IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 15

WCC No. 9806-7988

FAWN LYONS

Petitioner

vs.

MONTANA POWER COMPANY

Respondent/Insurer/Employer.

DECISION AND JUDGMENT

Summary: Claimant suffered a compensable back injury in 1979, while employed by Montana Power Company, which is self-insured. The employer accepted liability and paid benefits. In late 1995, claimant suffered a flare-up and sought medical care. Hearsay evidence indicates someone at Montana Power Company told the physician's office it would not cover medical care as claimant's file was closed. Claimant then spoke with a clerk in the employer's claims department, who told claimant her file was closed and could not be reopened. Claimant did not pursue the matter until 1998, when she consulted with attorney Chris J. Rager. On June 1, 1998, Rager faxed a letter to Montana Power Company's counsel, W. Wayne Harper demanding coverage and stating failure to respond by four p.m. that day would constitute denial of the claim. Not hearing from Harper by his "deadline," Rager filed a petition in this Court. Thereafter, counsel did not communicate outside of discovery demands and motions filed in this court. At the commencement of trial, the parties agreed claimant was owed $250 for out of pocket expenses associated with medical care and that Montana Power Company, which had paid 80% of claimant's medical bills under its health plan, would adjust its accounts to reflect payment from a workers' compensation account. Trial proceeded on issues of penalty and attorneys fees.

Held: The Court condemns the hard-ball litigation practice occurring in this case. This matter could have been resolved easily without litigation by communication between counsel. The approximately three hour deadline set by counsel for response to his demand was unnecessary, ill-mannered, and counterproductive. Montana Power Company is also at fault for not computing and paying benefits owed claimant instead of taking the position the matter would be resolved through litigation, though this fault is mitigated somewhat by the lack of clarity in the information provided by claimant regarding medical bills. Under

R.C.M. 92-849 (1975), a ten-percent penalty is awarded for Montana Power Company's unreasonable delay in paying benefits. Its position that claimant's care was closed and could not be reopened had no legal basis. The unreasonable conduct continued with Montana Power Company's failure to examine and resolve issues of payment to claimant after filing of the petition. A penalty may be awarded not only for unreasonable conduct prior to litigation but for an unreasonable defense during litigation. Attorneys fees are denied, however, because Montana Power Company conceded liability at the time of trial and because the information provided by claimant on the amount of reimbursement due her was not clear.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: R.C.M. 92-616 (1975). Although insurer's conduct in telling claimant, who was injured in 1979, that her file was closed, and could not be reopened for payment of medical benefits, had no legal basis and constituted unreasonable delay in paying benefits, claimant was not entitled to attorneys fees under R.C.M. 92-616 (1975) where the self-insured employer conceded liability prior to litigation at trial and the information provided by claimant on the amount of reimbursement due her was not clear prior to the commencement of the hearing.

Constitutions, Statutes, Regulations and Rules: Montana Code: R.C.M. 92-849 (1975). Claimant awarded ten-percent penalty under R.C.M. 92-849 (1975) for insurer's unreasonable delay in paying benefits where insurer told claimant that her file was closed and could not be reopened for payment of medical benefits without any legal basis or investigation and chose to litigate rather than take steps to determine the amounts due claimant.

Attorneys: Correspondence. The Court condemns the hard-ball litigation practice occurring in this case. This matter could have been resolved easily without litigation by communication between counsel. The approximately three hour deadline set by counsel for response to his demand was unnecessary, ill-mannered, and counterproductive. Montana Power Company is also at fault for not computing and paying benefits owed claimant instead of taking the position the matter would be resolved through litigation, though this fault is mitigated somewhat by the lack of clarity in the information provided by claimant regarding medical bills.

Attorneys: Conduct and Tactics. The Court condemns the hard-ball litigation practice occurring in this case. This matter could have been resolved easily without litigation by communication between counsel. The approximately three hour deadline set by counsel for response to his demand was unnecessary, ill-mannered, and counterproductive. Montana Power Company is also at fault for not computing and paying benefits owed claimant instead of taking the position the matter would

be resolved through litigation, though this fault is mitigated somewhat by the lack of clarity in the information provided by claimant regarding medical bills.

Penalties: Insurers. Claimant awarded ten-percent penalty under R.C.M. 92-849 (1975) for insurer's unreasonable delay in paying benefits where insurer told claimant that her file was closed and could not be reopened for payment of medical benefits without any legal basis or investigation and chose to litigate rather than take steps to determine the amounts due claimant.

¶1 The trial in this matter was held on November 12, 1998, in Butte, Montana. All of the exhibits offered at trial were admitted. In addition, the Court ordered the parties to file all correspondence between their counsel. That correspondence has been received and admitted as Exhibit 10. In addition the deposition of John Sando was submitted for the Court's consideration. Three witnesses - claimant, Joni Hope, and Thomas Kiely - were sworn and testified.

¶2 Ordinarily, the Court would issue findings of fact, conclusions of law and a judgment resolving the issues presented at trial. However, in this case the Court finds it more convenient to issue its decision in narrative form. Its findings of fact are contained in the narrative and can be identified by paragraph number in the event of an appeal.

¶3 Fawn Lyons, the claimant in this case, suffered a compensable back injury on May 11, 1979, while employed by Montana Power Company (MPC), which is self-insured. She underwent a diskectomy shortly after her injury but thereafter returned to work. MPC accepted liability and paid medical bills and benefits.

¶4 Between 1982 or 1983 and 1995, claimant did not require medical attention on account of her back. Then, in late 1995 claimant suffered a flareup of her back condition. She sought medical care from Dr. James P. Murphy, who had treated her for her initial injury.

¶5 Someone in Dr. Murphy's office contacted MPC's claims department to determine if the treatment would be covered under the 1979 claim. Whomever was contacted *apparently* responded that claimant's file was closed. The Court has only hearsay information about the contact. It does appear that contact occurred, but the exact exchange is unknown.

¶6 Claimant then contacted Joni Hope (Hope), a MPC employee. At the time of the contact, Hope was working as a clerk in the workers' compensation claims department at MPC. Claimant did not talk to Jerry Woods, who was MPC's claims adjuster. According to claimant, Hope indicated that her file was closed and that it could not be reopened. While Hope did not remember the call, I am persuaded that the conversation, as described by claimant, occurred.

¶7 Following her conversation with Hope, claimant did not pursue the matter further but did obtain medical care, incurring medical bills of approximately $2,000. Approximately

80% of those bills were paid by MPC's general medical plan covering its employees. Although claimant is no longer an employee of MPC, her husband is. The bills were paid under his coverage.

¶8 The matter then languished until 1998, when claimant consulted with Mr. Chris J. Ragar (Ragar), an attorney. Ragar took her case. On June 1, 1998, he faxed a letter to MPC's counsel, Mr. W. Wayne Harper (Harper), "demanding that Montana Power Company accept liability for the reasonable medical services that Ms. Lyons has required since approximately January 1996 (and which benefits have not been paid)." (Ex. 10.) The letter stated that it would be faxed by 1:45 p.m. and that failure to respond by 4:00 p.m. would constitute a rejection of the demand. Harper was out of his office and did not see the letter by the 4:00 p.m. deadline. On the same day, presumably after the 4:00 p.m. deadline expired, Ragar mailed a Petition for Hearing to the Court. The petition was received and filed June 2, 1998.

¶9 Counsel for claimant has argued that the demand he made on June 1st was sufficient under prior decisions of this Court and that he did not need to do more to attempt to resolve the matter prior to the petition. Whatever the practice before I became judge, I condemn what occurred here. The demand was no demand at all. There was no meaningful opportunity for MPC to evaluate and respond to the demand. The manner in which the demand was presented and the time allowed for response was unnecessary, ill-mannered and counterproductive.

¶10 On June 29, 1998, MPC filed its response. In its response, MPC admitted "it is liable for all reasonable medical benefits which the Petitioner required for her injury, **including those since 1996.**" (Answer at 2, emphasis added.)

¶11 That should have been the end of the litigation. All that remained to be determined was the amount owed and to pay that amount. It should have been a simple matter of securing billing statements, calculating what claimant paid out-of-pocket, issuing a check to claimant for her out-of-pocket payments, and making an accounting adjustment between MPC's general employee medical coverage account and its workers' compensation account. *See Galetti v. MPC,* 1999 MTWCC 11 (February 4, 1999).

¶12 But the parties, rather their attorneys, insisted on war. Discovery was propounded, motions were filed and briefed. The matter then came to trial in Butte on November 12, 1998. In colloquy with counsel the Court learned:

- Prior to the filing of the petition, claimant had not submitted to MPC information showing the amount of her out-of-pocket payments.
- After the filing of the petition, and as part of the discovery, medical bills were forwarded to MPC.

- The medical bills forwarded to MPC did not show the precise amount of claimant's out-of-pocket expenses. Several of the medical bills were confusing as to what was paid by claimant.
- Indeed, even at trial the claimant was unable to specify the exact amount she was owed for out-of-pocket expenses.
- On its part, MPC did not analyze the medical bills provided during discovery to determine what it owed claimant for her out-of-pocket expenses. It took the position that the bills were exhibits for trial and that it had no duty to calculate and pay reimbursement based on the exhibits.

¶13 During colloquy the parties agreed that MPC shall pay the claimant $250 to reimburse her for her out-of-pocket expenses. MPC also agreed to make accounting entries transferring MPC payments made for claimant's 1995-1996 care from MPC's employee medical plan to its workers' compensation plan.

¶14 Following the parties' agreement, the only issues remaining for determination were claimant's requests for attorney fees and a penalty. I will address those requests in reverse order.

¶15 Claimant's penalty request, as well as her request for attorney fees, is governed by the 1977 Workers' Compensation Act, which is the version of the Act in effect at the time of her injury. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶16 The applicable penalty provision is R.C.M. 92-849 (1975) which provides:

> **92-849. Increase in award for unreasonable delay or refusal to pay.** When payment of compensation has been unreasonably delayed or refused, either prior or subsequent to the issuance of an award, the full amount of the order, decision or award may be increased by ten percent (10%) of the weekly award. The question of unreasonable delay or refusal shall be determined by the workers' compensation judge and such a finding constitutes good cause to rescind, alter or amend any order, decision or award previously made in the cause for the purpose of making the increase provided herein.

Bottom line, the section requires a finding that the insurer unreasonably delayed or failed to pay benefits.

¶17 MPC's failure to at least inquire regarding the 1996 care was unreasonable. Its position that care was closed and could not be reopened had no legal basis: It continued to be liable for claimant's back treatment <u>if</u> related to her 1979 injury. A 10% penalty is therefore assessed.

¶18 Claimant also argues that MPC's defense in this case was unreasonable because at the time of trial it had not paid the 1996 medical bills. MPC counters that it had no obligation to pay medical bills submitted to it during the course of litigation. MPC is wrong. Its obligation to pay benefits due a claimant does not stop at the courthouse steps. It is a continuing obligation. A penalty may be awarded not only for unreasonable conduct prior to litigation but for an unreasonable defense during litigation. *Simons v. State Compensation Mut. Ins. Fund.,* 262 Mont. 438, 448, 865 P.2d 1118, 1124 (1993). Whether MPC analyzed the bills and agreed to pay the amounts owed or the Court reviewed the bills and entered judgment for the amounts owed, the result is the same. The difference is the **unnecessary time and expense** spent by lawyers and the Court in this litigation. While the lawyers may kiss off the time and expense, the Court does not.

¶19 On the other hand, claimant was unable to determine the amount of reimbursement due her. How can MPC pay when claimant cannot determine what it should pay?

¶20 The attorney fee statute in effect at the time of the claimant's injury does not require a finding that the insurer acted unreasonably. Section R.C.M. 92-616 (1975) provides:

> **92-616. Costs and attorneys' fees payable on denial of claim later found compensable.** In the event the insurer denies the claim for compensation or terminates compensation benefits, and the claim is later adjudged compensable by the division or on appeal, the insurer shall pay reasonable costs and attorneys' fees as established by the division. However, under rules adopted by the division and in the discretion of the division, an insurer may suspend compensation payment for not more than thirty (30) days pending the receipt of medical information.

MPC denied compensation on the ground that the claimant's case was closed. That denial was "tantamount to a 'termination of compensation benefits.'" *Allen v. Treasure State Plumbing,* 246 Mont. 105, 111, 803 P.2d 644, 647 (1990). Under 92-616 R.C.M., an award of attorney fees requires an adjudication by the Court. MPC's concession of liability in its response and its agreement at trial to paying $250 made an adjudication unnecessary. *Yearout v. Rainbow Painting,* 222 Mont. 65, 68, 719 P.2d 1258, 1260 (1986). Moreover, claimant had not determined the amount due when trial commenced. She substantially contributed to unnecessarily forcing the matter to trial. Attorney fees must therefore be denied.

¶21 In closing, I admonish both counsel against the sort of hard-ball practice that occurred in this case.

JUDGMENT

¶22 1. MPC shall abide by its agreement to reimburse claimant $250 and make accounting entries transferring payments made under its employee benefit program to its workers' compensation account.

¶23 2. Claimant is entitled to a $25 penalty. She is also entitled to a 10% penalty on the amount which is equal to the percentage of employee contributions in 1996 to MPC's medical benefits plan times the amount paid by the plan for claimant's 1996 care. *See Galetti v. MPC*, 1999 MTWCC 11 (February 4, 1999).

¶24 3. The claimant is not entitled to attorney fees or costs.

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

¶26 5. Any party to this dispute may have 20 days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 11th day of February, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Chris J. Ragar
Mr. W. Wayne Harper
Date Submitted: November 30, 1998