IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 2

WCC No. 9612-7668

JETTA ARDESSON

Petitioner

vs.

LEGION INSURANCE

Respondent/Insurer for

MOUNTAIN VIEW CARE CENTER

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Cook working at nursing home demanded inclusion of value of meals in temporary total disability rate. Insurer's adjuster initially conducted no investigation in response to demand. After claimant's request for mediation, insurer determined other employees could purchase meals for $1.50, but made no further investigation regarding actual value of the meal. Even after it was clear claimant was entitled to an increase for at least the $1.50 value, the insurer failed to increase the benefit rate because claimant's attorney demanded more than the $1.50. Subsequently, the insurer discovered that visitors to nursing home could purchase a meal for $3.00. Claimant's anecdotal evidence suggested an average restaurant meal cost $6.00. Her attorney had originally demanded $8.00 as the meal's value.

Held: Under section 39-71-123, MCA (1995), wages include the "actual value" of board constituting part of an employee's remuneration. "Actual value" is the equivalent of "market value." Based on common experience of the cost of meals generally and in institutional settings, the Court values the meals at $4.50. Penalty of $2.00 per week awarded on past and future benefits. Insurer unreasonably delayed payment of benefits corresponding to at least $3.00 valuation of meal. Unreasonable conduct included the insurer's failure to investigate the meal issue following claimant's demand, withholding of increase related to conceded $1.50 because claimant demanded more, and two-month delay in issuing check for conceded back benefits. Attorney fees also awarded.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-123, MCA (1995). Under section 39-71-123, MCA (1995), wages include the "actual value" of board constituting part of an employee's remuneration. "Actual value" is the equivalent of "market value." Market value is the amount a willing buyer would pay and a wiling seller would accept where neither is acting under duress. Based on common experience of the cost of meals generally and in institutional settings, the Court values the meals received by a cook for a nursing home at $4.50 for purposes of setting the TTD rate.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-612, MCA (1995).

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1995). Penalty awarded to claimant litigating inclusion of actual value of meals in wages for purposes of TTD benefit rate. Insurer unreasonably delayed payment of benefits corresponding to at least $3.00 valuation of meal. Unreasonable conduct included the insurer's failure to investigate the meal issue following claimant's demand, withholding of increase related to conceded $1.50 because claimant demanded more, and two-month delay in issuing check for conceded back benefits.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1995). The lack of a reasonable investigation into a claimant's demand for inclusion of the actual value of meals into wage rate is itself sufficient to impose a penalty on the insurer.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-2907, MCA (1995). The penalty provision is available to a claimant from the moment the insurer's delay in payment becomes unreasonable. See, Mintyala v. State Compensation Insurance Fund, 276 Mont. 521, 525, 917 P.2d 442, 445 (1996); Handlos v. Cyprus Indus. Minerals, 243 Mont. 314, 317, 794 P.2d 702, 704 (1990).

Attorney Fees: Cases Awarded. Attorneys fees awarded to claimant litigating inclusion of actual value of meals in wages for purposes of TTD benefit rate. While insurer had conceded liability for $3.00 per meal, a concession of liability is not an "offer" within section 39-71-612 cutting off liability for attorney's fees where the insurer did not pay the amount conceded and the concession was not implemented within 30 days as contemplated by section 39-71-612(2), MCA (1995). Insurer's delay and failure to pay conceded liability were unreasonable.

Attorney Fees: Unreasonable Denial or Delay of Payment. Attorneys fees awarded to claimant litigating inclusion of actual value of meals in wages for purposes of TTD benefit rate. While insurer had conceded liability for $3.00 per meal, a concession of liability is not an "offer" within section 39-71-612 cutting off liability for attorney's fees where the insurer did not pay the amount conceded and the concession was not implemented within 30 days

as contemplated by section 39-71-612(2), MCA (1995). Insurer's delay and failure to pay conceded liability were unreasonable.

Penalties: Insurers. Penalty awarded to claimant litigating inclusion of actual value of meals in wages for purposes of TTD benefit rate. Insurer unreasonably delayed payment of benefits corresponding to at least $3.00 valuation of meal. Unreasonable conduct included the insurer's failure to investigate the meal issue following claimant's demand, withholding of increase related to conceded $1.50 because claimant demanded more, and two-month delay in issuing check for conceded back benefits.

Penalties: Insurers. The lack of a reasonable investigation into a claimant's demand for inclusion of the actual value of meals into wage rate is itself sufficient to impose a penalty on the insurer.

Penalties: Insurers. The penalty provision is available to a claimant from the moment the insurer's delay in payment becomes unreasonable. See, Mintyala v. State Compensation Insurance Fund, 276 Mont. 521, 525, 917 P.2d 442, 445 (1996); Handlos v. Cyprus Indus. Minerals, 243 Mont. 314, 317, 794 P.2d 702, 704 (1990).

Wages: Board. Under section 39-71-123, MCA (1995), wages include the "actual value" of board constituting part of an employee's remuneration. "Actual value" is the equivalent of "market value." Based on common experience of the cost of meals generally and in institutional settings, the Court values the meals received by a cook for a nursing home at $4.50 for purposes of setting the TTD rate.

Wages: Meals. Under section 39-71-123, MCA (1995), wages include the "actual value" of board constituting part of an employee's remuneration. "Actual value" is the equivalent of "market value." Based on common experience of the cost of meals generally and in institutional settings, the Court values the meals received by a cook for a nursing home at $4.50 for purposes of setting the TTD rate.

1 The trial in this matter commenced on August 28, 1997, in Butte, Montana, and was recessed until October 22, 1997, when it resumed in Bozeman, Montana. Petitioner, Jetta Ardesson (claimant), was present and represented by Mr. Chris J. Ragar. Respondent, Legion Insurance (Legion), was represented by Mr. Steven S. Carey.

2 Exhibits: Exhibits 1 through 10, 13, 18 and 24 were admitted over the objections of Mr. Carey for the limited purpose of the penalty issue. Exhibits 11, 12, 14 through 17, 19 and 20 were admitted without objection. Exhibits 21 through 23 were withdrawn as they were duplicates of other exhibits. The Court reserved ruling on Exhibit 25 and now sustains the foundation objection to the exhibit as no foundation was offered.

3 Pages 6 through 11, 13 through 17, and 19 through 23 of Exhibit 26 were admitted. Page 12 of Exhibit 26 was refused. The Court reserved ruling on the remaining pages of Exhibit 26

and now admits pages 1, 2, 4 and 5 over objections of lack of foundation. Pages 1 and 2 are the response to a request for claimant's personnel file. The remaining pages of Exhibit 26 are part of the personnel file. Pages 4 and 5 are signed by claimant, and she did not deny her signature or that she signed them. (One is a copy of a driver's license.) Pages 3, 18, 24 and 25 are refused as they were not signed or written by claimant and no further foundation was offered. While the admitted pages provide some dates and background, none are relevant to the specific issues in this case.

4 At the second phase of the trial, the Court refused Exhibit 27 and admitted Exhibits 28 and 29.

5 Witnesses and Depositions: Claimant, Frank Herstein, Teri Bohnsack, Donald "Skip" Beadle and Anita McCorry were sworn and testified. No depositions were submitted.

6 Issues: The final pretrial order sets forth the following issues:

1. What is the value, for purposes of computing Petitioner's temporary total disability rate, of the free meals that Petitioner received.

2. What is the value, if any, for the purposes of computing Petitioner's temporary total disability rate, of the yearly bonus which Petitioner would have received in her employment.

3. Whether Respondent unreasonably delayed or refused payment of any benefits to which Petitioner is or was entitled to under the Workers' Compensation Act, thereby subjecting Respondent to the 20% penalty under 39-71-2907, M.C.A.

4. Whether Claimant is entitled to an award of attorney's fees and costs and, if so, to what extent.

(Final Pretrial Order at 2.) Claimant withdrew the second issue (regarding the bonus) at the commencement of trial.

7 Bench Ruling: At the close of trial, the Court ruled that Legion had unreasonably delayed benefits based on $1.50 a meal and that a 20% penalty shall attach to the benefits payable with respect to the $1.50. The Court indicated that the penalty will probably attach to the $3.00 rate which Legion ultimately used in paying benefits. The remaining issues were taken under advisement.

* * * * *

8 Having considered the final pretrial order, the trial testimony, the demeanor and credibility of the witnesses, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

9 Claimant was employed by Mountain View Care Center (Mountain View) on September 13, 1995. Mountain View is a nursing home, and claimant was hired as a cook to prepare the evening meal for home residents, visitors, staff and family members of residents. She also helped with lunch and the cleanup following lunch. She worked from 11:00 a.m. to 7:30 p.m.

10 On November 23, 1995, claimant injured her left arm and wrist while operating a food processor. The injury occurred in the course and scope of her employment with Mountain View.

11 At the time of the injury, Mountain View was insured by Legion.

12 Claimant submitted a timely claim for compensation and Legion accepted liability for the accident.

13 Since her injury, claimant has not returned to work and has continuously received temporary total disability (TTD) benefits on account of her injury.

14 Legion originally calculated claimant's TTD rate without consideration of any meals she received from her employer.

15 The claim in this case was adjusted by GAB Robins acting on behalf of Legion. The initial claims adjuster was Laurie Daigle (Daigle).

16 On July 22, 1996, claimant's attorney, Mr. Chris J. Ragar (Ragar), wrote to Daigle informing her that as part of claimant's employment she was entitled to one free meal a day. (Ex. 1.) Citing *Anderson v. State Compensation Ins. Fund,* 252 Mont. 73, 826 P.2d 931 (1992), he demanded that the value of the meal be included in computing her benefits. He valued the meal at $8.00 and demanded that $40.00 (*$8.00 x 5 days*) be added to claimant's weekly wage for purposes of determining her benefits.

17 Daigle did not reply.

18 On September 16, 1996, Teri Bohnsack (Bohnsack) succeeded Daigle as the adjuster in charge of the claim. At about that time, Mr. Steven S. Carey (Carey), the attorney representing Legion, became involved in the claim. At least by September 17, 1996, Ragar was addressing correspondence to Carey. (Ex. 2.)

19 At the time it employed claimant, Mountain View had a written personnel policy stating that employees could eat meals at the facility for a "nominal charge." The manual states: "Meal services shall be available at the discretion of the administrator. A **nominal charge** is made for meals served to employees." (Ex. 12 at 6, emphasis added.) Mountain View also had a written policy regarding meals for visitors, setting the amount per meal at $3.00. The policy read:

If you would like to have someone join you for a meal in the private dining room, your room, or the dining area, please let the kitchen know at least 2 hours before the meal. The fee is $3.00 per meal. Please pay the business office.

(Ex. 16 at 2.) In fact, few visitors ate meals at the facility.

20 Legion does not dispute that claimant, as a cook, was promised one meal a day for no charge. Bohnsack testified that Mountain View has never disputed that claimant received one free meal a day.

21 Between the time it received Ragar's July 22, 1996 letter and September 11, 1996, Legion and GAB Robins did no investigation concerning the meals.

22 Lacking a response from Legion or GAB Robins, claimant requested mediation of the issue. Mediation took place on September 11, 1996.

23 Shortly after the September 11, 1996 mediation, apparently on the same day, someone on behalf of Legion or GAB Robins contacted Mountain View and determined that Mountain View charged its employees $1.50 per meal.

24 During her testimony, Bohnsack agreed that based on the information elicited from Mountain View, claimant was entitled to an increase in her TTD rate based on the $1.50 value of one meal a day. However, Legion did not increase claimant's rate at that time because, according to Bohnsack, claimant's attorney insisted that she was due more.

25 On December 9, 1996, the claimant filed her present petition.

26 On December 31, 1996, over five months after claimant's initial demand and three and a half-months after Legion ascertained that claimant received a free meal for which Mountain View charged its other employees $1.50, Legion agreed to increase claimant's benefits based on $1.50 a meal for one meal a day. Carey wrote to Ragar on that date, as follows:

After verifying the information with Ms. Ardesson's employer, Ms. Ardesson's temporary total disability payment will be increased. Her prior rate was $182.81. Her new TTD rate will be $187.81.

The basis of the increase reflects that the employees received one meal a day which is valued at $1.50 per meal. Consequently, her wage pursuant to her Sec. 39-71-123, MCA, would be increased by $7.50 per week. Two-thirds of that comes to $5.00.

The adjuster, Teri Bohnsack, will be adjusting Ms. Ardesson's rate from here on out with a back TTD check coming payable to you and Ms. Ardesson.

(Ex. 6 at 1.)

27 As of December 31, 1996, no one at GAB Robins or on behalf of Legion had inquired into the value of the meal furnished claimant other than to ascertain that other employees could purchase a meal for $1.50.

28 In April 1997, Ragar issued a second set of interrogatories. At that time, Carey's mother was seriously ill, and he overlooked them.[(1)] On July 3, 1997, Ragar wrote to Carey requesting that he provide answers to the interrogatories. (Ex. 8.) Carey then requested Mountain View to respond to the interrogatories. He learned from Mountain View's responses that visitors who ate meals at the nursing home were charged $3.00. Carey promptly informed Ragar of the new information.

29 Upon learning this new information, on August 4, 1997, Ragar wrote to Carey and demanded that claimant's compensation be readjusted to reflect that amount. He warned that a failure to make an immediate adjustment could result in a penalty. He wrote, in relevant part:

I anticipate that, based on this latest information, you will immediately adjust her [claimant's] TTD rate and immediately pay her retroactive benefits. A failure to do so would be another reason requiring the imposition of the 20% penalty.

(Ex. 10.) Ragar also wrote that if dining at Mountain View was not open to the general public, then the $3.00 did not reflect the true value of the meal and claimant should be entitled to even more.

30 On August 18, 1997, Bohnsack notified claimant that her compensation was being increased based on $3.00 a meal, one meal a day. (Ex. 19.) Bohnsack testified that she should have ordered a check for back payments that same day but overlooked the matter until after the initial phase of this trial. Thus, the check for back benefits was not ordered until October 10, 1997, and not sent until October 13, 1997, nearly two months after liability for the additional payments was admitted.

31 In her trial testimony, Bohnsack agreed that she and her predecessor had the authority to determine the value of the meal and pay benefits based on the value. She also agreed that upon receipt of Ragar's July 22, 1996 letter, Mountain View should have been contacted. Finally, she agreed that the meals should have been valued at fair market value.

32 At various times claimant has contended that she was entitled to two meals a day. Her contention is not borne out. Her attorney's letter of July 22, 1996, states specifically that she was entitled to **one** meal. Her own testimony showed that she generally ate only one meal.

33 Claimant presented a sample menu of meals served at Mountain View. (Ex. 15.) The menu discloses that the menu for each meal is fixed. It provided no choice among the items served. For example, the lunch specified at page one of the menu was a veal patty,

whipped potatoes, Italian green beans, cherry tart, hot roll, margarine, coffee or tea, and low fat milk. The portions specified are small, for example, the veal patty was 3 ounces, and the milk was 4 ounces or one-half cup. Other examples of the portions of meat served at lunch are 3 ounce pot roast, 3 ounce pork, 2 ounce pork chop, 2 ounce seasoned ground beef, and 3 ounce baked fish. Non-meat and non-fish portions were more substantial.

34 The food served by Mountain View is institutional food purchased from an institutional food vendor. The average cost of meals per resident per day is $3.25. That cost is for the food itself and does not reflect the kitchen staff salaries or fixed or variable overhead for the kitchen and dining room.

35 Upon request, Mountain View serves meals to family members and friends. It does not cater to the general public, and its present administrator, Donald "Skip" Beadle (Beadle), does not believe that its licensing would permit it to cater to the general public. As a matter of fact, the only persons served food by the nursing home, other than residents and staff, are friends and relatives of residents. Few visitors eat at the facility.

36 Beadle testified, and I find as fact, that the $1.50 charged to employees was only intended to recover the cost of the food products purchased by the nursing home.

37 Beadle further testified that only one helping was permitted to employees. Beadle was not employed by Mountain View at the time of claimant's injury and I, therefore, do not rely on his testimony. Claimant and Frank Herstein, who worked as a cook in 1995, testified that employees could have as much as they wanted, subject to availability. Nonetheless, in listening to their testimony it is my clear impression and inference that this was a practice of the employees rather than any sanctioned policy of the nursing home.

38 Claimant presented anecdotal evidence indicating that average meals in restaurants are $6.00. Her evidence is consistent with the Court's own experience, which is extensive in light of its travel. Her experience in eating out did not qualify her as an expert and put her in no better position than the Court to determine either the cost of meals served in restaurants or the value of the meals served at Mountain View.

39 I find that restaurant prices are not a good measure of the fair value of the meals furnished to claimant. Restaurants offer a large variety of foods and they provide waitresses who take orders and serve individual diners. They likely have significantly higher fixed and variable costs than a nursing home. Their facilities are tailored to their specialized trade and their food may be more appealing than institutional food.

40 Claimant argued that Mountain View maintained unusually low prices for meals served to friends and relatives in order to encourage visitors. However, she offered no evidence to support her contention and it is disregarded. On the other hand, Legion presented no evidence showing that the $3.00 rate set by Mountain View was based on its assessment of

the market value of the meals it served. The general public could not dine at Mountain View and visitors did not regularly eat at the facility.

41 A better measure of the fair market value of the meals served to claimant is the price of nonsubsidized, institutional type food available to the public at other institutions. The parties did not attempt to survey such prices. The Court, however, has eaten in cafeterias located in government buildings which are operated on a contractual basis and which have limited menus. I cannot recall specific prices or menus, but based on my experience I find that $3.00 for the type of meal eaten by claimant understates the fair value of her meals. It is more difficult for me to put an exact value on the meals but based on the limited menu, the small portions, and the fact that Mountain View does not provide the amenities and atmosphere of a restaurant, I find that the fair market value of the meals is $4.50.

42 Legion unreasonably delayed payment of benefits to the extent that such benefits are based on $3.00 a meal. Ragar's July 22, 1996 letter put Legion on notice that claimant was entitled to an increase in benefits based on a free meal. Legion's adjuster conducted no investigation in response to the notice, indeed she did nothing. Claimant requested mediation, and a mediation conference was held on September 11, 1996. Someone on behalf of Legion then investigated to the extent that he or she contacted Mountain View and determined that claimant was entitled to a free meal and that other employees could purchase meals for $1.50 each. Legion made no further inquiry even though on its face $1.50 suggests that the price charged other employees was artificially low and did not reflect the fair value of the meals. Further inquiry, had it been made, would have disclosed the $3.00 charged by Mountain View to visitors.

43 Even though it was plain by mid-September 1996 that claimant was entitled to an increase based on at least $1.50 a meal, Legion still did not increase her benefits. According to the claims adjuster, it did not do so because claimant sought even more. The only plausible reason for refusing to pay claimant additional benefits based on the $1.50 a meal was to drive her additional demands down or force her to litigate her contention that she was entitled to more. Legion's refusal to pay the minimum amount it had determined to be due claimant was patently unreasonable.

44 Had Legion's adjusters done a thorough investigation following the mediation, they would have discovered that Mountain View's employee meal policy characterized the $1.50 a meal charge as "nominal" and that visitors were charged $3.00.

45 Legion did not discover the $3.00 visitor rate until late July 1997, more than a year after Ragar's demand that claimant be paid the fair value of her meal. Even then the discovery occurred only because claimant propounded discovery seeking the information. Then, after conceding liability based on the $3.00 rate, Legion's adjusters again dropped the ball and failed to send out the check for another two months.

46 The foregoing leads me to conclude that benefits based on the $3.00 rate were unreasonably delayed and that Legion's conduct was unreasonable.

47 I am unable to say, however, that Legion was unreasonable in disputing claimant's assertion that the value of the meals is more than $3.00 a meal.

CONCLUSIONS OF LAW

48 The Court has jurisdiction of this matter under section 39-71-2905, MCA.

49 Claimant's entitlement to inclusion of free meals in her wages for the purpose of computing her benefits is governed by section 39-71-123, MCA (1995), which provides in relevant part:

39-71-123. Wages defined. (1) "Wages" means the gross remuneration paid in money, or in a substitute for money, for services rendered by an employee, or income provided for in subsection (1)(d). Wages include but are not limited to:

. . . .

(b) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its **actual value** . . . . [Emphasis added.]

50 As set out in the preceding paragraph, the daily meal claimant received as part of her employment must be valued at "actual" value. The American Heritage Dictionary (Third ed. 1993), defines actual as follows:

actual *adj.* **1.** Existing and not merely potential or possible. **2.** Being, existing, or acting at the present moment; current. **3.** Based on fact. **--actually** *adv.*

It defines value, in relevant part, as:

value *n. Abbr.* **val. 1.** An amount, as of goods, services, or money, considered to be a fair and suitable equivalent for something else; a fair price or return. **2.** Monetary or material worth. **. . .**

"Actual value" is the equivalent of "market value." *Cf. State Highway Commission v. Vaughan,* 155 Mont. 277, 470 P.2d 967 (1970). Market value is the amount a willing buyer would pay and a willing seller would accept where neither is acting under duress. *State Highway Commission v. Metcalf,* 160 Mont. 164,173, 500 P.2d 951, 955 (1972); *Estate of Power v. State Board of Equalization,* 156 Mont. 100, 103, 476 P.2d 506, 507 (1970).

51 The Court must therefore determine what a willing buyer would pay a willing seller for the free meals. Three dollars is some evidence of value, but it is far from conclusive. Mountain View was not a public eating establishment. The public members eating there are relatives or visitors of patients. While the claimant did not present any direct evidence that the $3.00 price set by Mountain View incorporated some sort of subsidy to encourage

visitors to eat with patients, the few meals served by Mountain View to visitors suggest that it had little incentive to fix its price for the meals at a market value. On the other hand, claimant did not present evidence of market prices for the sort of meals served in the nursing home.

52 Claimant's evidence of prices paid at restaurants is inconclusive. It fails to consider that restaurants provide a greater variety of choice and may have overhead exceeding that in an institutional setting. Better comparisons would have been nonsubsidized hospital cafeterias offering limited menus or cafeterias in government buildings which are run by nonsubsidized contractors and which offer only limited menus.

53 In fact finding, a judge acts as jury. "Jurors are expected to bring to the courtroom their own knowledge and experience to aid in their resolution of the case." *State v. Kelman*, 276 Mont. 253, 262, 915 P.2d 854, 860 (1996). They may be guided by their personal experience in matters which are within common experience. *Fillinger v. Northwestern Agency, Inc. of Great Falls*, 938 P.2d 1347, 1355 (Mont. 1997). In *Fillinger* the Supreme Court held that expert testimony was unnecessary to establish the duty of care of an insurance agent where the particular matter - a failure to procure requested coverage - is within common experience. The same considerations apply to a judge in a bench trial.

54 In this case, the cost of meals is within common experience. In Montana cost varies more by type of establishment than by geographical location. It is within common knowledge that meals in an institutional or cafeteria setting offering limited menus generally do not cost as much as restaurant meals.

55 On the other hand, it is apparent to me that the meals eaten by claimant, which were balanced meals with typically two beverages, had a greater value than $3.00. I therefore have found that they should be valued at $4.50 for compensation purposes.

56 Based on the foregoing, the claimant is entitled to a retroactive increase in her temporary total disability rate in the amount of $5.00 a week. This amount is based on 66 2/3% of $7.50. 39-71-701, MCA. This is in addition to the amount by which her rate has already been increased.

57 The claimant's request for a penalty is governed by section 39-71-2907, MCA (1995), which provides:

39-71-2907. Increase in award for unreasonable delay or refusal to pay. (1) The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

The section applies to two situations.

58 The first is where the insurer agrees to make payments and then unreasonably delays the payments. This part of the section applies to the increase Legion agreed to make per Ragar's August 4, 1997 letter but which it failed to implement for over two months.

59 The second is where benefits are unreasonably delayed "prior or subsequent to the issuance of an order . . . granting a claimant compensation benefits." In *Paulsen v. Entech Inc.,* WCC No. 9209-6591 (1994), I construed similar language from an earlier version of section 39-71-2907, MCA. At issue in *Paulsen* was the 1989 version of section 39-71-2907, MCA, which provided in relevant part:

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.

(2) A finding of unreasonableness under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

The insurer in *Paulsen* had unreasonably delayed benefits for several months but had paid the benefits at issue six days after it was served with a petition requesting this Court to award the benefits. Following the payment, claimant amended his petition to seek only attorney fees and a penalty. I denied the penalty request based on the language of the section which refers to an "order," which I construed as the triggering event for imposition of the penalty. I noted that *Handlos v. Cyprus Indus. Minerals,* 243 Mont. 314, 317, 794 P.2d 702, 704 (1990), had "found the section to be ambiguous and construed it to allow imposition of the penalty in cases where the insurer delays payment until mid-trial." *Paulsen* at 7. However, I declined to extend the penalty beyond the mid-trial time of *Handlos* and denied the penalty request. On appeal the Supreme Court affirmed but did so in a nonreported, nonciteable decision.

60 In *Mintyala v. State Compensation Ins. Fund,* WCC No. 9502-7244 (1995), this issue was presented in a nearly identical situation. Claimant filed a petition on February 23, 1995. Prior to trial, on April 24, 1995, the insurer moved to dismiss on the ground that it had accepted liability with respect to the matters alleged in the petition. Claimant thereafter pursued attorney fees and a penalty. Based on my prior decision in *Paulsen*, which I found no reason to reconsider, I denied the requests.

61 On appeal, the Supreme Court determined that because its prior decision in *Paulsen* "was classified as nonciteable, that case is not binding on this [Supreme] Court." *Mintyala v. State. Fund,* 276 Mont. 521, 525, 917 P.2d 442, 445 (1996). It then reversed. As in *Paulsen,* the 1989 version of section 39-71-2907, MCA, applied. It was the same version as the one at issue in *Handlos*. After discussing *Handlos,* the Supreme Court characterized its holding in that case as follows:

In other words, the penalty provision is available to the claimant **from the moment the insurer's delay in payment becomes unreasonable**.

Mintyala at 527, 917 P.2d at 445-446, emphasis added.

62 Discussing the various amendments which had been made to the penalty statute over the years, the Supreme Court said in *Mintyala:*

Regardless of what version of the statute this Court has interpreted we have concluded that the penalty statute should be made available "where an insurer acts unreasonably to deny benefits to which a claimant is legally entitled the statutory penalty should be imposed."

Id. at 528, 917 P.2d at 446 (citing *Plooster v. Pierce Packing Co.,* 256 Mont. 287, 291, 846 P.2d 976, 978 (1993)).

63 The penalty statute under consideration in *Mintyala* has since been amended. However, the 1995 version of the section, which applies in this case, still refers to unreasonable delay which occurs "prior or subsequent to an order" of the Workers' Compensation Court. Therefore, the *Mintyala* holding applies and a penalty must be imposed for unreasonable delay whenever it occurred.

64 I have found, as a matter of fact, that Legion unreasonably delayed benefits. An insurer has a duty to conduct an investigation regarding a claimant's entitlement. *Stevens v. State Compensation Mut. Ins. Fund*, 268 Mont. 460, 466-67, 886 P.2d 962, 966 (1994). The investigation must be reasonably prompt, especially when the insurer receives a communication regarding the claim, 33-18-201(2), MCA.[(2)] A minimal investigation in July of 1996 would have disclosed claimant's entitlement to at least $3.00 per day for meals. The adjuster, however, did nothing in response to the information furnished by claimant that she received free meals. The claimant was forced into mediation. Even when an

investigation was done following the mediation, the adjuster ceased investigating upon learning that other employees were charged $1.50. The small amount of the charge should have prompted the adjuster to further investigate the "actual value" of the meal. Then, when claimant issued interrogatories which would have yielded, and ultimately did yield, the information concerning the $3.00 rate charged to visitors, the interrogatories went unanswered for three months and were answered only after prodding by claimant's attorney.

65 The lack of a reasonable investigation is in itself sufficient to impose the penalty. But that is not the end of the unreasonable conduct. Claimant was notified on August 18, 1997, that Legion would use the $3.00 rate and would issue her a check for back benefits based on that amount, yet no check was ordered for nearly two months. No excuse other than oversight was offered. That excuse is especially weak in light of the ongoing litigation. Even worse, although Legion did not dispute the use of $1.50 when it learned in September 1996 that $1.50 was the amount charged other employees, it did not increase claimant's compensation in response to the information. The excuse offered by the adjuster was that claimant was demanding that a higher meal rate be used. Thus, apparently as a negotiating strategy, Legion embarked upon a course of withholding what it admitted was due. It finally agreed to increase benefits based on the $1.50 only after this litigation was filed. Its conduct in this regard was per se unreasonable. Workers' compensation insurers owe a direct duty to pay claimants the benefits to which they are entitled and to do so promptly. Section 39-71-2203, MCA (1995), which governs private insurers such as Legion, provides in relevant part:

39-71-2203. Content of policies -- policies subject to approval, change, or revision by department. (1) All policies insuring the payment of compensation under this chapter must contain a clause to the effect that, as between the employee and the insurer, the notice to or knowledge of the occurrence of the injury on the part of the insured shall be deemed notice or knowledge, as the case may be, on the part of the insurer; that jurisdiction of the insured for the purpose of this chapter shall be jurisdiction of the insurer; and that the insurer shall in all things be bound by and subject to the awards, orders, judgments, or decrees rendered against such insured.

(2) **No such policy shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to compensation all the installments of compensation or other payments in this chapter provided for** and that the obligation shall not be affected by any default of the insured after the injury or by any default in the giving of any notice required by such policy or by this chapter or otherwise. Such agreement shall be construed to be a direct promise by the insured to the person entitled to compensation.

(3) Every policy or contract insuring against liability for compensation under compensation plan No. 2 must contain a clause to the effect that the insurer shall be directly and primarily liable to and will pay directly to the employee or in case of death to his beneficiaries or major or minor dependents, the compensation, if any, for which the employer is liable. [Emphasis added.]

The section does not permit a workers' compensation insurer to withhold benefits it concedes are due just because the claimant may assert that she is entitled to more.

66 I am therefore imposing a penalty in the amount of $2.00 on all weekly benefits paid and which may in the future be paid to the claimant. That penalty is based on the additional $15.00 a week (*$3.00 a meal times 5 days*) which the insurer, had it acted reasonably, should have used in computing benefits. Since the benefits are limited to 66 2/3% of the amount of wages, the additional weekly benefit amounts to $10.00. (*Twenty percent of $10.00 is $2.00.*)

67 Claimant's request for attorney fees is governed by section 39-71-612, MCA (1995), which provides:

39-71-612. Costs and attorneys' fees that may be assessed against an insurer by workers' compensation judge. (1) If an insurer pays or submits a written offer of 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 offered by the insurer, a reasonable attorney's fee and costs 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.

(2) An award of attorneys' fees under subsection (1) may only be made if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

(3) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

Claimant has satisfied the requirements of the section. The only payment made prior to trial was based on $1.50 a meal. The concession of liability for $3.00 a meal is not an "offer" of payment: an offer requires an acceptance and the insurer's concession amounted to a binding admission of liability. Even if the concession was deemed equivalent to an offer, the concession should have been implemented within 30 days as specified by section 39-71-612(2), MCA; it was not. The actions of the insurer in its handling of the claim were unreasonable. Thus, all elements for an award of attorney fees are met.

JUDGMENT

68 The Court has jurisdiction of this controversy pursuant to section 39-71-2905, MCA.

69 Claimant's weekly wage for purposes of computing her compensation benefits shall include $22.50 a week for the free meals she was provided by her employer.

70 Legion Insurance has already included $15.00 a week in computing and paying benefits. It is therefore liable for and shall pay, retroactively and prospectively, the additional weekly sum of $5.00, which amount is based on the additional $7.50 value attributable to meals.

71 Legion shall pay a penalty of $2.00 a week on all benefits paid claimant to date and on all future total and partial benefits.

72 Legion shall pay claimant her attorney fees and costs in an amount to be determined by the Court.

73 This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

74 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 15th day of January, 1998.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Chris J. Ragar
Mr. Steven S. Carey
Date Submitted: October 22, 1997

1. This finding is based on Mr. Carey's oral representations to the Court at the time of trial and Exhibit 8. As an officer of the Court, Mr. Carey was duty bound to be truthful in his representations, and his representations were not challenged by Mr. Ragar. The Court therefore accepts those representations as fact.

2. The section, which is part of the Insurance Code, makes it an unfair settlement to, as a matter of general business practice, "fail to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies."