

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 12

WCC No. 9510-7415

DANE C. SCHOFIELD

Appellant

vs.

CHRIS GIOVETTI

Claimant/Respondent.

ORDER ON JUDICIAL REVIEW

Summary: Fee dispute between attorney and workers' compensation claimant resulted in order of DOL hearing examiner that attorney was not entitled to 20% of permanent partial disability benefits where fee contract allows fees on benefits obtained "due to the efforts of the attorney" and claimant ultimately received amount of PPD benefits offered by adjuster without input or involvement of attorney. Attorney appealed to WCC.

Held: DOL decision affirmed where adjuster had computed and offered same amount of PPD benefits as claimant ultimately accepted without any involvement from attorney. The fact that claimant, on attorneys advice, went to mediation on request for additional PPD benefits does not change the fact that the amount of PPD benefits obtained were not obtained due to efforts of attorney. Attorney awarded 20% of rehabilitation benefits, which were obtained with his efforts.

Topics:

Attorney Fees: Fee Dispute. WCC affirmed order of DOL hearing officer that attorney was not entitled to 20% of PPD benefits where fee contract allowed fees on benefits obtained "due to the efforts of the attorney" and claimant ultimately received amount of PPD benefits computed and offered by adjuster without input or involvement of attorney. The fact that claimant, on attorneys advice, went to mediation on request for additional PPD benefits does not change the fact that no additional PPD benefits were obtained due to efforts of attorney. Attorney awarded 20% of rehabilitation benefits, which were obtained with his efforts.

This is an appeal by Dane C. Schofield, an attorney, from a Department of Labor and Industry decision denying his claim for attorney fees on permanent partial disability

benefits received by his client, Chris Giovetti. After hearing, the Department's hearing examiner found that Giovetti did not receive the benefits "due to the efforts of the attorney" and limited Schofield's attorney fee to 20% of rehabilitation benefits which Schofield did secure for Giovetti. For the reasons set forth in the following discussion, the Department's decision is **affirmed**.

Factual and Procedural Background

Chris Giovetti was injured on September 29, 1993, in an industrial accident while working for Stillwater Mining, which is self-insured. His claim for compensation was accepted by Stillwater.

Approximately six months after the accident, Giovetti sought legal advice from Dane C. Schofield concerning his entitlement to workers' compensation benefits. On March 4, 1994, Giovetti signed an attorney fee agreement providing in relevant part:

A. Claimant and attorney agree to a fee schedule as follows:

For cases that have been settled without an order of the workers' compensation judge or the Supreme Court, twenty percent (20%) of the amount of additional compensation payments the claimant receives **due to the efforts of the attorney**.
[Emphasis added.]

The agreement was approved by the Department on March 23, 1994.

Thereafter, by letter dated July 12, 1994, Stillwater's claims adjuster (Cathy Andersen of Crawford and Company) notified Giovetti that he was entitled to a 49% permanent partial disability benefit award, equating to 171.5 weeks of benefits at claimant's permanent partial disability rate of \$181.00 weekly. Neither Schofield's testimony nor other evidence show that Schofield had any input concerning Stillwater's computation, or that he had even contacted Stillwater or its adjuster. Andersen's letter was addressed to Giovetti.

Unhappy with the adjuster's calculations, Schofield and Giovetti requested mediation. Ultimately, Schofield persuaded the adjuster and Stillwater to kick in an additional \$1,724.00 in rehabilitation benefits. While Schofield apparently urged Giovetti to authorize him to petition the Workers' Compensation Court in the hope of obtaining more benefits, Giovetti threw in the towel and accepted the 171.5 weeks of permanent partial benefits and the \$1,724.00 in rehabilitation benefits. He thereafter executed a Petition for Compromise and Release Settlement for the lump sum payment of \$32,765.50. The petition was approved and the settlement amount was paid.

Thereafter, a dispute arose over the amount of the attorney fee due Schofield, who asserted that he was entitled to 20% of the total settlement excluding the amount paid claimant for his impairment rating. (Ex. J-5 at 8.) The impairment rating was 10% and

claimant's entitlement for the rate was therefore 35 weeks, or \$6,335.00. Thus, the net attorney fee claim was \$5,286.10 (\$32,765.50 less \$6335.00 times 20%).

Giovetti disputed Schofield's attorney fee claim. The Employment Relation's Bureau expressed the opinion that Schofield's fee was appropriate but ordered the fee withheld by the insurer pending a request for a hearing. (Ex. J-5 at 2.) Giovetti thereafter petitioned for hearing.

A telephone hearing was held on July 13, 1995, before a Department hearing examiner. Giovetti, his wife, and Schofield testified. Several exhibits were also submitted. Those exhibits are not set forth separately in the Department file but are interspersed with the pleadings and orders in the file.

On October 3, 1995, the hearing examiner issued his Findings of Fact, Conclusions of Law, and Order determining that Schofield is entitled only to a fee of \$340, which represents 20% of the rehabilitation benefits paid to claimant. In his conclusions of law, the hearing examiner held in relevant part.

14. As reflected in the record, the insurer established its impairment ratings on April 19, 1994--a little over one month after parties signed the Attorney Retainer Agreement. Nevertheless, the facts in this case do not compel a conclusion that Respondent [Schofield] ever achieved through his efforts any increase in benefits claimed which would entitle him to such attorney fees charged to the claimant. The fact a settlement came about after Claimant obtained counsel does not support Respondent's contentions that he should then automatically be entitled to the 20% contingency fee.

15. In summary, contrary to the contentions of Respondent, he was **not instrumental in obtaining the impairment award or permanent partial disability (PPD) benefits** as promulgated by the insurer. Although Claimant, through his attorney, initially rejected the insurer's determination of benefits entitled him, and went to mediation, Claimant ultimately gained only the additional rehabilitation benefits through the efforts of Respondent.

(Emphasis added.) This appeal by Schofield followed.

Discussion

The scope of the present appeal is circumscribed by Mr. Schofield's Amended Notice of Appeal, which sets forth the following contention on appeal:

The Respondent [Schofield, who was respondent in the proceeding below] believes that he is entitled to receive payment of attorney's fees on the Claimant/Petitioner's permanent-partial disability award based upon a written fee agreement.

The agreement which is the subject of the appeal was signed by both parties and approved by the Department. It provides that Schofield is entitled to a 20% fee **only** on those benefits received by Giovetti "**due to the efforts of the attorney.**" Despite other matters addressed by the hearing examiner and Schofield, the sole issue in this case is whether the permanent partial disability benefits received by claimant were "due to the efforts" of Schofield.

The starting point for our analysis is the statutory provision governing permanent partial disability benefits. The law in effect at the time of the injury applies, *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986) thus, the 1993 version of the provision applies. Section 39-71-703, MCA (1993), provides

39-71-703. Compensation for permanent partial disability. (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award.

(2) The permanent partial disability award must be arrived at by multiplying the percentage arrived at through the calculation provided in subsection (3) by 350 weeks.

(3) An award granted an injured worker may not exceed a permanent partial disability rating of 100%. The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment. The percentage to be used in subsection (2) must be determined by adding the following applicable percentages to the impairment rating:

(a) if the claimant is 30 years of age or younger at the time of injury, 0%; if the claimant is over 30 years of age but under 56 years of age at the time of injury, 2%; and if the claimant is 56 years of age or older at the time of injury, 3%;

(b) for a worker who has completed less than 9 years of education, 3%; for a worker who has completed 9 through 12 years of education or who has received a graduate equivalency diploma, 2%; for a worker who has completed more than 12 years of education, 0%;

(c) if a worker has no wage loss as a result of the industrial injury, 0%; if a worker has an actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage loss of more than \$2 an hour as a result of the industrial injury, 20%; and

(d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the worker can perform only light or sedentary labor activity, 20%; if a

worker, at the time of injury, was performing heavy labor activity and after the injury the worker can perform only medium labor activity, 15%; if a worker was performing medium labor activity at the time of the injury and after the injury the worker can perform only light or sedentary labor activity, 10%.

(4) The weekly benefit rate for permanent partial disability is 66 % of the wages received at the time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit amount established for an injured worker may not be changed by a subsequent adjustment in the state's average weekly wage for future fiscal years.

(5) If a worker suffers a subsequent compensable injury or injuries to the same part of the body, the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or injuries.

(6) As used in this section:

(a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds frequently;

(b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds frequently;

(c) "light labor activity" means the ability to lift up to 25 pounds occasionally or up to 10 pounds frequently; and

(d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5 pounds frequently.

Application of the section is largely mechanical. So long as the underlying facts are not in dispute, the computations are mathematical and precise. The adjuster's July 12, 1994 letter, laid out the computations as follows:

Impairment rating	10%
Age (between 30 and 56)	2%
Education (high school)	2%
Wage loss (more than \$2 per hour)	20%
Work capacity (heavy to medium)	<u>15%</u>
Total	49%

(Ex. J-7.) The letter went on to calculate claimant's entitlement at 171.5 weeks (350 weeks times 49%), and notified claimant that biweekly payments would be forthcoming.

There is no evidence that Schofield affected the determination in any way. The determination was not contingent or conditional. No evidence was presented that would

indicate the underlying facts were ever in controversy. No evidence was presented that Schofield contributed in any way to the calculation, or even corresponded or talked to the adjuster prior to the calculation.

The language of the fee agreement is plain and clear on its face: Schofield is entitled only to a fee on amounts secured by his efforts. The fact that the benefits were determined and paid after execution of the agreement are not enough, otherwise an attorney could execute the agreement, sit back and do absolutely nothing, and still collect a 20% fee on amounts subsequently paid, thus nullifying the "due to the attorney's efforts" language of the agreement.

Schofield advances various policy and historical arguments, but those arguments cannot alter the plain language of the agreement.

He also points out (without any evidentiary support in the record) that he prepared a petition to the Workers' Compensation Court and was prepared to argue that "as a matter of equity" the Court would award more than the 171 weeks and "would more likely than not award the entire 350 weeks." Appellant's Brief at 3. This information is apparently proffered in an attempt to show that Giovetti could have received more if he had followed his attorney's advice that he file a petition. If so, the suggestion that this Court can disregard statutory directives in determining permanent partial disability benefits and apply its own equitable standards is utterly without merit.

Schofield is entitled to exactly what the hearing examiner ordered -- \$340 -- which is 20% of the \$1,724 in rehabilitation benefits he did in fact secure for Giovetti.

ORDER

For the reasons set forth in the above discussion,

1. IT IS HEREBY ORDERED that the hearing examiners October 3, 1995, Findings of Fact, Conclusions of Law, and Order are **affirmed**.
2. IT IS FURTHER ORDERED that any party to this dispute may have 20 days in which to request a rehearing or amendment from this Order on Judicial Review.
3. This decision is certified as final for purposes of appeal.

Dated in Helena, Montana, this 7th day of February, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Chris Giovetti - Certified Mail
Mr. Dane C. Schofield

Ms. Christine L. Noland

Mr. Brian McCullough - ZIP Mail

Date Submitted: January 12, 1996