IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 78A

WCC No. 9306-6809

BRAND E. CAEKAERT

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

FRANK WILSON PLUMBING AND HEATING

Employer.

ORDER GRANTING ATTORNEY FEES

On October 12, 1995, this Court issued its ORDER AWARDING ATTORNEY FEES AND COSTS. The Court assessed costs in the amount of $1,007.65 and directed claimant to submit a verified statement of his claim for attorney fees. The matter of attorney fees is now ready for decision.

Claimant seeks $22,196.50 in fees. Respondent objects to this amount because the hourly rate upon which it is based exceeds $75 per hour. It also objects to the inclusion of hours spent pursuing the attorney fee issue.

Respondent argues that the Division rule fixing an hourly maximum of $75 must be applied. That rule states in part:

> 24.29.3802 ATTORNEY FEE REGULATION (1) This rule is promulgated under the authority of sections 39-71-203 and 39-71-613, MCA, to implement regulation of the fees charged to claimants by attorneys in workers' compensation cases as provided in section 39-71-613, MCA.
>
> . . .
>
> (4) The fee schedule set forth in subsection (3) [contingent percentage fee arrangement] does not preclude the use of other attorney fee arrangements, such as the use of a fee system based on time at a reasonable hourly rate **not exceeding $75.00 per hour**, but the total fee charged may not exceed the schedule set forth in

> subsection (3) except as provided in subsection (7). When such fee arrangement is utilized, the contract of employment shall specifically set forth the fee arrangement, such as the amount charged per hour. [Emphasis added.]
>
> . . .

The rule became effective on November 11, 1988, and implemented the second sentence of 39-71-614(2), MCA (1987), which provides:

> (2) The judge shall determine a reasonable attorney fee and assess costs. The hourly rate applied to the time spent must be based on the attorney's customary and current hourly rate for legal work performed in this state, **subject to a maximum established by the division.** [Emphasis added.]

It has long been the rule that the law in effect on the date of a worker's injury governs the worker's entitlement to compensation. In *Kraft v. Flathead Valley Lab. and Cont'rs.,* 243 Mont. 363, 366, 792 P.2d 1094, 1096 (1990), the Supreme Court considered the date on which a claim for carpal tunnel syndrome arose and determined that the law in effect "during the period" of time the condition arose should be applied. *Kraft* involved an old law, micro trauma claim made under the Workers' Compensation Act; however, the same test should apply in occupational disease cases, at least where the condition surfaces at a definite time, as it did in this case.

The claimant was diagnosed with bilateral carpal tunnel syndrome in February 1988. On February 10, 1988 and on March 2, 1988, he underwent carpal tunnel release surgeries. Claimant filed his Claim for Compensation on November 14, 1988. The State Fund accepted liability and paid the medical expenses for claimant's surgeries. (*Caekaert v. State Compensation Insurance Fund*, 268 Mont. 105, 110, 885 P.2d 495, 498 (1994).) Thus, claimant's disease manifested itself in early 1988, prior to the Department's adoption of the $75 maximum hourly rate for attorney fees. Since the rule was adopted after the claim arose, it is inapplicable. Claimant is entitled to attorney fees at his usual and customary rate.

The second issue is whether claimant is entitled to attorney fees for those hours spent litigating his entitlement to attorney fees. Respondent suggests that *Ingebretson v. Louisiana-Pacific Corporation,* WCC No. 9403-7030, Order Granting Attorney Fees and Costs, decided November 6, 1995, precludes an award of attorney fees with respect to time spent after remand on the attorney fee issue. *Ingebretson*, however, held only that attorney fees are not recoverable for time spent establishing the amount of the fees due. Attorney fees for time spent establishing the right to attorney fees were allowed. The fact that the entitlement was established prior to the appeal in that case, whereas it has been established post-appeal in this case, is immaterial. Claimant has deleted those hours spent to establish the amount due; thus, the remaining hours are compensable.

ORDER AND JUDGMENT AFTER REMAND

IT IS HEREBY ORDERED that the State Compensation Insurance Fund shall pay $22,196.50 in attorney fees, along with an additional $1,007.65 in costs. This Order and Judgment is final.

DATED in Helena, Montana, this 16th day of May, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Patrick G. Frank
Mr. William J. Mattix
Submitted: December 29, 1995