

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 56

WCC No. 9809-8068

KAREN RILEY

Petitioner

vs.

W.R. GRACE & COMPANY, Employer and

TRANSPORTATION INSURANCE COMPANY,

Insurer/Respondents.

DECISION AND JUDGMENT

Summary: Petitioner spouse of deceased worker seeks attorneys fees relating to previously-litigated case involving insurer's entitlement to offset from death benefits based upon prior settlement and spouse's social security. In prior case, Court allowed offset for settlement but not for social security. Insurer argued petitioner was not entitled to fees but if so not to contingency fee amount.

Held: Fees must be awarded under a specific statutory provision. Section 39-71-613, MCA (1985) is not applicable because the action at issue did not involve a "hearing" as described within that statute. Fees are awarded under section 39-71-612, MCA (1985) because the dispute concerned "the amount of compensation due." The amount of attorneys fees is governed by section 39-71-614, MCA (1985), which awards fees based on the time spent by the attorney, not upon a contingency agreement.

Topics:

Constitutions, Statutes, Regulations and Rules: 39-71-612, MCA (1985).

Attorneys fees must be awarded under a specific statutory provision. Section 39-71-613, MCA (1985) is not applicable to claim for attorneys fees following Declaratory Judgment action involving insurer's right to offset death benefits because the action did not involve a "hearing" as described within that statute. Fees are awarded under section 39-71-612, MCA (1985) because the dispute concerned "the amount of compensation due." The amount of attorneys fees is governed by section 39-71-614, MCA (1985), which awards fees based on the time spent by the attorney, not upon a contingency agreement.

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¶1 The trial in this matter was held on March 8, 1999, in Kalispell, Montana. Petitioner, Karen Riley the widow of a deceased worker, Donald A. Riley was represented by Mr. Allan M. McGarvey. Respondent, Transportation Insurance Company (Transportation), was represented by Mr. Thomas R. Bostock. A trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 through 7 were admitted without objection.

¶3 Witnesses: Thomas R. Bostock, counsel for respondent, was sworn and testified. The parties had previously stipulated that the attorneys may testify without need for co-counsel as it was anticipated none of the facts established through their testimony would be contested. No depositions were submitted.

JUDICIAL NOTICE

¶14 Petitioner seeks attorney fees with respect to a matter previously litigated in this Court, *W.R. Grace & Company and Transportation Ins. Co. v. Karen Riley*, 1998 MTWCC 26. In the prior case Transportation sought a determination as to its entitlement to offsets against death benefits being paid to Karen Riley (Karen). The Court takes judicial notice of the file and record in that case.

FACTS

¶15 The following facts are taken from the Declaratory Judgment in *W.R. Grace & Company and Transportation Ins. Co. v. Karen Riley* and the statement of uncontested facts filed by the parties in the present action, or are Court findings based on the evidence and exhibits presented at trial.

¶16 W.R. Grace & Company (Grace) formerly operated a vermiculite mine near Libby, Lincoln County, Montana. Donald A. Riley (Donald) worked for Grace at the Libby mine from May 1960 until March 3, 1987. Transportation insured Grace for occupational disease purposes during the latter years of Donald's employment. (Declaratory Judgment [Abbreviated DJ hereafter].)

¶17 During the course of his employment for Grace, Donald contracted asbestosis, an occupational disease. As a result, he submitted a claim to the Division of Workers' Compensation for occupational disease benefits. Following an administrative hearing before the Department of Labor & Industry (DLI), the hearing officer determined that Donald was permanently totally disabled, that such disability was solely related to his occupational disease, and that he was entitled to occupational disease compensation and medical benefits. (DJ.)

¶18 Transportation and Donald entered into a full and final compromise settlement for \$85,000. An Order approving such settlement was issued by the Employment Relations Division on December 28, 1993, and \$85,000 was paid by Transportation to Donald pursuant to that Order. (DJ.)

¶19 Donald died on February 26, 1997. (DJ.) At the time of his death he was married to Karen.

¶110 In a March 18, 1997 letter, Karen through Mr. Allan M. McGarvey (McGarvey), made a demand to the insurer for death benefits. (Uncontested Fact [abbreviated UF hereafter]; Ex. 1.)

¶111 By letter dated April 2, 1997, Transportation denied the claim. (UF; Ex. 2.)

¶112 By letter dated April 7, 1997, McGarvey asked Transportation to reconsider its position and to accept the claim. (UF; Ex. 3.)

¶13 By letter dated April 15, 1997, Mr. Thomas R. Bostock (Bostock), counsel for Transportation, advised McGarvey the insurer would "initiate weekly death benefit payments." Bostock explained, "however, payment of these benefits is being made under §39-71-608, MCA, 1985." The letter further explained that Transportation would "immediately file a petition for declaratory ruling before the Workers' Compensation Court **for clarification of the recoupment issue.**" (UF; Ex. 4, emphasis added.)

¶14 Transportation then initiated payment of death benefits at the rate of \$299 per week, which is the rate of benefits that would have been paid to Karen had the death occurred upon the onset of the disease. Transportation paid Karen death benefits under reservation of rights retroactive to February 26, 1997. (UF.)

¶15 Although Transportation notified Karen that it was commencing death benefits under a reservation of rights, the communications between McGarvey and Bostock indicated that Transportation was not disclaiming liability for death benefits but only seeking offsets from those benefits. (Ex. 4 at 1-2; Ex. 6; Court Finding.)

¶16 In May 1997, Karen formally retained McGarvey by retainer agreement. (Ex. 5; UF.)

¶17 In negotiations between May 1997 and September 1997, McGarvey attempted to negotiate a settlement of the recoupment dispute with Transportation. The efforts are reflected in a September 5, 1997 letter written by Bostock. (UF; Ex. 6.)

¶18 On September 10, 1997, Transportation filed the Petition for Declaratory Judgment. The petition was resolved by Declaratory Judgment entered March 23, 1998. (DJ.)

¶19 Through its Petition for Declaratory Judgment, Transportation argued it was entitled to take two offsets against the death benefits. First, it sought to recoup a portion of the lump-sum settlement previously paid to Donald. Specifically, it sought to recoup the amount of the settlement that exceeded what Donald would have received in biweekly benefits prior to his death had he not taken the lump-sum settlement. Second, Transportation sought to offset social security benefits received by Karen on account of her husband's death. Transportation did not otherwise contest its liability for death benefits. (DJ.)

¶20 The Court agreed with Transportation with respect to that portion of the lump-sum payment which exceeded benefits Donald would have received on a biweekly basis prior to his death. However, I found that Transportation was not entitled to an offset with respect to Karen's social security benefits. The judgment reduced Karen's death benefits from \$299.00 per week to \$260.28 a week. Since no reduction for social security benefits was allowed, the final award was greater than the amount sought by Transportation but less than the \$299.00 claimed by Karen. (DJ.)

Prior Resolution of *Res Judicata* Issue

¶21 Earlier in this proceeding, Transportation filed a Motion for Summary Judgment arguing that the doctrine of *res judicata* bars any award of attorneys' fees with respect to the prior declaratory judgment action. Transportation pointed out that Karen's Notice of Representation and Response to Petition for Declaratory Judgment prayed for "an award of costs and attorneys fees." But, as noted in this Court's Order Denying Summary Judgment (March 3, 1999), neither party briefed Karen's attorney fee request in the declaratory judgment matter and the Court simply did not consider the request in that proceeding. (*Id.* at 2.) I denied the motion, finding that the attorney fee issue was neither expressly nor impliedly decided by the Court in the declaratory judgment proceeding. Therefore, the issue is now properly before the Court.

Discussion

¶22 Transportation takes the position that no attorney fees are due. Secondly, it argues that if fees are due, then an award less than the contingency fee agreed between Karen and McGarvey is appropriate in light of the limited time and labor spent by McGarvey.

¶23 Karen's entitlement to attorney's fees is governed by the 1985 version of the Workers' Compensation and Occupational Disease Acts (WCA and ODA) since it was the law in effect at the time Donald's occupational disease claim arose. *W.R. Grace & Company and Transportation Ins. Co. v. Karen Riley*, 1998 MTWCC 26, ¶ 26; *Madill v. State Compensation Ins. Fund*, 280 Mont. 450, 458, 930 P.2d 665, 670 (1997); *Hilbig v. Central Glass Co.*, 249 Mont. 396, 399, 816 P.2d 1037, 1039 (1991). The amount of any attorney's fees awarded is also governed by the statutes applicable to the underlying claim for benefits. *Worts v. Hardy Construction Co.*, 249 Mont. 477, 483, 817 P.2d 231, 235 (1991); *Cuellar v. Northland Steel*, 226 Mont. 428, 431, 736 P.2d 130, 132 (1987).

¶24 However, the parties disagree as to which 1985 attorney fee statute applies in this case. Karen contends that fees are recoverable under section 39-72-613, MCA (1985), of the ODA. Transportation argues that the governing statute is section 39-71-612, MCA (1985), of the WCA. Determination of the applicable statute is significant to the outcome of this matter since the statutes use different standards for determining attorney's fees.

¶25 Section 39-72-613, MCA (1985), of the ODA provides as follows:

Costs and attorney fees. (1) If an insurer requests that a hearing be held before the division and the claim is determined compensable by the division after the hearing and the insurer does not appeal the division's decision to the workers' compensation judge, reasonable costs and attorney fees, as determined by the division, shall be paid to the claimant's attorney by the insurer.

(2) If an insurer appeals a decision of the division to the workers' compensation judge or from the judge to the supreme court and the claim is determined compensable, reasonable costs and attorney fees, as determined by the workers' compensation judge,

shall be paid to the claimant's attorney by the insurer for proceedings before the division, the workers' compensation judge, and the supreme court.

The "hearing" referred to in the section is the hearing provided under the ODA in cases where the insurer denies liability for an occupational disease claim. §§ 39-72-602, -611, and -612 to -613, MCA (1985). The Division's jurisdiction, which was later subsumed by the DLI,⁽¹⁾ see 1989 Montana Laws, chap. 613, § 64, did not extend to controversies where the insurer accepted liability but disputed the amount of benefits due. *Gomez v. Montana Municipal Ins. Authority*, WCC No. 9411-7177, Order Granting in Part/denying in Part the Motion to Dismiss (January 27, 1995) (holding that where the insurer accepted liability but contested the percentage of liability attributable to occupational factors, the panel procedures and DLI hearing requirements do not apply, rather the matter is one for the Court to hear de novo); and see also *Theda Bea Bouldin v. Liberty Northwest Ins. Corp.*, WCC No. 9604-7536, Partial Summary Judgment and Decision (October 8, 1996).

¶26 In the present case, Donald's claim for benefits was decided long ago and the attorney fees sought by Karen are not in connection with that proceeding. The declaratory judgment action did not involve a dispute over Transportation's liability for death benefits. The matter litigated in the action concerned Transportation's right to offsets and, ultimately, the net amount of the benefits due Karen, a controversy over which the Court, not the Department, had jurisdiction. Section 39-72-613, MCA (1985), is inapplicable.

¶27 Recognizing that the specific procedures referenced in section 39-72-613, MCA, were not used, Karen asks the Court to construe the section broadly to encompass the declaratory judgment proceeding. Citing *Stuber v. Moodie Implement*, 236 Mont. 189, 769 P.2d 1205 (1989), she argues that broad construction is appropriate given the policy interest of avoiding the diminishment of benefit awards by attorney's fees. The Court, however, is prohibited from expanding the section to encompass proceedings that the statute does not encompass. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, **not to insert what has been omitted** or to omit what has been inserted." § 1-2-101, MCA, (emphasis added).

¶28 The question, then, is whether attorney fees may be awarded under section 39-71-612, MCA (1985), which provides:

Costs and attorneys' fees that may be assessed against an employer or insurer by workers' compensation judge. (1) If an employer or insurer pays or tenders payment of compensation under chapter 71 **or 72** of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or tendered by the employer or insurer, a reasonable attorney's fee as

established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation. [Emphasis added.]

(2) When an attorney's fee is awarded against an employer or insurer under this section there may be further assessed against the employer or insurer reasonable costs, fees, and mileage for necessary witnesses attending a hearing on the claimant's behalf. Both the necessity for the witness and the reasonableness of the fees must be approved by the workers' compensation judge.

The section applies to both workers' compensation claims (chapter 71) **and** occupational disease claims (chapter 72). The dispute in the declaratory judgment action related "to the amount of compensation due" since Transportation paid benefits and disputed only a portion of what was paid.

¶29 Under section 39-71-612, MCA (1985), attorney's fees may be assessed against the insurer only if "the award granted by the judge is greater than the amount paid or tendered by the employer or insurer." Based upon this provision, Transportation argues that Karen is not entitled to attorney fees because the Court's ruling on the declaratory judgment action gave Karen *less* than what Transportation had been paying. Petitioner on the other hand, asserts that Transportation was paying petitioner under a reservation of rights and should not be considered to have "paid or tendered" *any* benefits under the statute. The Court rejects both contentions.

¶30 In paying under a reservation of rights, the insurer put Karen on notice that the portion of payments equal to Transportation's claimed offsets were conditional and that it might seek to recoup that portion. In fact Transportation sought to enforce its claimed offsets, and reduce Karen's benefits accordingly, by bringing its declaratory judgment action. To constitute a payment or tender contemplated by section 39-71-612, MCA, nothing must be left to negotiate, no conditions may be attached. See *J & L Tire and Alignment Center v. Peak*, 247 Mont. 169, 171, 805 P.2d 571 572-73 (1991) ("To be an offer [tender] contemplated by the statute nothing must be left to negotiate."). Only that portion of the payments remaining after the claimed offsets were made without reservation, therefore it is only the difference between the \$299 full weekly benefits and the claimed offset which constituted "payment" within the meaning of section 39-71-612, MCA. Since Transportation did not prevail with respect to one of the claimed offsets, Karen is entitled to attorney fees based on the difference between the unreserved portion of payments and the actual benefits found due her by the Court.

¶31 The amount of attorney fees due Karen is governed by section 39-71-614, MCA (1985), which provides as follows:

Calculation of attorney fees. (1) The amount of an attorney's fee assessed against an employer or insurer under 39-71-611 or 39-71-612 must be based exclusively on the time

spent by the attorney in representing the claimant on the issues brought before the workers' compensation judge. The attorney must document the time spent and give the documentation to the judge. The judge shall determine a reasonable attorney fee and assess costs. He is not bound by the documentation submitted to him. The hourly fee the judge applies to the time spent must be based on the attorney's customary and current hourly fee for legal work performed in this state.

(2) This section does not restrict a claimant and an attorney from entering into a contingency fee arrangement under which the attorney receives a percentage of the amount of compensation payments received by the claimant because of the efforts of the attorney. However, an amount equal to any fee and costs assessed against an employer or insurer under 39-71-611 or 39-71-612 and this section must be deducted from the fee an attorney is entitled to from the claimant under a contingency fee arrangement.

On its face, the section applies to attorney fees awarded under section 39-71-612, MCA. Karen, however, argues that the Court should disregard the section and award her the amount due under her contingent fee agreement with McGarvey because Transportation failed to timely identify the section.

¶132 Whether or not Transportation argued section 39-71-614, MCA, the Court must follow the statutes, including section 39-71-614, MCA, regarding attorney fees. Citation to a specific statute governing benefits or attorney fees does not constitute an affirmative defense which is waived unless affirmatively pleaded or stated. *Compare with Rasmussen v. Heebs Food Center*, 270 Mont. 492, 497, 893 P.2d 337, 340 (1995); *Haag v. Montana Schools Group Ins. Authority*, 274 Mont. 109, 115, 906 P.2d 693, 697 (1995). Failure to cite a specific statute does not constitute a judicial admission of fact or law which is binding in further proceedings. *Compare with Plouffe v. Burlington Northern, Inc.*, 224 Mont. 467, 473-74, 730 P.2d 1148, 1153 (1987).

¶133 Karen also argues that Transportation is estopped from relying upon section 39-71-614, MCA, because its attorney led McGarvey to believe the insurer was not arguing for calculation of fees on an hourly rate. Transportation, however, argued at trial that the contingent fee amount was too much and that fees should be determined according to the factors listed in *Wight v. Hughes Livestock Co., Inc.*, 204 Mont. 98, 664 P.2d 303 (1983). (See Claimant's Brief Supporting Use of Contingency Fee/*Wight* Factors, at 2-3, and Ex. 1.) The insurer never stipulated nor conceded that Karen is entitled to the contingent fee. The *Wight* factors, if applied, would allow the Court to determine attorney fees on a basis other than the contingent fee agreement, including on a hourly basis if appropriate. The six elements of equitable estoppel are not met under these facts.⁽²⁾ Neither are the elements for judicial estoppel, which estops parties from asserting

inconsistent and contradictory positions in separate litigation. The clearest reason for the rule is to prevent parties from playing "fast-and-loose with the courts." To give rise to

judicial estoppel, the first representation must have been made knowingly and free from the other party's inducement; it applies particularly to admissions or positions asserted under oath or in previous litigation.

Caekaert v. State Compensation Mut. Ins. Fund, 268 Mont. 105, 115, 885 P.2d 495, 501-502 (1994). Transportation did not make any representation concerning section 39-71-614, MCA. It did not represent that attorney fees must be calculated pursuant to the contingent fee agreement. It simply failed to cite section 39-71-614, MCA. Oversight does not give rise an estoppel.

JUDGMENT

¶134 1. Pursuant to sections 39-71-612 and 39-71-614, MCA (1985), petitioner is entitled to reasonable attorney fees and costs incurred in *W.R. Grace & Company and Transportation Ins. Co. v. Karen Riley*, WCC No. 9709-7824.

¶135 2. Karen is entitled to attorney fees based on the difference between the unreserved portion of payments and the actual benefits found due her by the Court.

¶136 3. The amount of fees must be determined in accordance with section 39-71-614, MCA (1985). That determination shall be governed by the procedures set forth in ARM 24.5.343.

¶137 4. This JUDGMENT is certified as final.

¶138 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 10th day of September, 1999.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Allan M. McGarvey

Mr. Thomas R. Bostock

Date Submitted: May 7, 1999

1. The 1999 Legislature transferred the hearing function from the Department to the Workers' Compensation Court. 1999 Montana Laws, ch. 442, § 23.

2. Equitable estoppel requires proof of the following six elements:

1. the existence of conduct, acts, language, or silence amounting to a representation or a concealment of a material fact;

2. these facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him;

3. the truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time it was acted upon by him;
4. the conduct must be done with the intention, or at least the expectation, that it will be acted upon by the other party, or under circumstances both natural and probable that it will be so acted upon;
5. the conduct must be relied upon by the other party and, thus relying, he must be led to act upon it; and
6. he must in fact act upon it in such a manner as to change his position for the worse.

Elk Park Ranch, Inc. v. Park County, 282 Mont. 154, 165, 935 P.2d 1131, 1137-8 (1997).

Without analyzing the other facts, there is no evidence for factors 5 and 6. At best, Karen can claim only that she should be able to take advantage of the insurer's oversight.