IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9010-5978

WAYNE FRANCETICH,

Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,

Respondent/Insurer for

DICK'S CONOCO,

Employer.

ORDER DENYING ATTORNEY FEES AND COSTS

This matter comes to the Court for consideration of petitioner's request for attorney fees and costs filed on May 17, 1994. Given the nature of the issues in this case, a brief synopsis of the pleadings and the procedures followed will be helpful.

Petitioner Wayne Francetich (Francetich) filed his petition for hearing on October 15, 1990, and simultaneously filed petitioner's request for stay pending appeal (39-71-2910, MCA; Rule 7, M.R.A.P.); points and authorities. By stipulation the parties resolved the request for a stay and it was withdrawn. The petition was appropriately treated as an appeal from a decision by the Department of Labor and Industry and a briefing schedule was set. The petition set forth as issues:

1. The subrogation statutes in issue, 39-71-414(6)(a), MCA, are unconstitutional.

2. Claimant need not repay SCMIF $5,391.03 or any other sum.

3. SCMIF must pay Claimant the interest it could have, and should have earned on the said $5,391.03 during the time SCMIF had said money and during which period it refused to invest the same in an interest bearing account pursuant to the demands of Claimant that it do exactly that.

4. Claimant is entitled to an award of reasonable attorney fees and costs.

The Workers' Compensation Court entered its judgment in favor of respondent, State Compensation Insurance Fund (State Fund) on January 17, 1991. Claimant appealed. The Montana Supreme Court **reversed** this Court's decision on March 10, 1992, declaring

section 39-71-414(6)(a) unconstitutional. The Supreme Court remanded the case "so that the court may make a factual determination as to whether the claimant's damages and costs of being made whole exceed his workers' compensation and third-party recovery combined, and for an appropriate order in accordance with the principles stated in this opinion."

At a pretrial conference on August 24, 1992, counsel agreed to file a notice of resolution of the subrogation issue with the Court. Petitioner moved to disqualify Judge Reardon and the matter was placed in abeyance pending disposition of the recusal request. With the appointment of Judge McCarter the issue of recusal became moot. By letter, dated February 19, 1994, counsel for the petitioner advised the Court that the sole remaining issues were that of attorney fees and costs. Subsequently petitioner's claim for reasonable costs and attorney fees was filed, to which respondent replied and petitioner responded. Counsel have stipulated that an evidentiary hearing is not necessary. The matter is fully briefed and ready for decision.

DISCUSSION

The statutes in effect at the time of the injury govern any determination by the Workers' Compensation Court with regard to benefits and attorney fees. ***Caldwell v. Great Western Sugar Co.,*** *229 Mont. 448, 746 P.2d 627 (1987).* Francetich was injured on December 2, 1988, therefore the statutes enacted in 1987 must be applied. The applicable statutes:

> **39-71-611. Costs and attorneys' fees payable on denial of claim or termination of benefits later found compensable.** (1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:
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> (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
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> (b) the claim is later adjudged compensable by the workers' compensation court; and
>
> (c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.
>
> (2) 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. [Emphasis added.]
>
> **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. [Emphasis added.]

In his affidavit, petitioner requests attorney fees at the rate of $150.00 per hour for eighty (80) hours. The number of hours, which is apparently a different number than that which had been reported on a tally sheet prepared by Mr. Burris at the request of the State Fund, "rounds the time off" to include time spent after October 6, 1993. The tally sheet has been lost. Petitioner does not specify which of the attorney fee statutes he is relying upon in making his claim for attorney fees and costs, but generally argues that the statutes were not expressly designed to cover cases where a statute (in this instance section 39-71-414, MCA) is held unconstitutional. Petitioner cites no authority for this position.

Before attorney fees can be recovered from an insurer in a case arising after July 1, 1987, there must be a showing of unreasonable conduct on the part of that insurer. §§ 39-71-611(1)(c) and 39-71-612(2). Claimant argues that it was "patently" clear to the members of the Supreme Court that section 39-71-414, MCA was unconstitutional, therefore it should likewise have been clear to the State Fund attorneys. But the unconstitutionality of the statute was not clear to the Workers' Compensation Court. The ultimate outcome of the case does not render either the insurer's nor the Workers' Compensation Court's views unreasonable. The unconstitutionality of a statute is never presumed and must be shown beyond a reasonable doubt. ***Vanio v. Brookshire,*** *258 Mont. 273, 852 P.2d 596 (1993).* The position of the State Fund was not unreasonable. At the time of its subrogation claim, the State Fund, pursuant to section 39-71-414, MCA, was relying on procedures which were in compliance with existing law as enacted by the Legislature.

An award of costs is governed by section 25-10-201, MCA. ***Baeta v. Don Tripp Trucking,*** *254 Mont. 487, 839 P.2d 566, (1992)*.

25-10-201. Costs generally allowable. A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows:

(1) the legal fees of witnesses, including mileage, or referees and other officers;

(2) the expenses of taking depositions;

(3) the legal fees for publication when publication is directed;

(4) the legal fees paid for filing and recording papers and certified copies thereof necessarily used in the action or on the trial;

(5) the legal fees paid stenographers for per diem or for copies;

(6) the reasonable expenses of printing papers for a hearing when required by a rule of court;

(7) the reasonable expenses of making transcript for the supreme court;

(8) the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and

(9) such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law.

Claimant requests costs in the amount of $586.18, rounded off to $600.00. The recap of costs shows a charge of $158.80 for "Costs - Helena trip" and all remaining costs are billed to phone, postage or copies. None of the requested costs are allowable under section 25-10-201, MCA, and are hereby **denied**.

IT IS HEREBY ORDERED that claimant's request for attorney fees and costs is **denied**.

The Order herein is certified as final for purposes of appeal to the Montana Supreme Court pursuant to ARM 24.5.348.

DATED in Helena, Montana, this 9th day of November, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Don Edgar Burris
Mr. Laurence A. Hubbard