IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 11

WCC No. 9806-7991

GARY GALETTI

Petitioner

vs.

MONTANA POWER COMPANY

Respondent/Insurer/Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Self-insured employer accepted liability for claimant's 1983 back injury, but denied liability for 1994 flare-up. Although liability was accepted at the commencement of the hearing, trial proceeded on claims for attorneys fees and penalty.

Held: WCC found the self-insured employer's denial of the claim for medical benefits was unreasonable where the adjuster had persisted in maintaining claimant's flare-up was not compensable despite medical information and legal precedent to the contrary in his files. Further evidence of unreasonable conduct came through evidence the employer ignored several requests by claimant for a copy of his entire file, failing even to provide a copy of the doctors' response to the self-insured employer's inquiries. Attorneys fees were not awarded, however, because the employer conceded liability at the commencement of the hearing and adjudication on the issue of liability was therefore unnecessary. (Note: the WCC was reversed on this point; see 2000 MT 234, ¶ 15-25.) A penalty was imposed on the amount of medical benefits claimant paid out of pocket, but not on the amount paid by the employer's self-insured health plan. (Note: the WCC was reversed on its conclusion penalty was not appropriate on amounts paid by the employer's health plan; see 2000 MT 234, ¶ 26-32.)

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-611, MCA (1983).** Self-insured employer accepted liability for claimant's 1983 back injury, but denied liability for 1994 flare-up. Although the employer accepted liability at the commencement of the hearing, trial proceeded on claims for attorneys fees and penalty. WCC found the self-insured employer's denial of the claim for medical

benefits unreasonable where the adjuster had persisted in maintaining claimant's flare-up was not compensable despite medical information and legal precedent to the contrary in his files. Further evidence of unreasonable conduct claim came through evidence the employer ignored several requests by claimant for a copy of his entire file, failing even to provide a copy of the doctors' response to the self-insured employer's inquiries. Attorneys fees were not awarded, however, because the employer conceded liability at the commencement of the hearing and adjudication on the issue of liability was therefore unnecessary. (Note: the WCC was reversed on this point; see Galetti v. Montana Power Company, 2000 MT 234, ¶ 15-25, which held that fees were proper under section 39-71-612, MCA (1983)).

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-2907, MCA (1983). Self-insured employer accepted liability for claimant's 1983 back injury, but denied liability for 1994 flare-up. Although the employer accepted liability at the commencement of the hearing, trial proceeded on claims for attorneys fees and penalty. WCC found the self-insured employer's denial of the claim for medical benefits unreasonable where the adjuster had persisted in maintaining claimant's flare-up was not compensable despite medical information and legal precedent to the contrary in his files. Further evidence of unreasonable conduct claim came through evidence the employer ignored several requests by claimant for a copy of his entire file, failing even to provide a copy of the doctors' response to the self-insured employer's inquiries. A penalty was imposed on the amount of medical benefits claimant paid out of pocket, but not on the amount paid by the employer's self-insured health plan. (Note: the WCC was reversed on its conclusion penalty was not appropriate on amounts paid by the employer's health plan; see Galetti v. Montana Power Company, 2000 MT 234, ¶ 26-32.)

Attorneys Fees: Unreasonable Denial or Delay of Payment. Self-insured employer accepted liability for claimant's 1983 back injury, but denied liability for 1994 flare-up. Although the employer accepted liability at the commencement of the hearing, trial proceeded on claims for attorneys fees and penalty. WCC found the self-insured employer's denial of the claim for medical benefits unreasonable where the adjuster had persisted in maintaining claimant's flare-up was not compensable despite medical information and legal precedent to the contrary in his files. Further evidence of unreasonable conduct claim came through evidence the employer ignored several requests by claimant for a copy of his entire file, failing even to provide a copy of the doctors' response to the self-insured employer's inquiries. Attorneys fees were not awarded, however, because the employer conceded liability at the commencement of the hearing and adjudication on the issue of liability was therefore unnecessary. (Note: the WCC was reversed on this

point; see Galetti v. Montana Power Company, 2000 MT 234, ¶ 15-25, which held that fees were proper under section 39-71-612, MCA (1983)).

Penalties: Insurers. Self-insured employer accepted liability for claimant's 1983 back injury, but denied liability for 1994 flare-up. Although the employer accepted liability at the commencement of the hearing, trial proceeded on claims for attorneys fees and penalty. WCC found the self-insured employer's denial of the claim for medical benefits unreasonable where the adjuster had persisted in maintaining claimant's flare-up was not compensable despite medical information and legal precedent to the contrary in his files. Further evidence of unreasonable conduct claim came through evidence the employer ignored several requests by claimant for a copy of his entire file, failing even to provide a copy of the doctors' response to the self-insured employer's inquiries. A penalty was imposed on the amount of medical benefits claimant paid out of pocket, but not on the amount paid by the employer's self-insured health plan. (Note: the WCC was reversed on its conclusion penalty was not appropriate on amounts paid by the employer's health plan; see Galetti v. Montana Power Company, 2000 MT 234, ¶ 26-32.)

¶1 The trial in this matter was held on November 12, 1998, in Butte, Montana. Petitioner, Gary Galetti (claimant), was present and represented by Mr. Chris J. Ragar. Respondent, Montana Power Company (MPC), was represented by Mr. W. Wayne Harper. No transcript of the trial has been prepared.

¶2 Exhibits: Exhibits 1(a) through 1(ii), 2 through 25, 27 through 30, 32, 34 though 38, and 40 through 42 were admitted after all objections were withdrawn. Exhibit 1(jj) was admitted over claimant's objection. Exhibits 1(kk), 1(ll), 26 and 39 were withdrawn. Exhibit 31 was objected to and admitted. The Court takes judicial notice of Exhibit 33.

¶3 Witnesses and Deposition: Claimant, Thomas F. Kiely, and Joni Hope were sworn and testified. In addition the parties submitted the deposition of Dr. Charles E. Buehler for the Court's consideration.

¶4 Issues Presented: As set forth in the Final Pretrial Order, the following issues are presented for decision:

1. Whether MPC is liable for the medical expenses that Claimant incurred in December 1994 and thereafter, as medical benefits under the Workers' Compensation Act for Claimant's 1983 injury; and if so, to what extent.

2. Whether MPC is liable for a 20% penalty for unreasonable delay and denial of payment of benefits.

3. Whether MPC is liable for the payment of reasonable attorney's fees and costs.

(Final Pretrial Order at 2.)

¶5 Having considered the Final Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, the Court makes the following:

FINDINGS OF FACT

¶6 On August 13, 1983, claimant suffered a compensable back injury while employed by MPC. MPC accepted liability for the claim and paid appropriate workers' compensation benefits.

¶7 MPC is self-insured pursuant to Plan I of the Workers' Compensation Act.

¶8 As a result of his injury, in October 1983 claimant underwent chemonucleolysis at the L3-L4 and L4-L5 vertebral levels. (Exs. 1cc, 1dd, 1ee.) The procedure involved injection of Chymodiacten (chymopapain) into the disk spaces at both levels. The drug dissolved the disks. (Buehler Dep. at 9.)

¶9 While chemonucleolysis was an accepted medical procedure in 1983, it was discontinued because of a risk of anaphylactic shock. (*Id.* at 11.)

¶10 Chymopapain may also dissolve or destroy parts of the vertebrae. (*Id.* at 12.) In addition, the procedure frequently leads to degenerative arthritic changes, especially the formation of osteophytes (bone spurs). (*Id.*) In this case, the claimant has suffered severe degenerative changes of the lumbar spine as a result of the chemonucleolysis. (*Id.* at 20.)

¶11 Following the chemonucleolysis, the claimant returned to work for MPC and has continued working.

¶12 On December 11, 1994, claimant experienced a severe flareup of his back condition. The flareup occurred when claimant coughed while lying in bed. It occurred after claimant had been snowmobiling the day before.

¶13 On December 11, 1994, and for some time thereafter, claimant experienced back and left leg pain. (Ex. 1q.; Trial Test.) He was initially unable to urinate and was admitted to St. James Community Hospital in Butte, where he was hospitalized for five days. (Ex. 1q.) His symptoms improved and he returned to work.

¶14 MPC denied liability for the flareup and declined payment for medical expenses. However, a substantial part of the approximately $10,000 in medical expenses were paid by a medical plan covering the claimant and other MPC employees. The plan is a self-insurance plan maintained by MPC and funded by contributions from both MPC and MPC employees.

¶15 At trial MPC accepted liability for the 1994 flareup as related to claimant's 1983 back injury. MPC further conceded that the treatment provided to claimant following the 1994 flareup was reasonable and agreed to reimburse claimant for the approximate $2,000 out-

of-pocket payments he paid on account of his insurance deductible. Finally, it agreed to make accounting adjustments transferring the amounts paid to medical providers under its general medical plan to MPC's workers' compensation liability fund.

¶16 The only issues remaining are whether claimant is entitled to a penalty and attorney fees.

¶17 Claimant has been employed by MPC for twenty years. He currently works as the lead transmission operator.

¶18 Since his 1983 injury and chemonucleolysis he has continued to experience back pain and has had some degree of symptoms on a daily basis. He testified that his supervisors are aware that he has a bad back and that his immediate supervisor has known since about 1991 that his back bothers him. (Trial Test.)

¶19 Despite back pain, after 1983 the claimant continued to work and engage in some of his hobbies. One of his hobbies is occasional recreational snowmobiling. He rode on his knees and avoided any lifting of the machines.

¶20 On the day before his 1994 flareup claimant snowmobiled in the West Yellowstone area for two or three hours. After snowmobiling, he and his wife went to dinner, then returned to their room. The following morning, while lying in bed, claimant coughed hard and immediately experienced a sharp pain. His specific symptoms and hospitalization have already been described.

¶21 Claimant requested MPC to accept liability for his flareup. His request was handled by Jerry Woods (Woods), MPC's claims manager at that time. Claimant testified that he spoke with Woods three to four times over the phone and Woods indicated it was unlikely MPC would accept his claim.

¶22 Woods believed that claimant's condition was related to snowmobiling and not to the 1983 injury. His belief apparently arose out of the report by another MPC employee that claimant had attended a snowmobile outing sponsored by Red Line Sports the weekend he was injured. (Ex. 30 at 1.) This information was recorded in a memo written by Woods to claimant's file. (*Id.*) The note, however, confirms that claimant was in bed when he coughed and suffered a back spasm. (*Id.*) The note reads in its entirety:

> I visited with Louette J. regarding Gary's recent back propblem [sic]. She advised that this event took place at West Yellowstone while Gary was attending a snowmobile outing that was sponsored by Red Lines Sports. The promoter is Mat Krsul. Gary apparently was in bed when he coughed and suffered the back spasm. He apparently had been snowmobileing [sic] most of the weekend.

(*Id*.)

¶23 The claim file does not reflect that Woods did any further investigation into the nature and extent of claimant's snowmobiling. There is nothing in his file to rebut claimant's report that he had snowmobiled for only two or three hours the day before his flareup. There is nothing in the file to indicate that claimant was in any sort of accident or suffered any strain while snowmobiling or that he suffered an onset of symptoms while snowmobiling. Indeed, Woods' note, as quoted in the previous paragraph, shows that he was aware that claimant's symptoms were triggered by a coughing spell in bed.

¶24 Dr. Baggenstos who performed the chemonucleolysis in 1983 and one of the physicians treating claimant following his 1994 flareup, noted in a January 18, 1995 office note that claimant had been injured at work in 1983 and in 1989 and attributed the 1994 flareup to the prior work-related injuries. (Ex. 1o.) A copy of the office note was sent to Woods. (*Id*.)

¶25 Dr. Charles E. Buehler, an orthopedic surgeon who also treated claimant following his 1983 injury and again following his 1994 flareup, recorded on February 22, 1995, "I do think that his present condition is related to his industrial injury of August 13, 1983." (Ex. 1f.)

¶26 Dr. Richard C. Dewey, a neurosurgeon, did a neurosurgical consultation on December 29, 1994. He did not comment on the relationship of the flareup to prior work-related injuries. (Ex. 1p.)

¶27 On January 26, 1995, Dr. Henry Gary, a neurosurgeon, conducted a neurosurgical consultation to explore possible surgery. His impression at the time was:

> IMPRESSION: 1. Chronic degenerative disc disease with low back pain and episodic radicular or referred pain into the left leg. From his myelographic and MR appearances and his exam, I am doubtful that surgical therapy would do much for this man. I have spent a considerable period of time discussing with him to be persistent in a stretching exercise program and to try to pattern his life to learn to avoid producing things that significantly aggravate his pain.

(Ex. 1s at 2.) On February 14, 1995, Dr. Gary provided claimant with a short letter stating, "Mr. Galetti was injured on numerous occasions while working at the Montana Power Company resulting in chronic back and leg pain." (Ex. 1r.)

¶28 Woods also requested an independent medical examination by Dr. John S. Diggs, a physiatrist. Dr. Diggs conducted the exam on March 7, 1995. He chronicled claimant's work-related injuries (1979, 1983 and 1989) and his medical treatment over the years. (Ex. 1l.) Dr Diggs questioned claimant about his snowmobiling and recorded:

> Gary was asked about recent snowmobiling activities. He states for several years with all of his back symptoms he has never had complaints or problems with snowmobiling. He does not equate his recurrent symptoms that appeared while

> coughing last December with any snowmobiling activity. He has not been on a snowmobile since he was treated in the hospital last December.

(*Id*. at 2.) The doctor concurred with the other physicians in concluding that claimant's 1994 flareup was attributable to his underlying back condition, which in turn was the result of his work-related injuries. In his impression, he recorded:

> Gary's most recent symptoms, January, 1994, do not represent a new injury but would be related to his history of the old injury going back to September, 1983. The degenerative changes demonstrated by several scans of his low back represent a borderline problem for Gary in which the valsalva pressure in the spine with coughing would lead to recurrent radiculopathy and severe low back pain with loss of bowel/bladder function and partial left leg weakness with loss of sensation, requiring hospital treatment with subsequent improvement on conservative care. The valsalva effect with coughing is not an unusual cause of recurrent, severe, low back pain, particularly in an individual with more than one level of relative spinal stenosis demonstrated by radiological scans and myelogram. Riding a snowmobile would not necessarily aggravate a back condition if the individual used good judgment and cushioned any bumps or bouncing through his feet and legs.

In this case I agree with Dr. Baggenstos, Dr. Gary, and Dr. Dewey that his recent back flare up and hospitalization is directly related to the original injury of 1983. Today he did not give a history of snowmobile activity that would account for his low back exacerbation and hospitalization.

(*Id*. at 3.)

¶29 Lacking information that the claimant's report concerning his snowmobiling and the onset of his flareup was false, the medical opinions reflected in the foregoing paragraphs should have ended Woods' inquiry. The claim for benefits for the 1994 flareup should have been accepted at this point.

¶30 But on March 23, 1995, Woods, still not satisfied, wrote letters to the doctors. In his letters he first acknowledged that claimant's condition had been **"'related' to his work injuries, absent any trauma being reported**." (Ex. 34, 35, 36, 37, and 38; emphasis added.) He then went on to pose the following hypothetical and question:

> In view of the long time span between the most recent problem and the history as reported, considering further that no additional treatment was rendered since the 1989 event, and if it were to be shown that Gary had been attending a snowmobile outing on December 9, 10, & 11, when on the morning of December 11, Gary was in bed in West Yellowstone when he sneezed and experienced his pain that has been recorded as being the first disabling event since 1989, would this scenario cause

> you to consider that this latest event would not be a direct result of his earlier events of 1983 & 1989?

(*Id.*)

¶31 On its face, the hypothetical posed in Woods' March 23, 1995 letters was unsupported by any information he had. It erroneously assumed that claimant had been snowmobiling for three straight days rather than two to three hours on December 10th. It erroneously assumed that claimant had been snowmobiling on December 11th, the day of his flareup.

¶32 Dr. Baggenstos replied that he was not aware of the facts outlined in the March 23rd letter and under that set of facts was unable to assess the relatedness of the flareup to the earlier work-related injuries. (Ex. 1i.) Dr. Dewey's reply was more supportive of relating claimant's flareup to his prior work-related injuries than to snowmobiling. He said:

> I appreciate the concerns you have in your letter of 23 March 95. Mr. Galetti, with the sneeze that he experienced in bed, has suffered a back injury. That injury is a muscular spasm that has occurred in muscles which basically were not capable of tolerating the strain of a sneeze. This is not uncommon. All of us experience back spasm at times. It is impossible for me to relate the sneeze related back pain to injuries that he had in the past, except to say that patients who have had structural injuries of the spine, and especially patients who have undergone injections of the spine, have a much more sensitive back than those who have not. I do not feel that he has had a structural injury at this point. Most likely, his current problem is a combination of all of the problems in his back that have preceded it, and aggravated by a relatively rigid, nonlimber muscular structure.

(Ex. 1j.) Dr. Buehler acknowledged that snowmobiling could have caused the flareup "**if Gary [claimant] was lifting snowmobiles and doing heavy type of work,**" but reemphasized his prior opinion that degenerative changes due to prior work-related injuries weakened claimant's back and "predispose[d him] to further problems with only very minor incidents." (Ex. 1k; emphasis added.) Dr. Diggs replied that "Mr. Galetti's episode of coughing in bed would be directly related to snowmobiling on a three day rally." (Ex. 1jj.)

¶33 Woods informed claimant by letter in April 1995 that his claim was being denied because there was insufficient medical evidence to relate the flareup back to the 1983 injury. (Ex. 21 at 1.) Woods wrote that it was "quite reasonable" for MPC to conclude that his injury was related to his snowmobiling activities and not to the 1983 injury. (*Id.*)

¶34 That denial and the delay in finally accepting liability for the flareup was unreasonable. Woods had been provided unequivocal medical opinions relating the onset of the flareup to a coughing spell and claimant's weakened back, which was due to his prior work-related injuries. Woods had in his files a copy of the Montana Supreme Court opinion in *Walker v. United Parcel Service,* 262 Mont. 450, 865 P.2d 1113 (1993), which held that where a

claimant provides proof that his current condition is related to a prior work-related injury the burden shifts to the insurer to prove that his condition was permanently aggravated by a subsequent accident. Woods had no evidence of a subsequent accident. He did have overwhelming evidence that claimant suffered a permanently weakened back as a result of his prior work-related injuries and that his weakened condition made him susceptible to flareups of the sort he experienced in December 1994.

¶35 Further evidence of the unreasonable handling of this claim was provided by claimant, who testified that despite several requests for a copy of his entire claim file he was never furnished with the entire file. Importantly, the doctors' responses to Woods' March 23, 1995 letter, were not furnished.

CONCLUSIONS OF LAW

I. Applicable Law

¶36 Claimant's industrial injury occurred on August 13, 1983. His claim is governed by the 1983 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Costs and Attorney's Fees

¶37 Section 39-71-611, MCA (1983), governs when costs and attorney's fees should be awarded:

> **39-71-611. Costs and attorneys' fees payable on denial of claim or termination of benefits later found compensable.** In the event an insurer denies liability for a claim for compensation or terminates compensation benefits and the claim is later adjudged compensable by the workers' compensation judge or on appeal, the insurer shall pay reasonable costs and attorneys' fees as established by the workers' compensation judge.

In this case, MPC denied compensation on the ground that claimant had suffered a subsequent non-work-related injury, thus relieving it of liability for prior work-related injuries. Such denial was "tantamount to a termination of benefits." *Allen v. Treasure State Plumbing,* 246 Mont. 105, 111, 803 P.2d 644, 647 (1990).

¶38 Claimant, however, is not due attorney fees under the section since it requires an adjudication. MPC's concession of liability at the commencement of hearing made an adjudication unnecessary and attorney fees must therefore be denied. *Yearout v. Rainbow Painting,* 222 Mont. 65, 68, 719 P.2d 1258, 1260 (1986).

III. Penalty

¶39 A penalty may be awarded only if the insurer's conduct is unreasonable. § 39-71 -2907, MCA.

¶40 In evaluating when a penalty is appropriate the Supreme Court has stated:

> The triggering event for the purpose of awarding penalties for unreasonable delay or refusal to pay compensation is the insurer's receipt of medical verification of a compensable injury. Unless such verification contradicts other evidence sufficient to make the verification inherently incredible, the insurer's duty to pay commences and failure to pay (or deny a claim) will expose the carrier to the possibility of penalties after thirty days.

Holton v. F. H. Stoltze, 195 Mont. 263, 268, 637 P.2d 10, 13 (1981).

¶41 A subsequent injury or flareup is compensable if "it is the direct and natural result of a compensable primary injury, and not the result of an independent intervening cause attributable to the claimant's own intentional conduct." *Rightnour v. Kare-Mor Inc.*, 225 Mont. 187, 189, 732 P.2d 829, 831 (1987). The Supreme Court has held that once a claimant proves by a preponderance of the evidence, with positive medical testimony, that his present disability is related to his compensable injury, the burden of proof shifts to the insurer to show by substantial evidence that the cause of the current disability was an intervening act. *Walker v. United Parcel Service*, 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993.) In this case the claimant provided MPC with overwhelming medical evidence relating his flareup to his pre-existing back condition, which in turn was due to his prior work-related injuries. The burden was thereby shifted to MPC to establish that he suffered a new, non-work-related injury or permanent aggravation.

¶42 The Court has found as a matter of fact that MPC's claims adjuster lacked a substantial medical basis for contesting the claim. When presented with overwhelming medical evidence he ignored it and took a second run to obtain contrary medical opinion. In doing so he asked the doctors to assume erroneous, unsupported facts.

¶43 Claimant is therefore entitled to a penalty in an amount to be determined by this Court. The full 20% penalty shall be applied to claimant's out-of-pocket expenses for his 1994 and 1995 medical care.

¶44 Since MPC self-insures for both workers' compensation claims and medical benefits for its employees, a penalty should not attach to the medical benefits it paid under its general medical benefits programs, at least to the extent those payments are attributable to MPC contributions. Whether paid from funds allocated for accounting purposes to workers' compensation benefits or from funds allocated for MPC's general medical benefits program for its employees, the payments have been made and have been by MPC. To that extent, claimant has not suffered detriment. However, as noted in the findings of fact, MPC's employee medical benefits program is funded by contributions from both MPC and its employees. Thus, to the extent that the payments for claimant's 1994 and 1995 medical care are attributable to contributions by MPC employees, MPC shifted its workers'

compensation liability to its contributing employees, including the claimant. I therefore conclude that a penalty shall attach to that portion. In the event the parties cannot agree on the amount of the employee contribution, the Court will hold a further hearing to make the determination.

JUDGMENT

¶45 1. Claimant is not entitled to attorney fees and costs.

¶46 2. Claimant is entitled to a penalty equal to 20% of his out-of-pocket medical expenses for his 1994 flareup of his back condition. He is also entitled to a 20% penalty on that amount of medical expenses paid by MPC's employee medical benefits plan which is equal the total medical payments times the percentage of employee contributions to the plan during 1994. If the parties are unable to agree on the percentage, a further hearing will be held and the Court will make the determination.

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

¶48 4. 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 4th day of February, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Chris J. Ragar
Mr. W. Wayne Harper
Date Submitted: November 12, 1998