IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 38

WCC No. 9911-8367

ROBERT O. WASHINGTON

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

HAROLD CHRISTELEIT

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, who was seriously injured through electrocution in 1975, had recovered from a third party, leading to a 1977 Order Determining Subrogation Interest from the DOL. In 1998, claimant sought to set aside the Subrogation Order on the basis of the "made whole" doctrine articulated by the Supreme Court in cases decided after the original order. While that matter was pending before the DOL, State Fund acquiesced and agreed to reimburse claimant for $123,014.73 it had collected in subrogation through withholding benefits and to pay full benefits in the future without deduction. The present petition was filed to resolve issues of attorneys' fees and penalty.

Held: Attorneys fees not awarded where the DOL hearing officer's denial of the insurer's motion for summary judgment, after which the insurer acceded to claimant's position, was not an adjudication, a requirement for attorneys' fees under 92-616, RCM (1974). Under 92-824.1, RCM (1947), penalty awarded where insurer, between 1987 and 1994, paid medical expenses at rate of 34.15% despite DOL order that it pay 100% and later claim reimbursement. Conduct in derogation of DOL order was unreasonable. Penalty not awarded, however, on insurer's failure to reduce social security offset after cessation of social security auxiliary payments when claimant's children were grown where claimant had been notified of offset and could have informed insurer the auxiliary benefits had terminated.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: 92-616, RCM (1974). Attorney fees not awarded where DOL hearing officer's denial of insurer's motion for summary judgment, after which insurer acceded to claimant's position, was not adjudication, a requirement for award of attorneys fees under 92-616, RCM (1974).

Constitutions, Statutes, Regulations and Rules: Montana Code: 92-824.1, RCM (1974). Under 92-824.1, RCM (1947), penalty awarded where insurer, between 1987 and 1994, paid TTD claimant's medical expenses at rate of 34.15% despite DOL order that it pay 100% and later claim reimbursement under subrogation order. Conduct in derogation of DOL order unreasonable. Even though insurer would later be entitled to reimbursement, claimant was deprived of immediate monies. Penalty not awarded, however, on insurer's failure to reduce social security offset after cessation of social security auxiliary payments when claimant's children were grown where claimant had been notified of offset and could have informed insurer the auxiliary benefits had terminated.

Penalties: Insurers. Under 92-824.1, RCM (1947), penalty awarded where insurer, between 1987 and 1994, paid TTD claimant's medical expenses at rate of 34.15% despite DOL order that it pay 100% and later claim reimbursement under subrogation order. Conduct in derogation of DOL order unreasonable. Even though insurer would later be entitled to reimbursement, claimant was deprived of immediate monies. Penalty not awarded, however, on insurer's failure to reduce social security offset after cessation of social security auxiliary payments when claimant's children were grown where claimant had been notified of offset and could have informed insurer the auxiliary benefits had terminated.

¶1 The trial in this matter was held on January 31, 2000, in Billings, Montana. Petitioner, Robert O. Washington (claimant), was present and represented by Mr. Patrick R. Sheehy. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Greg E. Overturf. A trial transcript has not been prepared.

¶2 Motion for Partial Summary Judgment and Post-trial Briefs: The parties filed cross-motions for partial summary judgment regarding the claimant's request for attorney fees. The matter was not decided before trial and the Court granted the parties additional time to submit post-trial briefs regarding both the attorney fees and penalty. The final brief was filed and the matter deemed submitted on February 28, 2000. The merits of the motion for summary judgment are addressed and decided in the present decision.

¶3 Exhibits: Exhibits 1 though 76 were admitted without objection.

¶4 Witnesses and Depositions: Patty Washington and Mike Welsh testified. No depositions were submitted.

¶5 Issues Presented: The issues as set forth in the Pretrial Order are:

- Whether Petitioner is entitled to an award of reasonable attorneys' fees and costs from the Respondent.
- Whether Petitioner is entitled to the 10% penalty from the Respondent.

¶6 Having considered the Pretrial 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

¶7 Claimant was seriously injured on May 28, 1975, when he was electrocuted by a 14,440 volt power line. As a result of the accident, his right arm was amputated near the shoulder, his right leg amputated below the knee, and his left foot amputated.

¶8 The injury occurred at work. At that time, claimant's employer was insured by the State Fund, which accepted liability for his claim and commenced paying benefits to claimant.

Subrogation Order

¶9 In 1977 the claimant recovered $623,367 in an action brought by him against a third party. (*See* Ex. 44-1 at 4.) The action arose out of his industrial accident.

¶10 Thereafter, on September 26, 1977, the Division of Workers' Compensation (Division) entered an Order Determining Subrogation Interest. (Ex. 44-1 at 4-5.) The Order required claimant to pay the State Fund $30,492.72 from the third-party recovery. It further authorized the State Fund to reduce future payments to 34.15% of amounts otherwise due claimant, until such time as the State Fund is paid $141,926.98 in benefits, at which time claimant's full benefits would be restored.

Petitions to Rescind Subrogation Order

¶11 Claimant filed a petition with this Court in October 1998, asking that the subrogation Order be set aside. WCC No. 9810-8075. On February 12, 1999, I dismissed the petition for lack of jurisdiction, finding that the request should be submitted to the Department of Labor and Industry (Department). 1999 MTWCC 17.

¶12 Thereafter, the claimant petitioned the Department requesting recission. The State Fund moved for partial summary judgment, arguing that the third-party judgment collaterally estopped claimant from arguing he had not been made whole. The motion was denied July 8, 1999, by a Department hearing officer. (Ex. 43 at B-1 to B-6.) The hearing officer found that the "made whole" doctrine, as articulated in Supreme Court cases decided after the 1977 subrogation determination by the Division, requires a determination of "the full impact of his [claimant's] injuries **as that impact has developed to date**." (*Id*. at

4, emphasis added.) Since, in retrospect, the 1977 verdict may not have made claimant whole, he found that claimant was not precluded from arguing that good cause exists to reopen the subrogation Order. (*Id.*)

¶13 Following denial of its motion for partial summary judgment, the State Fund agreed to reimburse claimant the full $123,014.73 it had collected in subrogation and to pay full benefits in the future without deduction for any subrogation interest. This action for attorney fees and a penalty followed.

State Fund Deductions from Medical Payments

¶14 One of the provisions of the 1977 subrogation Order limited the subrogation deduction to compensation benefits. It required payment of medical benefits in full but permitted the State Fund to periodically seek reimbursement for 65.85% of the medical payments. The Order provided:

In order to avoid the practical problems involved in having both the insurer and the claimant paying a portion of future medical costs, the Division orders that the State Fund shall pay for full medical costs and shall periodically request reimbursement of those medical costs from the claimant. In effect, the claimant will be required to reimburse the insurer for 65.85% of all future medical the State Fund pays due to the claimant's industrial injury. The provisions of this paragraph of the Division's Order are subject to revision by the Division should the arrangement as set forth in this paragraph become difficult to manage.

(Ex. 44-1 at 5.)

¶15 Notwithstanding the provision quoted in the previous paragraph, in 1987 the State Fund began paying only 34.15% of claimant's medical bills. (*See* Ex. 22.) A May 23, 1990 State Fund interoffice memorandum states that the practice began on January 21, 1987, and that prior to that time the State Fund had been paying medical bills in full and then collecting its 65.85% reimbursement from claimant. (Ex. 26.) The memorandum goes on to note that the original Order required payment of medical bills in full, with claimant to reimburse the Fund at a later time.

¶16 Despite the memorandum, the State Fund continued the practice of paying only 34.15% of claimant's medical bills until October 1, 1994, when it acknowledged its error. Thereafter, it resumed paying the medical bills at 100%.

¶17 The reduction in medical benefits was contrary to the Department Order and unreasonable. An insurer cannot unilaterally disregard the plain terms of a Department Order.

¶18 The State Fund has attached an accounting of medical benefits which it paid at the 34.15% rate to its post-trial brief. The amount shown is $12,387.50. (Respondent's Post Trial Memorandum on Issues Raised at Trial at 2.) Claimant objects to the evidence since it

was not introduced at trial, and calculates the amount as $28,894.64. That calculation is based on the difference between the amount repaid to claimant pursuant to the stipulation and the amount shown in the subrogation Order and an accountant's calculation as actually paid by the State Fund. Claimant argues that the difference is attributable to unpaid medical, as "settled by the parties." (Petitioner's Reply Brief at 2.) The Court is unable to find in the evidence any agreement or proof that the $28,894.64 represents unpaid medical, or is anything other than a compromise of the parties. The State Fund **concedes** $12,387.50, and I will adopt the concession, since it does not depend on my reviewing the post-trial exhibits or finding other proof for it.

Social Security Offset - Auxiliary Benefits

¶19 For many years the claimant has been deemed permanently totally disabled and has been receiving Social Security Disability Income (SSDI) payments. Prior to June 1, 1993, those benefits included auxiliary benefits. SSDI auxiliary benefits may be payable to the disabled workers' wife, widow, dependent child, and certain others. The State Fund included the auxiliary benefits claimant received in computing the social security offset to his benefits.

¶20 Claimant's auxiliary benefits ended on June 1,1993. However, the State Fund was unaware at that time that the auxiliary benefits had ended or been reduced, thus it continued to include the auxiliary benefits in determining the offset. It relied on claimant to inform it of the cessation of auxiliary benefits.

¶21 Claimant and his wife assert they were never informed they needed to report the cessation of the auxiliary benefits. However, a review of correspondence in 1979 and 1984 between the State Fund and claimant or his wife show that they were notified that the amount of the offset was determined by the amount of his SSDI benefits. (Exs. 1 , 2, 5, 6, and 11.) Indeed, there is correspondence, sent or received by claimant, which shows he was informed in 1984 that SSDI payments to his dependent children affected the offset. He was copied with a June 6, 1984 letter of the Social Security Administration to the Division of Workers' Compensation which set out the amounts of his SSDI and the amounts paid for him and his three dependent children. (Ex. 11.) Then, in an August 13, 1984 letter from Bill Visser, a State Fund Claims Examiner Supervisor, claimant was told that the change in the number of his dependents from four to three affected the offset and correspondingly affected his workers' compensation benefits. (Ex. 12.)

¶22 The same correspondence shows that the State Fund was aware that claimant had three dependent children and was receiving auxiliary benefits for them. It could have inquired as to the ages of the children and calendered the file for the dates on which his children attained the age of majority. On the other hand, it is not unreasonable to assume that since claimant was aware that the auxiliary benefits affected the offset he would report future changes in those benefits.

¶23 Mike Welsh, the present claims adjuster handling claimant's case, testified without contradiction that the first time the State Fund was made aware that auxiliary benefits had ceased was in June 1999, when it received correspondence from the Social Security Administration stating that all auxiliary benefits ceased in June 1993. He then calculated an underpayment of $2,709.36. (Ex. 44-4 at 2.) A warrant to claimant for that amount was remitted August 4, 1999. (*Id.*)

CONCLUSIONS OF LAW

¶24 The claimant seeks penalties and attorney fees. His request for penalties are governed by the 1973 version of § 92-824.1 R.C.M. (1947) since that was the provision in effect on the date of his injury. *See Madill v. State Compensation Ins. Fund*, 280 Mont. 450, 458, 930 P.2d 665, 670 (1997). The section provides:

92-824.1 Increase in award for unreasonable delay or refusal to pay. When payment of compensation has been unreasonably delayed or refused, either prior or subsequent to the issuance of an award, the full amount of the order, decision or award may be increased by ten per cent (10%) of the weekly award. The question of unreasonable delay or refusal shall be determined by the board and such a finding shall constitute good cause to rescind, alter or amend any order, decision or award previously made in said cause for the purpose of making the increase provided herein.

As set forth in the section, the penalty is not payable for every delay in benefits. It is payable only where the delay is unreasonable, in other words where delay is the result of unreasonable actions on the part of the insurer.

¶25 I have found that the State Fund's payment of medical expenses at the 34.15% rate between 1987 and 1994 was contrary to the Department's subrogation Order and was unreasonable. Even though claimant was required to reimburse the State Fund after the fact for his 65.85% share of medical expenses, the State Fund's actions deprived him of immediate monies. Lacking other evidence of the amount of medical benefits denied, I have accepted the State Fund's concession that the amount was at least $12,387.50, and the penalty will be imposed on that amount.

¶26 On the other hand, I have found that the State Fund's failure to reduce the social security offset when claimant's auxiliary benefits were terminated in 1993 was not unreasonable since it was reasonable in expecting that claimant would notify it of any change in his social security disability benefits. No penalty is due regarding those benefits.

¶27 The attorney fees statute in effect on the date of the claimant's injures was § 92-616 R.C.M. (1974) (effective March 11, 1974 (1974 Mont. Laws, ch. 173, § 2.), and it is that statute which must be applied in this case. *Madill v. State Compensation Ins. Fund*, 280 Mont. 450, 458, 930 P.2d 665, 670 (1997). The section provides:

> In the event the insurer denies the claim for compensation or terminates compensation benefits, and the claim is later adjudged compensable, by the division or on appeal, the insurer shall pay reasonable costs and attorney's fees as established by the division. However, under rules adopted by the division and in the discretion of the division, an insurer may suspend compensation payments for not more than thirty (30) days pending the receipt of medical information.

As set forth in the statute, two elements must be satisfied for an award of attorney fees. First, the insurer must have denied the claim or terminated benefits. Second, the claim must then be "adjudged compensable." The State Fund argues that neither element has been met. The Court agrees.

¶28 The State Fund neither denied liability for the claim nor terminated benefits. *Myers v. 4B's Restaurants,* 172 Mont. 159, 561 P.2d 1331 (1977), cited by claimant as supporting his contention that the first element is met, is inapposite. In *Meyers* the Supreme Court held that claimant was entitled to attorney fees where the insurer denied permanent total disability benefits but paid permanent partial disability benefits. The Court held that the insurer need not deny *all benefits*, rather a partial denial satisfies element one. In this case, the insurer did not deny or terminate claimant's benefits either in whole or part. Until and unless the claimant was successful in persuading the Department that there was good cause to reopen the Division's 1977 subrogation Order, the 1977 Order governed the amount of benefits due claimant. The State Fund paid the proper amount directed in the Order.

¶29 The second element requires that there be a judgment awarding additional benefits in order to recover attorney fees. In *Cosgrove v. Industrial Indemnity Company,* 170 Mont, 249, 254, 552 P.2d 622, 624 (1976), the Supreme Court said "an adjudication of the claim as compensable either by the Division or on appeal to the courts is a prerequisite to the allowance of attorneys' fees to the claimant." It held that language of the statute was plain and that the claimant was not entitled to attorney fees even though the insurer admitted liability and paid benefits after a request for hearing had been filed but prior to any hearing.
¶30 Subsequent Supreme Court decisions in *Yearout v. Rainbow Painting,* 222 Mont. 65, 719 P.2d 1258 (1986)*; McNeel v. Holy Rosary Hosp.,* 228 Mont. 424, 742 P.2d 1020 (1987); and *Leikam v. Edson Exp.*, 228 Mont. 66, 740 P.2d 1130 (1987), reached the same conclusion. In *Yearout* the Court affirmed a denial of attorney fees where the insurer's attorney conceded liability at the commencement of the actual hearing. Of the statutory language, it said, "It is clear from the language of the statute that there must be an adjudication of compensability before an award of attorney's fees is authorized." 222 Mont. at 68, 719 P.2d at 1259.

¶31 The Department's denial of the State Fund's motion for partial summary judgment was not an adjudication of claimant's entitlement to benefits. It was nothing more than an interlocutory Order rejecting one of the State Fund's defenses to the claim.

JUDGMENT

¶32 1. The claimant is entitled to a penalty of $1,238.75 with regard to the unpaid medical benefits and the State Fund shall pay claimant that sum.

¶33 2. The claimant is not entitled to a penalty with regard to the offset since the State Fund was not unreasonable in expecting that claimant would notify it of any reduction in his social security disability benefits.

¶34 3. Claimant is not entitled to attorney fees.

¶35 4. Claimant is entitled to his costs and shall file his memorandum of costs in accordance with Court rules.

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

¶37 6. 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 23rd day of June, 2000.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Patrick R. Sheehy
Mr. Greg E. Overturf
Date Submitted: February 28, 2000