief regarding his motion for summary judgment, along with numerous supporting exhibits. (Memorandum of Authorities in Support of Petitioner's Motion for Summary Judgment; Exhibits to Memorandum of Authorities in Support of Petitioner's Motion for Summary Judgment.) The brief attacked a rule of the Department which required the insurer's prior authorization for a claimant to change treating physician. In a section entitled "STATEMENT OF FACTS," Heisler set out a subsection entitled "Lack of Reasonable Basis for State Fund's Position." In that subsection, Heisler challenged the Department's rationale for the regulation. He also argued that the State Fund had no guidelines for determining when to approve a change of treating physician and had no good reason for refusing to approve Dr. Nelson. However, in the argument section of his brief, Heisler pursued only his legal attack on the regulation. Specifically, he argued:

- The rule violated the freedom of choice guaranteed by section 33-22-111, MCA (1991). (This Court and the Supreme Court held that it did not.)

- The 1993 amendments to the freedom of choice provision cannot be retroactively applied in this case. (This Court did not retroactively apply the amendments, so the outcome of this case did not turn on this argument.)
- The rule was impermissibly arbitrary and therefore in "derogation of the 'freedom of choice' law." (*Id.* at 11.) (This Court and the Supreme Court held that the freedom of choice statute invoked by Heisler was inapplicable.)
- The rule violated Heisler's constitutional right to privacy. (This Court held that it did not and the argument was never addressed by the Supreme Court.)

Not one of his arguments addressed a penalty or attorney fee.

¶23 The State Fund filed an answer brief on January 6, 1995. (Insurer's Response to Petitioner's Summary Judgment Memorandum.) Heisler then filed a reply brief. (Reply Memorandum in Support of Petitioner's Motion for Summary Judgment (Petitioner's Reply Memorandum) (January 30, 1995).)

¶24 One of the issues raised in the exchange of these later briefs was Heisler's citation to various depositions. In his reply, Heisler characterized the State Fund's argument with respect to the depositions:

The State Fund strenuously argues that depositions of its employees are "irrelevant" to this case. It bases this argument on a stipulation to bifurcate the issues.

(Petitioner's Reply Memorandum at 2.) Heisler then went on to argue that the depositions were relevant to show the "**arbitrary character**" of the Department's rule. (*Id.* at 3.) He argued that the depositions were relevant to both the "bifurcated" issue **and** the validity of the rule, but argued that for purposes of the motion for summary judgment the relevance was with respect to the rule:

[T]he depositions are relevant to the present issue of the validity of the Rule. They **also** are relevant to the bifurcated question of unreasonable conduct to the Claimant. The evidence clearly bears on both issues.

Thus, the State Fund's initial argument has no merit. **This Court should consider the depositions in determining the validity of the Rule.**

(Petitioner's Reply Memorandum at 4; emphasis added.)

¶25 There was no ambiguity in Heisler's argument. While he was urging that the depositions provided factual information regarding the issues of attorney fees and penalty, he was urging that for the time being the depositions should be considered only with respect to his constitutional challenge. The depositions were offered **solely** to support his constitutional challenge.

¶26 On June 1, 1995, this Court issued its ruling denying the motion for summary judgment. (Order Denying Summary Judgment.) In that Order, I determined that the statute guaranteeing freedom of choice with respect to a treating physician was inapplicable to the State Fund. That ruling was affirmed on appeal. I further held that the 1993 legislative amendments were not a factor in determining the validity of the Department's regulation since the regulation was permissible under the law in effect at the time of Heisler's injury. That determination was sustained on appeal. Finally, I held that the regulation did not violate Heisler's right to privacy. The Supreme Court did not address that holding.

¶27 My Order Denying Summary Judgment did not address the issues regarding attorney fees and penalty, since those matters were not raised by the motion.⁽²⁾ The final sentence of the Order addressed the attorney fee and penalty claim, as follows:

This matter shall be placed on the next trial calendar to determine whether Heisler is entitled to attorney fees or a penalty.

¶28 On June 2, 1995, a new scheduling order was issued. (Order Resetting Scheduling Order (June 2, 1995).) The first sentence of the Order reads:

This Order is issued pursuant to the Court's order contained in the Order Denying Summary Judgment, issued June 1, 1995, directing that this matter be placed on the next trial calendar to determine whether the petitioner is entitled to attorney fees or a penalty.

¶29 On August 29, 1995, Heisler filed a document entitled Petitioner's Request That the Court Enter Final Judgment Based on its Summary Judgment Order. The text of the document reads as follows:

COMES NOW the Petitioner, and herewith states and alleges as follows:

The Petitioner intends to offer **no further evidence or arguments** regarding the issues raised in this petition.

WHEREFORE, Petitioner requests the Court to enter its judgment pursuant to its summary judgment in this matter. [Emphasis added.]

And this Court did just what Heisler asked. It entered Judgment as follows:

IT IS HEREBY ORDERED AND ADJUDGED that the petition in this matter be and is hereby **dismissed with prejudice** and that the Court's prior Order Denying Summary Judgment shall constitute its decision in this case.

(Judgment, August 31, 1995; emphasis added.) The judgment was certified as final. (*Id.*)

¶30 The decision on appeal addressed only Heisler's contention that the regulation requiring prior approval for a change in treating physician is unconstitutional. It reversed

this Court's determination that it did not. It did not address any claim for attorney fees. It did not reverse this Court's decision dismissing other parts of the petition.

¶131 It should be abundantly apparent from the foregoing discussion that Heisler was provided a full and fair opportunity to pursue his claim for attorney fees and a penalty, and chose not to do so. This Court's prior judgment dismissed those claims. The decision on appeal did not reverse that dismissal and it therefore stands as the law of the case. Heisler cannot relitigate the matter. *State v. Woods*, 945 P.2d 918, 921 (Mont. 1997) ("Under the doctrine of law of the case, a prior decision of this Court resolving a particular issue between the same parties in the same case is binding and cannot be relitigated. *State v. Black*, 245 Mont. 39, 44, 798 P.2d 530, 533 (1990). We hold that this Court's previous resolution of the issue concerning the second hearing remains binding.")

Discussion: Costs

¶132 In his motion following remand, Heisler requested not only attorney fees and a penalty, but also costs. He submitted a sworn affidavit regarding costs in the total amount of \$1,492.71. (Petitioner's Memorandum of Attorney's Fees, Costs, and Penalties (June 2, 1997).) State Fund did not dispute the enumerated costs, although it questioned whether claimant prevailed. Claimant indeed did prevail on a significant issue and is entitled to his costs. Since there was no challenge to the specific costs enumerated, they are allowed.

JUDGMENT

¶133 1. Petitioner, Michael Heisler, is not entitled to attorney fees or a penalty with respect to his present petition.

¶134 2. Respondent, State Compensation Insurance Fund, shall pay petitioner's attorney the sum of \$1,492.71 as costs in this matter.

¶135 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶136 4. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this Decision.

DATED in Helena, Montana, this 17th day of March, 1998.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Lawrence A. Anderson

Mr. Norman C. Peterson

Mr. Thomas E. Martello - Courtesy Copy

Date Submitted: March 6, 1998

1. The rule provides in relevant part:

(8) Motions regarding discovery, procedure and similar pretrial issues may be presented informally by telephone conference call. The moving party shall arrange the call and for the participation of all parties. The court may designate a hearing examiner to preside and decide the motion. The court may make an oral ruling or direct that the motion be presented in writing and briefed. Any oral order shall thereafter be confirmed by written order.

2. In effect, the motion was one for *partial* summary judgment.