

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 56

WCC No. 9212-6637

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JOHN RATHMANN

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer.

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ORDER DENYING ATTORNEY FEES, COSTS AND PENALTY;  
ORDER DENYING REQUEST FOR JUDGMENT

This Court's order of March 7, 1994, sets forth a brief history of the proceedings in this case and will not be restated. The remaining issues to be considered are petitioner's claim for attorney fees, costs and a penalty. On March 25, 1994, claimant submitted his Brief on Expenses, Costs, Penalties and a document entitled Expenses, Costs; Submitted to the Court for Reimbursement. Also, on March 25, 1994, the State Fund's Brief in Response to Request for Payment of Attorney Fees, Costs and Penalty was filed. Claimant supplemented his information by letter which was received on March 28, 1994 and on April 7, 1994, filed his Reply to S.C.M.I.F.'s Brief on Expenses, Costs, and Penalty.

On March 29, 1994, claimant filed a Request for Judgment wherein he alleged the State Fund had failed to comply with the time requirement for filing briefs as set by the Court, and State Fund responded to this request on March 30, 1994. The Request for Judgment is **denied**. The Court record clearly shows that the brief was timely filed in the Workers' Compensation Court and the certificate of mailing indicates a copy was sent to Mr. Rathmann.

DISCUSSION

The statutes in effect at the time of the injury govern any determination by the Workers' Compensation Court with regard to benefits and attorney fees. ***Caldwell v. Great Western Sugar Co.***, 229 Mont. 448, 746 P.2d 627 (1987).

PENALTY

The claimant submits multiple pages and expends considerable time discussing indemnification for his efforts, calling the Court's attention to various statutes dealing with: subrogation; Titles 2 and 27; sections 21-1-202 and 37-61-421, MCA. The applicable statute for the determination of a penalty for an injury occurring in 1988 is section 39-71-2907, MCA (1987).

**39-71-2907. Increase in award for unreasonable delay or refusal to pay.** (1) When payment of compensation has been unreasonably delayed or refused by an insurer, either prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant compensation benefits, the full amount of the compensation benefits due a claimant between the time compensation benefits were delayed or refused and the date of the order granting a claimant compensation benefits may be increased by the workers' compensation judge by 20%. 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.

The sole issue presented by this petition following this Court's dismissal of issues which had not been mediated, was which insurer was liable. That issue was resolved without an adjudication by the Court.

A brief discussion of the chronology of these proceedings may be helpful in resolving the pending motions. The Court record reflects that the petition was filed in December of 1992, but due to the claimant's failure to mediate various issues the trial was vacated. In February 1993 Claimant's Motion for Partial Summary Judgment was filed. In March of 1993, claimant decided to represent himself and fired his attorney. By letter dated March 22, 1993, the Court requested information from the claimant regarding whether he wished to pursue the Motion for Summary Judgment filed on his behalf by his former attorney. Again in August of 1993, the Court requested a status report from the parties and claimant responded by letter dated August 25, 1993, requesting that the motion be decided. The claimant also advised the Court of time constraints as a result of being enrolled for classes at the University. Following briefing, the Court scheduled oral argument, which at the claimant's request was scheduled for January 18, 1994. By letter dated February 8, 1994, the State Fund accepted liability for the claimant's injury, thus resolving the dispute without the need for an adjudication. Therefore, an Order dismissing all parties except the State Fund was issued.

The Court finds that there has not been an unreasonable delay in these proceedings and that there is no basis for a penalty. The controversy among the insurers and the other parties involved highly technical issues of law. The Court is unable to characterize the State

Fund's position as beyond the pale of legitimate legal argument and therefore cannot characterize its actions as unreasonable.

#### ATTORNEY FEES

The claimant is not entitled to attorney fees because he is not an attorney. As the Supreme Court decided in **Lussy v. Bennett**, 214 Mont. 301, 308, 692 P.2d, 1232 (1984).

Lussy purports to bring himself within the statute allowing attorney fees, on the basis that he was the attorney-in-fact for the members of his family. Of course he is confusing an attorney **authorized to practice law** with a person clothed with the powers of an agent. He further claims that by proceeding pro se, he is in truth an attorney, as such is entitled to attorney fees. It may be said that such an argument is frivolous.

#### COSTS

The claimant requests costs as follows:

|                                          |             |
|------------------------------------------|-------------|
| Certificates of mailing . . . . .        | 69.50       |
| Stamps and envelopes . . . . .           | 51.48       |
| Special Postage envelope . . . . .       | 27.16       |
| Pages of Text . . . . .                  | 314.00      |
| Misc. Photocopy charges . . . . .        | 28.08       |
| Pay Phone Charges . . . . .              | 29.70       |
| Private phone Charges . . . . .          | 27.20       |
| (not inclusive)                          |             |
| Legal services consult fee . . . . .     | 5.00        |
| Expenses to Mr. Bulman . . . . .         | 66.31       |
| Legal expenses to Mr. Cok . . . . .      | 648.98      |
| Misc office equipment . . . . .          | 38.00       |
| Books, including <u>Larson</u> . . . . . | 446.00      |
| Book on Torts . . . . .                  | 10.95       |
| Parking Meter Change . . . . .           | 1.85        |
| Total . . . . .                          | \$ 1,764.21 |

An award of costs is governed by section 25-10-201, MCA. **Baeta v. Don Tripp Trucking**, 254 Mont. 487, 839 P.2d 566, (1992). The section provides:

**25-10-201. Costs generally allowable.** A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows:

- (1) the legal fees of witnesses, including mileage, or referees and other officers;
- (2) the expenses of taking depositions;
- (3) the legal fees for publication when publication is directed;
- (4) the legal fees paid for filing and recording papers and certified copies thereof necessarily used in the action or on the trial;
- (5) the legal fee paid stenographers for per diem or for copies;
- (6) the reasonable expenses of printing papers for a hearing when required by a rule of court;
- (7) the reasonable expenses of making transcript for the supreme court;
- (8) the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and
- (9) such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law.

This Court has routinely rejected requests that it award costs for copying, telephone calls, mailing, and similar items since they represent ordinary office overhead. **Gray v.**

**Columbus Hospital, WCC No. 8612-5436, decided September 30, 1988.** Legal fees are not an allowable cost, rather they are part of attorney fees. Insofar as claimant seeks to recover payments he has made to attorneys as a part of his request for attorney fees, that request is governed by section 39-71-611, MCA (1987). Under subsection (1)(c) of the statute, attorney fees may be awarded only if the insurer's denial of liability was unreasonable. As already found by this Court, the State Fund's denial was not unreasonable. Since the costs enumerated by claimant are not allowable under section 25-10-201, MCA, his request for an award of costs is **denied**.

IT IS HEREBY ORDERED that petitioner's request for attorney fees, costs and penalty are **denied**.

DATED in Helena, Montana, this 27th day of April, 1994.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. John Rathmann - CERTIFIED  
Mr. Thomas E. Martello