

**DISCLAIMER**

The "Greg Kemp" involved in the following workers' compensation matter is in no way associated with the Greg Kemp who is currently residing in Hawaii.

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1999 MTWCC 81**

**WCC No. 9711-7866**

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**GREG KEMP**

**Petitioner**

**vs.**

**CIGNA PROPERTY & CASUALTY**

**Respondent/Insurer for**

**WOLSEY MANAGEMENT, INCORPORATED/**

**FAMILIAN NORTHWEST**

**Employer.**

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**ORDER REGARDING ATTORNEY FEES**

**Summary:** Following *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, counsel for a medical provider wrote an insurer asserting that the medical provider must be paid its fees without deduction of the 20% attorney fee lien which the Supreme Court had decided must come out of medical benefits when the attorneys work resulted in obtaining medical benefits in a disputed liability case. Counsel attempted to distinguish Lockhart as applying only when other benefits were not sufficient to satisfy the fees. WCC ordered counsel to file objections in the WCC if this was the position his client took regarding payment of fees in this case. Counsel did not file objections and informed the Court his client had not appeared in the matter.

**Held:** Counsel's argument is frivolous under Lockhart, which is unequivocal and forecloses his argument. Counsel may have avoided sanctions by not appearing in this case, but he will not be able to continue to make this frivolous contention in other matters without

appearing in the WCC, which has exclusive jurisdiction over medical benefits disputes in workers' compensation cases.

### **Topics:**

**Benefits: Medical Benefits: Lockhart.** Following *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, counsel for a medical provider wrote an insurer asserting that the medical provider must be paid its fees without deduction of the 20% attorney fee lien which the Supreme Court had decided must come out of medical benefits when the attorneys work resulted in obtaining medical benefits in a disputed liability case. Counsel attempted to distinguish Lockhart as applying only when other benefits were not sufficient to satisfy the fees. WCC held counsel's argument was frivolous under Lockhart, suggesting it may be sanctionable if made in a case in which counsel actually appeared.

### **Cases Discussed: *Lockhart v. New Hampshire Ins. Co.*, 1999 MT**

**205.** Following *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, counsel for a medical provider wrote an insurer asserting that the medical provider must be paid its fees without deduction of the 20% attorney fee lien which the Supreme Court had decided must come out of medical benefits when the attorneys work resulted in obtaining medical benefits in a disputed liability case. Counsel attempted to distinguish Lockhart as applying only when other benefits were not sufficient to satisfy the fees. WCC held counsel's argument was frivolous under Lockhart, suggesting it may be sanctionable if made in a case in which counsel actually appeared.

**Attorneys Fees: Lien.** Following *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, counsel for a medical provider wrote an insurer asserting that the medical provider must be paid its fees without deduction of the 20% attorney fee lien which the Supreme Court had decided must come out of medical benefits when the attorneys work resulted in obtaining medical benefits in a disputed liability case. Counsel attempted to distinguish Lockhart as applying only when other benefits were not sufficient to satisfy the fees. WCC held counsel's argument was frivolous under Lockhart, suggesting it may be sanctionable if made in a case in which counsel actually appeared.

¶1 This is a contested liability case. Liability was ultimately resolved in favor of the claimant, thus entitling him to payment of medical benefits. Since claimant was successful, his attorney is entitled to a fee of 20% with respect to benefits payable as a result of the adjudication. However, certain medical providers notified the insurer that attorney fees could not be deducted from medical benefits and that they were entitled to payment in full, without deduction. In light of the contention, the Court ordered the insurer

to remit 80% of medical benefits due medical providers and withhold the remaining 20% pending a determination regarding attorney fees.

¶12 As a result of similar contentions in *Liberty Northwest Ins. Corp. v. Nancy Petak*, WCC No. 9711-7872 and *Lockhart v. New Hampshire Ins. Co.*, WCC No. 9705-7746, I invited argument regarding attorney fees on medical benefits from parties in that case, as well as *amici curiae*. One of the parties in the Petak case was Community Medical Center. (See Order Denying Community Medical Center's Motion to Dismiss issued March 4, 1998.) Along with other parties and *amici curiae*, Community Medical Center, through counsel Mr. Regan Whitworth, appeared and argued the issue. On July 31, 1998, I issued a joint decision in the *Petak* and the *Lockhart* matters, 1998 MTWCC 60, concluding that medical providers are entitled to full payment of medical benefits without deduction for attorney fees. I concluded that attorney fees must be recouped from claimants' compensation benefits, not from their medical benefits.

¶13 On appeal, my decision was reversed. *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205. The Supreme Court held that in a disputed liability case the attorney fee lien attaches to medical benefits and must be satisfied from those benefits. The decision is clear. It is unequivocal.

¶14 Nonetheless, on October 1, 1999, following the Supreme Court's decision, Mr. Regan Whitworth, as attorney for Community Medical Center and Missoula Radiology, Incorporated, wrote the insurer in this case, demanding payment in full on behalf of his clients. Regarding the Supreme Court's decision in *Lockhart*, he stated that the decision allows for deduction of attorney fees "only where there are insufficient compensation benefits to allow payment of the claimant's attorney's lien." He asserted that since compensation benefits in this case are sufficient to satisfy the attorney fees due with respect to medical benefits, his clients must be paid in full without deduction for attorney fees. A copy of Mr. Whitworth's letter is attached to this Order.

¶15 In light of Mr. Whitworth's letter, I issued an Order requiring medical providers who disputed the deduction of attorney fees to file written objections no later than December 6, 1999. I scheduled a hearing on objections for December 9, 1999. I directed that the Order be served by mail upon all known medical providers. In addition, the Court mailed a copy of the Order directly to Mr. Whitworth.

¶16 Not having received any objections by December 8, 1999, and faced with a scheduled hearing on December 9, 1999, on December 8<sup>th</sup> I requested the clerk of court to contact Mr. Whitworth to determine if he had mailed written objections. He indicated he had not.

¶17 On December 9, 1999, Mr. Whitworth faxed the clerk of court the following message:

As you requested, this facsimile transmission confirms our telephone conversation yesterday in which I related that (1) this firm represents Community Medical Center

(CMC) and Missoula Radiology, Inc. (MRI) with respect to charges for Mr. Kemp's treatment, and (2) we do not believe that CMC and MRI are properly parties to Mr. Kemp's case, and do not intend to appear voluntarily. **CMC and MRI, of course, do not by this confirmation of our telephone conversation waive any rights.** [Emphasis added.]

¶8 This Court does not know what games Mr. Whitworth intends to play. He has avoided filing a written objection, thus he has avoided potential sanctions under section 39-71-2914, MCA, which are equivalent to Rule 11 sanctions under the Montana Rules of Civil Procedure. If he intends in the future to contest the 20% attorney fee, then he must apply to this Court since it has exclusive jurisdiction over benefits, including medical benefits and the attorney fee lien. He is well aware of the Court's jurisdiction over the matter; his motion to dismiss on jurisdictional grounds was denied in *Petak*, 1998 MTWCC 21. If not now, he must face the music in the future.

¶9 The Supreme Court decision is clear and unequivocal. Mr. Whitworth's contention that it applies only where claimant's compensation benefits are insufficient to satisfy attorney fees is frivolous. His conduct is beyond the pale of legitimate advocacy.

¶10 Accordingly, IT IS HEREBY ORDERED that Cigna Property & Casualty remit to claimant's attorney the full 20% this Court previously ordered be withheld.

DATED in Helena, Montana, this 16<sup>th</sup> day of December, 1999.

(SEAL)

\s\ Mike McCarter  
JUDGE

c: Mr. Kenneth H. Grenfell

Mr. Leo S. Ward

Mr. Regan Whitworth

Attached: [Whitworth letter of October 1, 1999](#)