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

**1994 MTWCC 54**

**WCC No. 9106-6160**

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**IN THE MATTER OF:**

**SCOTT MASSEY, d/b/a ALL SEASONS CONSTRUCTION**

**Petitioner**

**vs.**

**UNINSURED EMPLOYERS' FUND/**

**DAVID CLARKE**

**Respondent.**

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ORDER DENYING MOTION FOR ATTORNEY FEES;
ORDER PERMITTING THE FILING OF A NEW PETITION

On March 9, 1994, the claimant, David Clarke, submitted Respondent's Motion for Attorney Fees, along with a supporting brief and an affidavit of his attorney, Mr. Mark E. Jones. These documents set forth the caption, as above, but without any identifying docket number. However, the information set forth in the filings and an accompanying letter of claimant's counsel show that the attorney fees sought by claimant are in connection with a prior proceeding litigated in this Court under WCC No. 9106-6160. The Court therefore retrieved the file for WCC No. 9106-6160, filed the motion under that docket number, and fixed a date for the Uninsured Employers' Fund (UEF) and Scott Massey to respond. The UEF chose not to respond. However, Scott Massey filed a brief opposing any award of attorney fees. The Court also received claimant's reply brief.

Due to the unusual manner in which the claimant's request arises, we will briefly review the history of this case. The original Petition for Hearing was filed by the employer, Scott Massey, d/b/a All Seasons Construction (Massey), on June 3, 1991. Massey asked that the Court determine that claimant was either an independent contractor or was outside the scope of any employment with Massey at the time of a 1990 injury. The issues, as set forth in the final Pretrial Order, were as follows:

> 1. Whether Defendant David Clarke was an employee or an independent contractor at the time of his accident.

2. If Defendant Clarke was an employee of Petitioner Scott Massey d/b/a all Seasons Construction, whether Petitioner should reimburse Defendant Uninsured Employers' Fund for expenditures it has made on Clarke's behalf.

3. If Defendant Clarke was an independent contractor, whether Defendant Clarke should reimburse Defendant Uninsured Employers' Fund for expenditures it has made on his behalf.

The Court issued its Findings of Fact and Conclusions of Law and Judgment on November 12, 1991, holding that David Clarke was an employee of Massey and that Massey was uninsured. It ordered Massey to reimburse the UEF for all amounts it had paid to claimant on account of his workers' compensation claim.

As evident from the final Pretrial Order, attorney fees were not requested and were not identified by either party as an issue in the case. However, following trial the claimant did nonetheless request an award of attorney fees. (Claimant's Proposed Findings of Fact, Conclusions of Law and Judgment at 7.) Petitioner objected to the request and asked that sanctions be imposed because the request was untimely and outside the scope of issues listed in the Pretrial Order. No attorney fees were awarded and this Court admonished claimant's counsel to limit proposed findings of fact and legal briefs to the issues presented in the pretrial order. (Findings of Fact and Conclusions of Law and Judgment.) Neither party filed a request for a new trial or an appeal within the times allowed by law. On January 29, 1992, a standard Notice of file closure was served on all parties and the Workers' Compensation Court file was closed.

Attached to Massey's brief in opposition to claimant's present motion are copies of Respondent's Petition for Attorney Fees dated December 23, 1991 and date stamped as received by the State Fund on February 4, 1994; Rule 12 (B) Motion to Dismiss by Massey dated January 13, 1992; a Brief in Support of Rule 12 (B) Motion to Dismiss by Massey dated January 13, 1992; and Respondent's Brief in Opposition to Petitioner's Motion to Dismiss dated February 2, 1994 and date stamped as received by the UEF on February 11, 1992. While these documents designate the forum as the "Workers' Compensation Court for the State of Montana Missoula Area," the cause number set forth in the caption is "WCD No. 5-90-000329." Massey states that the petition was never filed with the Court. In any event, these documents are not part of the Court file in this case and do not effect the disposition of claimant's present motion.

Claimant's Reply Brief indicates that at the time this case was pending in Workers' Compensation Court he was also pursuing a direct action against Massey in District Court under section 39-71-515, MCA. He states that the district court case was not resolved until June of 1993, and that until that time.

it remained unclear whether Clarke, the injured employee, would be awarded all related attorney fees in Montana District Court. . .. In June of 1993, it was determined by the Montana District Court that Clarke was entitled to only fees incurred in that District Court action and must return to this Court for the bulk of the fees, since this matter was litigated extensively in the Workers' Compensation Court.

## DISCUSSION

Massey correctly points out that the attorney fee issue was never before this Court. Insofar as the present captioned case is concerned, it is too late for claimant to request attorney fees. His attempt to raise the attorney fee issue in the case has already been rejected and he did not appeal from the decision rebuffing his attempt.

However, the fact that claimant may not raise the attorney fee issue in the original proceeding is not dispositive of his request. When claimant's motion for attorney fees was received on March 9, 1994, the Court, not claimant, assigned the original docket number to the motion and treated it as part of the original case. It did not consider or determine whether the motion should be treated as a new petition and assign a new docket number. While a reopening of the original proceeding is barred by the Court's previous decision, Massey has not cited any authority indicating that a new petition is time barred or that there is any other insuperable bar to the filing of a new petition. On the other hand, the Court's treatment of the motion as a continuation of the old case hardly alerted the parties of the need to address the propriety of treating the motion as a petition.[(1)]

## ORDER

In light of the foregoing discussion, the Motion for Attorney Fees is **denied without prejudice**. Claimant may revise, recaption and submit the motion in the form of a petition and the Court will accept it for filing and give it a new docket number. In the event the claimant files such a petition, Massey may raise any defenses it may have, including any defenses which present an insuperable bar to the prosecution of the petition. It may raise the mediation issue anew; however, the Court urges the parties to submit to mediation prior to bringing this matter back to the Court.

DATED in Helena, Montana, this 8th day of June, 1994.

(SEAL)

Mike McCarter
JUDGE

c: Ms. Kristine L. Foot
Mr. Mark E. Jones
Mr. David A. Scott

1. Massey also argues that the motion is barred on account of claimant's failure to mediate the attorney fee issue. Claimant counters that the mediation provisions apply only to "benefits" and that the Department of Labor and Industry has by administrative regulation determined that attorney fee issues are outside the scope of the statute. This Court encourages pretrial mediation of **all** issues brought before it, and it has inherent authority to order a settlement conference whether or not the mediation statutes apply. ARM 24.5.334. In any event, a failure to mediate is not an insuperable bar to petitioning the Court for attorney fees since the failure can be cured by submitting to mediation.