IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 51

WCC No. 9902-8160

GREGG THOMPSON

Petitioner

vs.

CIGNA

Respondent/Insurer for

DEACONESS HOSPITAL

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: PTD claimant receiving benefits on a biweekly benefits wanted lump sum settlement. His attorney was in negotiations with a claims adjuster who did not have final authority to approve settlement. An out-of-state bureaucratic maze caused lengthy delay and put the adjuster in the position of having to attempt to change agreed settlement terms.

Held: Insurer's failure to give final settlement authority to an in-state adjuster violated ARM 24.29.804. Nevertheless, penalty not awarded where authority under section 39-71-2907, MCA (1981) is to award a penalty where "compensation benefits due a claimant" are unreasonably delayed or refused. Because claimant was continuing to receive biweekly benefits, and was not entitled to a lump sum settlement as a matter of law, there was no delay on benefits due him. Attorneys fees, however, awarded where 39-71-612, MCA (1981) does not contain that limitation.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-612, MCA (1981). PTD claimant receiving benefits on a biweekly benefits wanted lump sum settlement. His attorney was in negotiations with a claims adjuster who did not have final authority to approve settlement. An out-of-state bureaucratic maze caused lengthy delay and put the adjuster in the position of having to attempt to change agreed settlement terms. Although penalty not awarded because claimant was receiving biweekly benefits

and was not entitled to a lump sum settlement as a matter of law, meaning there was no unreasonable delay of benefits due claimant, attorneys fees awarded where section 39-71-612, MCA (1981) does not contain that limitation.

Constitutions, Statutes, Regulations and Rules: Montana Code: 39-71-2907, MCA (1981). PTD claimant receiving benefits on a biweekly benefits wanted lump sum settlement. His attorney was in negotiations with a claims adjuster who did not have final authority to approve settlement. An out-of-state bureaucratic maze caused lengthy delay and put the adjuster in the position of having to attempt to change agreed settlement terms. Penalty not awarded because claimant was receiving biweekly benefits and was not entitled to a lump sum settlement as a matter of law, meaning there was no unreasonable delay of benefits due claimant.

Attorneys Fees: Unreasonable Denial or Delay of Payment. PTD claimant receiving benefits on a biweekly benefits wanted lump sum settlement. His attorney was in negotiations with a claims adjuster who did not have final authority to approve settlement. An out-of-state bureaucratic maze caused lengthy delay and put the adjuster in the position of having to attempt to change agreed settlement terms. Although penalty not awarded because claimant was receiving biweekly benefits and was not entitled to a lump sum settlement as a matter of law, meaning there was no unreasonable delay of benefits due claimant, attorneys fees awarded where section 39-71-612, MCA (1981) does not contain that limitation.

Penalties: Insurers. PTD claimant receiving benefits on a biweekly benefits wanted lump sum settlement. His attorney was in negotiations with a claims adjuster who did not have final authority to approve settlement. An out-of-state bureaucratic maze caused lengthy delay and put the adjuster in the position of having to attempt to change agreed settlement terms. Penalty not awarded because claimant was receiving biweekly benefits and was not entitled to a lump sum settlement as a matter of law, meaning there was no unreasonable delay of benefits due claimant.

¶1 This trial in this matter was held on April 26, 1999, in Billings, Montana. Petitioner, Gregg Thompson (claimant), was present and represented by Mr. James G. Edmiston. Respondent, CIGNA, was represent by Mr. Leo S. Ward. A trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 though 18 were admitted without objection.

¶3 Witnesses and Depositions: Claimant, Patrick R. Sheehy and Michele Fairclough were sworn and testified. No depositions were submitted.

¶4 Issues Presented: As set forth in the Pre-trial Order, the following issues are presented for decision:

1. Whether Petitioner is entitled to an award of the twenty percent penalty pursuant to §39-71-2907, MCA (1981).

2. Whether Petitioner is entitled to an award of attorney fees and costs pursuant to Sections 39-71-611/612, MCA (1981).

¶5 Having considered the Pre-trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 On October 22, 1981, claimant suffered an industrial injury while working for Deaconess Hospital (Deaconess). Deaconess was insured by CIGNA.

¶7 CIGNA accepted liability for the claim and has paid medical and compensation benefits.

¶8 At the time of the settlement negotiations which are at issue in this proceeding, claimant had been determined to be permanently totally disabled (PTD) and was receiving PTD benefits on a biweekly basis.

¶9 In March 1997, claimant retained attorney Patrick R. Sheehy (Sheehy) to represent him.

¶10 On June 2, 1997, Sheehy wrote Michele Fairclough (Fairclough), a claims adjuster for CIGNA, asking for information regarding benefits and stating, "I am working up this case up for settlement." [Sic.] (Ex. 1.) CIGNA was slow in responding, finally providing the information Sheehy requested on September 9, 1997. (Ex. 3.)

¶11 On September 23, 1997, Sheehy wrote another letter, this time to Chip McKenna, a senior claims examiner for CIGNA. In it he calculated CIGNA's exposure for lifetime permanent total and permanent partial disability benefits at $226,675.77. (Ex. 4 at 2.) He stated that claimant needed to buy a house. He made no settlement demand, rather he requested that CIGNA make an "offer of settlement." (*Id.*)

¶12 Receiving no reply, on February 11, 1998, Sheehy wrote to Fairclough telling her that claimant "cannot live on the amount he receives from workers' compensation and Social Security . . . [and] would like to settle his case." (Ex. 5 at 1.) He told Fairclough that he had outstanding bills of $2,925 and also needed a new car. (*Id.*) He calculated claimant's "immediate needs" at $10,000 and then requested Fairclough to "give me a call so that we can work something out, with either a partial lump[-]sum advance or a settlement of the claim altogether." (*Id.*)

¶13 Despite claimant's short-term, limited needs, Sheehy never pursued a partial lump-sum advance, rather he sought to settle the entire claim. He acknowledged in his testimony that both claimant and CIGNA were more interested in settling the whole claim.

¶14 On April 2, 1998, Sheehy followed up with another letter to Fairclough setting out his present value calculation of $106,879.88 with respect to the approximately $220,000.00 potentially due in future benefits. (Ex. 6.) He noted that if he were successful in pursuing a lump-sum conversion of all future benefits there would be no discount and offered to compromise the claim for a $150,000.00 lump-sum payment. (*Id.*)

¶15 At trial Sheehy conceded that the odds of obtaining lump sum of all future benefits through litigation was "not good," and the record in this case does not contain any justification for such a conversion.

¶16 Sheehy then talked with Fairclough in June of 1998, concerning the possibility of settling the case for the cost of an annuity. The next communication was on July 14, 1998, when Sheehy and Fairclough again talked by telephone. Fairclough suggested $121,132 and asked if claimant would take that amount. Fairclough's personal settlement authority was limited to $50,000 or $75,000. She told Sheehy she did not have settlement authority for the proposed amount and would have to take the proposal to a claims committee of three persons.

¶17 Sheehy memorialized parts of the July 14, 1998 conversation in a letter. (Ex. 7.) He wrote in relevant part:

I am writing to confirm our telephone conversation of today. I asked if you had any authority yet to settle the claim. You advised that your internal operating procedure for claims where settlement is over $100,000 is to have the file reviewed by a committee of claims people here and elsewhere. You advised that the earliest that the claims committee could meet would be in the end of July. It is your intention to present a settlement proposal to the claims committee for ultimate resolution of the claim (reserving medical benefits and the settlement submitted on an offset petition) at that meeting at the end of July. You thought you could get back to me by the first week in August. I would appreciate that very much.

(*Id.*)

¶18 Fairclough did not get settlement authority at the end of July as she had expected as the claims committee meeting was canceled.

¶19 In early November Fairclough telephoned Sheehy and suggested he send a signed settlement petition for the $121,132 they had discussed. She indicated that she did not yet have settlement authority but that she was confident the proposal would be approved; sending a written petition would save time.

¶20 Sheehy testified that in late November or early December Fairclough called him and told him that she had settlement authority for the $121,132. Fairclough did not recall the conversation. She testified that she did not have settlement authority at the time and could

not imagine why she would have told him that. On the other hand, she conceded that she did not anticipate any problems in getting the settlement approved by her superiors.

¶21 I am persuaded that the November conversation regarding settlement took place and that during the conversation Fairclough talked about the settlement in such a way as to lead Sheehy to reasonably believe that it had been approved. That may not have been Fairclough's intent, and she does not recall the conversation, but that was the effect of the conversation.

¶22 In late November or early December, Fairclough's immediate supervisor instructed her to present a financial management package CIGNA offers in conjunction with lump-sum settlements, but otherwise indicated his approval of the settlement. Fairclough called Sheehy and told him about the package. Sheehy did not immediately reject the proposal and indicated he would present it to claimant. He met with claimant between December 5th and 10th to discuss the package. Claimant rejected it and Sheehy communicated the rejection to Fairclough shortly thereafter.

¶23 Fairclough testified that acceptance of the financial package was not a pre-condition to the settlement, however, she still had not cleared the settlement with all of the required supervisors. The supervisors were at CIGNA offices scattered throughout the United States.

¶24 Fairclough had initially sent the settlement proposal to her team leader, who was one of the three individuals who was required to approve the settlement. He was in Salt Lake City. He indicated his approval in December. The proposal then went to CIGNA's Denver office for review by the second supervisor. That supervisor reviewed the proposal in January 1999 and directed Fairclough to get a new annuity quote, to take a $7,500 overpayment into account, and to explore possible closure of medicals.

¶25 Fairclough obtained a new annuity quotation for $117,100 (ex. 9 at 2) and then called Sheehy in early January. She talked to him about offsetting a prior $7,500 advance and a Social Security overpayment, and suggested that the medical also be settled. On January 12, 1999, she wrote Sheehy a follow-up letter, which read:

I have enclosed the recent annuity quote for Mr. Thompson. From this figure we would deduct the advance of 7500.00 that was made from PPD benefits. Taking the advance into account would leave a balance of 109,600.00. [Handwritten note: What about SSDI overpayment of 4530.23?]

In addition, I have also included a list of all medical payments made since April of 1995. As you can see there is not a lot of activity. Would Mr. Thompson be willing to consider settlement of medical benefits? At this time we would look at increasing the settlement by approximately 10,000 if we were then able to close the medical benefits.

Let me know what you think.

Sincerely,

\s\ *Michele*
Michele Fairclough
Senior Claims Representative
enc

[Handwritten note: * Pat - I also included a copy of the original annuity quote for 121,132 - however, we would like to take credit for the 7500 advance & what about the SSDI overpayment of 4530.23? Michele]

(Ex. 9 at 1.)

¶26 Sheehy was understandably stunned but held his powder during the telephone conversation. He later talked with his client and then, on January 29, 1999, responded in writing. (Ex. 10.) He set out a history of their negotiations, reminded Fairclough that they had previously agreed to settle for $121,132, and said of the new proposal:

When I received you [sic] fax of January 12, 1999, I was @$#&#$%$. You were not proposing a few modest changes; you were proposing a whole new settlement, for a lot less money, and one that would close out Gregg's medical benefits in future for a lot less money. . . .

(*Id.* at 3.)

¶27 Upon receiving Sheehy's letter, Fairclough saw the urgency of getting prompt corporate approval for the original settlement proposal. She contacted the second tier supervisor in Denver and urged him to get the settlement approved.

¶28 On February 9, 1999, claimant filed a Petition for Hearing asking for a declaration that a settlement contract for the $121,132 existed and seeking enforcement of the agreement. Claimant also sought a 20% penalty and attorney fees.

¶29 Then at the end of February 1999, Fairclough received final corporate approval for the settlement. Fairclough then submitted the settlement petition which had been forwarded to her in November to the Department of Labor and Industry (Department) for approval. The Department approved the settlement on March 29, 1999, and Fairclough ordered a settlement check on or about April 5, 1999. The check was approved April 22, 1999, and electronically authorized or sent April 23, 1999.

¶30 It is obvious to the Court that had Fairclough or some other adjuster residing in Montana been given final settlement authority, this matter would have been taken care of in July 1998 and this legal action would never have ensued. Fairclough clearly felt that the settlement was a good one, as did Sheehy, but the settlement was held up because of CIGNA's requirement for three additional layers of approval. The out-of-state corporate

bureaucratic maze plainly caused much of the delay and put Fairclough in a position of having to attempt to change the settlement terms.

¶31 The insurer's delays in obtaining settlement approval were not deliberate.

¶32 The insurer did not unreasonably delay payment of the lump sum once it was approved by the Department on March 29, 1999.

CONCLUSIONS OF LAW

¶33 Since the claimant's industrial injury occurred in the fall of 1981, the 1981 version of the Workers' Compensation Act applies. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶34 The failure of CIGNA to give final settlement authority to a Montana resident adjuster violated Department regulations, specifically ARM 24.29.804, which provides:

24.29.804 ADJUSTERS IN MONTANA (1) Every insurer is required to designate at least one adjuster, maintaining an office in Montana, which shall pay compensation when due and **which shall have authority to settle claims.** [Emphasis added.]

The regulation has been in effect since 1976 and was adopted pursuant to section 39-71-203, MCA (1981), of the Workers' Compensation Act (WCA), which provides in relevant part:

39-71-203. Powers of division. The division is hereby vested with full power, authority and jurisdiction to do and perform any or all things, whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of any power, authority, or jurisdiction conferred upon it under this chapter.

. . . .

The Act requires insurers to promptly pay benefits, § 39-71-407, MCA (1981), and also provides for lump-sum advances and conversions of future benefits, § 39-71-741, MCA (1981). One of the obvious purposes of a rule requiring that a resident adjuster have "authority to settle claims" is to ensure that lump-sum requests are promptly considered and not delayed by the very sort of interstate, intercorporate bureaucratic maze exemplified by the present case. CIGNA's argument that the regulation does not require "full and final authority", Cigna's Post-trial Brief at 6, is meritless: authority to settle claims is authority to settle claims, nothing less. It is full and final authority.

¶35 Section 39-71-2907, MCA (1981), provides for imposition of a penalty where benefits are unreasonably delayed. If applicable to the facts of this case, a penalty is in order since the insurer's delay in processing the settlement was unreasonable, especially in light of ARM 24.29.804.

¶36 Section 39-71-2907, MCA (1981), however, has limited application. It provides:

39-71-2907. Increase in award for unreasonable delay or refusal to pay. 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. [Emphasis added.]

The bolded language is critical. In *Perry v. Tomahawk Transportation,* 226 Mont. 318, 322, 735 P.2d 308, 311 (1987), the Supreme Court held that this language means that a penalty can be imposed "only upon those benefits which are due, that is, **owed and payable**."

¶37 Thus, I must determine when the $121,131 became "owed and payable." In considering the matter, I note that the WCA provides for biweekly compensation benefits, § 39-71-702, MCA (1981), and that the claimant does not allege any delay in the payment of those benefits. I further note that under the law in effect in 1981, lump-sum conversions were the exception to the general rule of biweekly benefits. *Sullivan v. Aetna Life & Cas.,* 271 Mont. 12, 18, 894 P.2d 278, 281 (1995).

¶38 Claimant's request for a lump-sum conversion was governed by section 39-71-741, MCA (1981). The section provides:

39-71-741. Compromise settlements and lump-sum payments -- division approval required. The biweekly payments provided for in this chapter may be converted, in whole or in part, into a lump-sum payment. Such conversion can only be made upon the written application of the injured worker or the worker's beneficiaries, with the concurrence of the insurer, and shall rest in the discretion of the division, both as to the amount of such lump-sum payment and the advisability of such conversion. The division is hereby vested with full power, authority, and jurisdiction to allow and approve compromises of claims under this chapter. All settlements and compromises of compensation provided in this chapter are void without the approval of the division. Approval of the division must be in writing. The division shall directly notify every claimant of any division order approving or denying a claimant's settlement or compromise of a claim. A controversy between a claimant and an insurer regarding the conversion of biweekly payments into a lump sum is considered a dispute for which the workers' compensation judge has jurisdiction to make a determination.

The Division of Workers' Compensation was succeeded by the Department of Labor and Industry, which now has the responsibility for approving lump-sum payments.

¶39 In this proceeding, claimant asserts that as of November 1998, there was a contract between claimant and CIGNA for a $121,131 lump-sum advance and that CIGNA's delay in acting on the contract constitutes an unreasonable delay for which sanctions should be imposed. At trial, I wondered whether section 39-71-741, MCA's, requirement that a petition be submitted in writing was in effect a statute of frauds. I asked the question because there was no evidence that prior to February 1999, the insurer signed the petition. I asked for briefing on the matter.

¶40 In retrospect my inquiry and my request for briefing on the statute of frauds were misdirected. Whether or not section 39-71-741, MCA, is pigeon-holed as a statute of limitations, its requirements must be met before any lump sum becomes due and payable. Accordingly, whether or not the insurer's written endorsement was required on the settlement petition, no lump-sum payment was "owed and payable" until the Department approved the petition. Since the Department did not approve the settlement until after this litigation commenced, under *Perry* no penalty can be imposed even if Fairclough's communication in November 1998 amounted to a binding acceptance of the settlement. Once the Department approved the settlement, CIGNA acted with reasonable promptness issuing the check. The request for a penalty must therefore be **denied**.

¶41 Claimant's request for attorney fees is a different matter. That request is governed by section 39-71-612, MCA (1981), and the Supreme Court's interpretation of the section in *Madill v. State Compensation Ins. Fund,* 280 Mont. 450, 930 P.2d 665 (1997).

¶42 Section 39-71-612, MCA (1981), provides:

39-71-612. Costs and attorneys' fees payable based on difference between amount paid by insurer and amount later found compensable. (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 and the settlement or award is greater than the amount paid or tendered by the employer or insurer, a reasonable attorney's fee as established by the division or the workers' compensation judge if the case has gone to a hearing, based solely upon the difference between the amount settled for or awarded and the amount tendered or paid, may be awarded in addition to the amount of compensation.

(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 division or the workers' compensation judge.

¶43 *Madill* involved a number of controversies, all of which were resolved without trial, some of which were resolved without even a petition. One of the controversies was claimant's request for a lump-sum conversion of all future benefits, which undiscounted amounted to about $225,000.00. The insurer countered with an offer of $90,000.00, $30,000.00 to be paid in a lump sum, $34,000.00 to be used to purchase an annuity, and the remaining $26,000.00 to be retained by the insurer to reimburse itself for prior overpayments. Petitioner rejected the offer, pointing out that under *Willis v. Long Construction Co.,* 213 Mont. 203, 690 P.2d 434 (1984), no discount was allowed and that claimant had accumulated overdue indebtedness of $30,000.00. He then petitioned this Court for a lump-sum conversion of all future benefits, i.e., for $225,000.00. Literally on the steps of the courthouse, the parties settled by agreeing to a lump-sum advance of $69,038.39, which was to be applied (subtracted from) against the **undiscounted** value of future benefits. Documentation supporting the advance was provided establishing that it was "necessary for payment of necessities, including medical treatment clothing, beds, housing repairs, auto repairs, loans from family members, and overdue real estate tax." 280 Mont. at 457, 930 P.2d at 669.

¶44 The Supreme Court held that claimant was entitled to attorney fees under section 39-71-612, MCA, with respect to the settlement. It held that even though the settlement amount was less than the amount demanded, the fee should be based on the difference between the settlement and any prior amounts paid or actually tendered. 280 Mont. at 462, 930 P.2d at 673. Thus, it made no difference that claimant demanded more than he got.

¶45 Under *Madill* the claimant is entitled to attorney fees. He demanded and agreed to settlement of his claim for the sum of $121,132. Had CIGNA agreed to the settlement without his resorting to litigation it would owe no attorney fee since no controversy would have arisen. Certainly CIGNA was entitled to a **reasonable** time to consider and process his demand. But it failed to do so. The request got stuck in the corporate bureaucracy and the delay amounted to a rejection of the demand. Moreover, acceptance of the demand was seemingly communicated but repudiated. Claimant was forced to file a petition.

¶46 Since claimant has prevailed with respect to a substantial part of his prayers for relief, he is entitled to his costs.

JUDGMENT

¶47 1. Claimant is not entitled to a penalty with respect to the settlement of his claim.

¶48 2. Claimant is entitled to attorney fees with respect to the settlement. The amount of attorney fees shall be determined by agreement of the parties. If they cannot agree, the Court will hold a hearing and make its own determination.

¶49 3. Claimant is entitled to his costs. He shall submit a memorandum of costs in accordance with Court rules.

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

¶51 5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 17th day of August, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Edmiston
Mr. Leo S. Ward
Mr. Patrick R. Sheehy - Courtesy Copy
Date Submitted: May 28, 1999.