IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2001 MTWCC 60

WCC No. 2001-0321

GARY GALETTI

Petitioner

vs.

MONTANA POWER COMPANY

Respondent/Insurer/Employer

and

DEPARTMENT OF LABOR AND INDUSTRY,

SUBSEQUENT INJURY FUND

Respondent.

SUMMARY AND FINAL JUDGMENT

Summary: Claimant was injured in 1983 while working for Montana Power Company (MPC), which was self-insured. MPC accepted liability and paid benefits, however, at the time of the injury the claimant had been certified as disabled under the subsequent injury provisions of the Montana Workers' Compensation Act. Those provisions limit the insurer's liability for compensation benefits to 104 weeks and impose liability for benefits beyond the 104 weeks upon the Subsequent Injury Fund (SIF). The benefits paid claimant in the 1980s were less than the 104 weeks. In 1999 claimant made a demand for permanent partial disability benefits exceeding the 104 weeks. MPC denied the demand and the petitioner filed a petition with the Court. At the time of the petition, MPC had paid claimant 101 1/6 weeks of the 104 weeks. Two years after the demand, MPC moved to join the SIF and the motion was granted. SIF then paid $41,000 to claimant, while MPC paid an additional 2 6/7 weeks of benefits. The parties have agreed to the dismissal of the substantive claims, however, claimant seeks a penalty and attorney fees against MPC.

Held: MPC is liable for attorney fees and a penalty not only with respect to the 2 6/7 weeks of additional benefits it paid after the filing of this action but also with respect to the $41,000 paid by the SIF. By failing to give the SIF notice of the claim and denying further liability, MPC substituted itself for the SIF. It is liable for attorney fees on the SIF payments

since the amount ultimately obtained by settlement with the SIF was greater than the amounts tendered by MPC. Its failure to involve the SIF also unreasonably delayed the SIF settlement, rendering it liable for a penalty.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: sections 39-71-907 to 39-71-911, MCA (1983). Under Subsequent Injury Fund statutes, the Montana Subsequent Injury Fund is liable for compensation benefits in excess of 104 weeks which are payable to an injured worker who was previously certified as disabled.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: sections 39-71-908, MCA (1983). Under Subsequent Injury Fund statutes, the insurer or self-insurer is required to give the Subsequent Injury Fund notice of its potential liability prior to the expiration of 104 weeks following a work-related injury of a worker who has been certified as disabled.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: sections 39-71-908, MCA (1983). An insurer or self-insurer which fails to provide the notice required by section 39-71-908, MCA (1983), and denies a claim for further benefits, is liable for attorney fees and a penalty where the claim is subsequently submitted to the Subsequent Injury Fund and accepted by it.

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Subsequent Injury Fund. An insurer or self-insurer which fails to provide the notice required by section 39-71-908, MCA (1983), and denies a claim for further benefits, is liable for attorney fees and a penalty where the claim is subsequently submitted to the Subsequent Injury Fund and accepted by it.

Attorney Fees: Cases Awarded: Subsequent Injury Fund. In a Subsequent Injury Fund case, an insurer or self-insured which fails to provide the notice required by section 39-71-908, MCA (1983), and denies a claim for further benefits, is liable for attorney fees where the claim is subsequently submitted to the Subsequent Injury Fund and accepted by it.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-612, MCA (1983): In a Subsequent Injury Fund case, an insurer or self-insured which fails to provide the notice required by section 39-71-908, MCA (1983), and denies a claim for further benefits, is liable for attorney fees and a penalty where the claim is subsequently submitted to the Subsequent Injury Fund and accepted by it.

Penalties: Insurers. In a Subsequent Injury Fund case, an insurer or self-insured which fails to provide the notice required by section 39-71-908, MCA (1983), and denies a claim for further benefits, is liable for a penalty where the claim is subsequently submitted to the Subsequent Injury Fund and accepted by it.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-2907, MCA (1983): In a Subsequent Injury Fund case, an insurer or self-insured which fails to provide the notice required by section 39-71-908, MCA (1983), and denies a claim for further benefits, is liable for a penalty where the claim is subsequently submitted to the Subsequent Injury Fund and accepted by it.

¶1 This case involves a claim for permanent partial disability benefits on account of a 1983 injury. Prior to his 1983 injury, the claimant had been certified under the subsequent injury statutes, Title 39, ch. 71, part 9, as suffering from a physical disability. At the time of the 1983 injury, claimant's employer - Montana Power Company (MPC) - was self-insured. The initial petition named MPC as the sole respondent, however, the Subsequent Injury Fund (SIF) was thereafter joined as an additional respondent.

¶2 On October 5, 2001, I held a telephone conference with counsel and ascertained that MPC had paid claimant 104 weeks of benefits and that the SIF and claimant had settled. Thereafter, on November 16, 2001, the Court received a Stipulation for Entry of Judgment requesting dismissal with prejudice of all claims, past and present, for compensation benefits. The Stipulation was based on payment of 104 weeks by MPC and an additional $41,000 by the SIF. The Stipulation reserves, however, claimant's request for attorney fees, costs, and a penalty against MPC.

¶3 The request for attorney fees and a penalty is the subject of a summary judgment motion filed by MPC on September 4, 2001. That motion has been comprehensively briefed and was finally submitted on October 29, 2001. It is now ripe for decision.

Additional Facts

¶4 As set forth in a statement of undisputed facts, and not controverted by claimant, prior to the filing of the present petition MPC had paid claimant 75 weeks of permanent partial disability benefits and 26 1/7 weeks of temporary total disability benefits, or a total of 101 1/7 weeks of benefits. (Montana Power Company's Reply Brief at 2.) On October 5, 2001, which was five months after the filing of the present petition, MPC paid claimant an

additional 2 6/7 weeks, bringing its total payments to 104 weeks of compensation benefits. (*Id*.)

Discussion

¶5 MPC's liability, if any, for attorney fees and a penalty is in the first instance dependent on its duty to pay additional benefits to claimant. MPC argues that its duty to claimant was satisfied upon payment of 104 weeks of benefits, therefore it cannot be liable for either attorney fees or a penalty on any additional amounts paid by the SIF. Claimant argues that attorney fees and a penalty should extend to the amounts paid by the SIF since MPC had the initial duty to pay **all** benefits.

¶6 The duty question is determined by the statutes governing the SIF. The statutes were originally enacted in 1973 and are set forth in Title 39, ch. 71, part 9. While they have been amended over the years, the basic requirements have not changed. Essentially, they provide that a physically or mentally disabled worker can be certified as disabled under the Workers' Compensation Act. § 39-71-905, MCA. Once certified, the liability of the insurer which insures an employer who hires the disabled person is limited to 104 weeks of benefits. Payment of additional compensation benefits is the responsibility of the SIF.

¶7 The obvious purpose of the SIF provisions is to encourage employers to hire disabled workers without incurring increased premiums or loss. However, the shifting of liability to the SIF is somewhat less straightforward than suggested in the previous paragraph. A thorough discussion of the statutes is therefore necessary. Since claimant was injured August 13, 1983, the 1983 statues apply.

¶8 The 1983 provision for certification provided as follows:

> **39-71-905. Certification as vocationally handicapped.** A person who wishes to be certified as vocationally handicapped for purposes of this part may apply to the division on forms furnished by the division. The division shall conduct an investigation and shall issue a certificate to a person who, in the division's discretion, meets the requirements for vocationally handicapped certification. An employee who is requesting reemployment may be certified as vocationally handicapped. An employee who is not employed at the time of application for certification must be certified as vocationally handicapped before entering new employment in order for the new employer to receive the benefits of this part.

Based on the parties' arguments in this case, the claimant was presumably certified under this section[(1)] prior to his commencing his employment with MPC.

¶9 The 1983 version[(2)] of the statute limiting liability with respect to employees certified as disabled provided:

> **39-71-907. Certified vocationally handicapped person to be compensated for injury as provided by chapter - employer liability for compensation limited.** A person certified as vocationally handicapped who receives a personal injury arising out of and in the course of his employment and resulting in death or disability must be paid compensation in the manner and to the extent provided in this chapter or, in case of his death resulting from such injury, the compensation must be paid to his beneficiaries or dependents. The liability of the employer for payment of compensation, for furnished medical care, and burial as provided in this chapter is limited to those benefits occurring during the period of 104 weeks after the date of injury. Thereafter, all compensation and the cost of all medical care and burial is the liability of the fund.

As set forth in section 39-71-907, MCA (1979-83), "The liability of the employer for payment of compensation . . . is limited to those benefits **occurring during the period of 104 weeks after the date of injury. Thereafter, all compensation . . . is the liability of the fund**." Under the plain language of the section, any compensation benefits which became due after 104 weeks (two years) following the claimant's injury was the responsibility of the SIF.

¶10 However, the shifting of liability to the SIF is complicated by other provisions. Section 39-71-908, MCA, requires the insurer to notify the SIF prior to the expiration of the 104 weeks of the likelihood of liability beyond the 104 weeks. The 1979 version of the section, which was in effect in 1983, provided:

> **39-71-908. Notification of fund of its potential liability under part - review by fund.** Not less than 90 or more than 150 days before the expiration of 104 weeks after the date of injury, the employer, carrier, or the industrial insurance fund, as the case may be, shall notify the fund whether it is likely that compensation may be payable beyond a period of 104 weeks after the date of the injury. The fund thereafter may review, at reasonable times, such information as the employer, carrier, or industrial insurance fund has regarding the accident and the nature and extent of the injury and disability.

There is no indication whether the notice contemplated in the section was ever given by MPC.

¶11 The notice provision set forth in the previous paragraph is significant because it gives rise to the next section, which is section 39-71-909, MCA. The 1983 version of the section, which was enacted in 1973, provided:

> **39-71-909. Effect of fund's failure to give notification of its intent to dispute liability - subsequent notification by fund authorized.** If the fund does not notify the carrier of its intent to dispute the payment of compensation, medical, and burial benefits, **the employer, carrier, or industrial insurance fund shall continue to**

> **make payments <u>on behalf of the fund</u> and shall be reimbursed by the fund for all benefits paid that pertain to the period beyond 104 weeks after the date of the injury.** However, at any time subsequent to 104 weeks after the date of injury, the fund may notify the carrier of a dispute as to payment of benefits. The liability of the fund to reimburse the employer, carrier, or the industrial insurance fund shall be suspended 30 days thereafter until the controversy is determined. [Bolding and underlining added.]

Assuming notice was given the SIF in accordance with section 39-71-908, MCA, the section expressly contemplates that the insurer shall continue making payments beyond the 104 weeks so long as the SIF does not notify the insurer of "its intent to dispute the payment of compensation." On the other hand, the section specifically provides that any such payments made by the insurer are "on behalf of the fund [SIF]." This provision is reiterated and emphasized by section 39-71-911, MCA (1983), which provides:

> **39-71-911. Obligation to make payments on behalf of fund not an independent liability.**The obligation imposed by this part on the employer, carrier, or industrial insurance fund to make payments on behalf of the fund does not impose an independent liability on the employer, carrier, or industrial insurance fund.

It is thus clear that the insurer or self-insurer is **not** independently liable to a claimant certified as disabled once it has paid 104 weeks of compensation benefits.

¶12 Of course, the whole scheme, as outlined above, depends upon compliance with the notice provision. If the insurer fails to notify the SIF pursuant to section 39-71-908, MCA, the SIF cannot notify the insurer whether it disputes payment of further benefits. We do not know in this case whether notice was given back in 1984 or 1985. On the other hand, there is also no evidence that the claimant ever made a demand for additional benefits at the end of the 104-week period or that additional benefits were clearly due at that time. Thus, there may have been nothing for the SIF to dispute at the time.

¶13 Claimant has provided an affidavit showing that in December 1998, MPC paid him a Holton award based upon an 11% impairment. (Petitioner's Brief Opposing MPC's Motion for Summary Judgment, Ex. 1.) The award was part of the 104 weeks of benefits paid by MPC. Thereafter, on June 24, 1999, claimant demanded additional permanent partial disability benefits. (*Id*.) MPC failed to pay any additional benefits and a year and a half later, on May 4, 2001, the claimant filed the present petition. MPC answered the petition without mentioning the SIF. (Answer, May 30, 2001.) It was not until July 17, 2001, that MPC alleged that the SIF is liable for any additional benefits. (Motion to Join Subsequent Injury Fund.)

¶14 This brings me back to the statutes governing attorney fees and penalties.

¶15 Both parties agree that section 39-71-612, MCA, applies. At the time of claimant's injury in August 1983, that section provided:

> **39-71-612. Costs and attorneys' fees payable based on difference between amount paid by insurer and amount later found compensable.** (1) If an employer or insurer pays or tenders payment of compensation under chapter 71 or 72 of this title, but controversy relates to the amount of compensation due and the settlement or award is greater than the amount paid or tendered by the employer or insurer, a reasonable attorney's fee as established by the division or the workers' compensation judge if the case has gone to a hearing, based solely upon the difference between the amount settled for or awarded and the amount tendered or paid, may be awarded in addition to the amount of compensation.
>
> (2) When an attorney's fee is awarded against an employer or insurer under this section there may be further assessed against the employer or insurer reasonable costs, fees, and mileage for necessary witnesses attending a hearing on the claimant's behalf. Both the necessity for the witness and the reasonableness of the fees must be approved by the division or the workers' compensation judge.

In *Madill v. State Compensation Ins. Fund,* 280 Mont. 450, 930 P.2d 665 (1997), the Supreme Court construed this section as requiring payment of attorney fees where an insurer paid some benefits but denied additional benefits demanded by the claimant, then the parties agreed on a settlement involving payment of additional benefits. The fees are payable on the difference between the amount originally paid and the amount of the settlement. Under *Madill* attorney fees are assessable against at least the additional 2 6/7 weeks of benefits paid by MPC after the filing of the present petition.

¶16 MPC argues that since the SIF was liable for all benefits over and above 104 weeks, it cannot be liable for attorney fees on the $41,000 paid by the SIF. Its argument ignores statutory provisions requiring it to give notice to the SIF of a potential claim for more than 104 weeks. The purpose of the notice is to allow the SIF to accept or dispute the claim for additional benefits. Following the claimant's June 24, 1999 demand for additional permanent partial disability benefits, MPC was clearly on notice that the claimant was seeking benefits over and above 104 weeks. At that point, if not before, it had a duty to notify the SIF of the claim for additional benefits so that the SIF could determine whether to pay them or dispute them. Had it provided such notice, the SIF could have accepted liability for the additional benefits, authorized MPC to pay them, and then have reimbursed MPC for the benefits. That is the procedure contemplated by the statute.

¶17 Instead, MPC denied the claim for additional benefits, then waited two years to notify the SIF. It substituted its own judgment for that of the SIF, taking upon itself the duties and responsibilities of the SIF. Claimant correctly points out that under the statutes applicable in this case, the Court is required to liberally construe statutes in his favor. § 39-71-104, MCA (1983) (Repealed by 1987 Mont. Laws, ch. 464, § 68). Applying the liberal construction rule, I hold that where the insurer fails to give timely notice to the SIF and makes decisions

which are properly those of the SIF, it stands in the shoes of the SIF and is liable for attorney fees where the claimant ultimately recovers more than what the insurer previously paid. Therefore, MPC is liable for attorney fees on both the 2 6/7 weeks of benefits it paid claimant after he brought the present petition and the $41,000 paid by the SIF. If the parties are unable to determine the fees due, then I will do so.

¶18 Claimant's request for a penalty is governed by section 39-71-2907, MCA. At the time of the claimant's injury, the section provided:

> **39-71-2907. Increase in award for unreasonable delay or refusal to pay.** 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.

¶19 In the foregoing discussion, I have determined that MPC assumed the SIF's responsibilities and duties by failing to give notice to the SIF of the claimant's demand for additional benefits and making its own determination of liability beyond the 104 weeks. In doing so, MPC delayed benefits which the SIF agreed were due the claimant. MPC's failure to notify the SIF of the claim for additional benefits, and the resultant delay that it caused in payment of those benefits, was unreasonable. MPC is therefore liable for a penalty with regard to the $41,000.

¶20 The 2 6/7 weeks of additional benefits paid by MPC is subsumed in the additional benefits paid by the SIF and is therefore subject to the penalty. As I have previously pointed out, MPC was required to notify the SIF of potential liability for benefits over and above 104 weeks and thereby allow the SIF to dispute the claimant's entitlement to additional benefits. MPC shut out the SIF and made its own determination as to all benefits. That conduct was unreasonable and requires imposition of the penalty with respect to the 2 6/7 weeks.

¶21 In reaching my decision, I am fully aware that MPC's handling of the claim may not have been the result of deliberate indifference to claimant's entitlement to additional benefits - more probably it was the result of simple oversight. However, the subsequent injury statutes imposed specific duties upon MPC. Those duties were non-delegable. Oversight, while understandable, does not excuse MPC from its statutory responsibilities.

¶22 My discussion of MPC's contentions presents an unusual case where a motion for summary judgment by one party requires that summary judgment be entered in favor of the adverse party. A formal cross-motion is not required for the Court to grant summary judgment to the non-moving party, as long as "the original movant had a full and fair opportunity to meet the proposition" and the other party is entitled to judgment as a matter of law. *Hereford v. Hereford*, 183 Mont. 104, 107-08, 598 P.2d 600, 602 (1979).

FINAL JUDGMENT

¶23 The petitioner is entitled to attorney fees and a penalty with respect to the 2 6/7 weeks of benefits paid by Montana Power Company after the commencement of this action.

¶24 The petitioner is entitled to attorney fees and a penalty with respect to the $41,000 paid by the Subsequent Injury Fund to the claimant.

¶25 The parties should be able to determine the actual amounts due for attorney fees and the penalty. In the event that they cannot do so, the Court reserves continuing jurisdiction to do so.

¶26 The Court's prior partial judgment dismissing claims with respect to claimant's entitlement to benefits and the liability of the Subsequent Injury Fund with respect to penalties and attorney fees are reaffirmed and incorporated in this Final Judgment.

¶27 Claimant is entitled to his costs against Montana Power Company and shall file his memorandum of costs in accordance with Court rules.

¶28 This Judgment is certified as final for purposes of appeal.

DATED in Helena, Montana, this 5th day of December, 2001.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Chris J. Ragar
Mr. Kelly M. Wills
Ms. Julia W. Swingley
Submitted: October 29, 2001

1. The 1983 statute had last been amended in 1979, so it is probably unimportant when exactly the claimant was certified.

2. As with section 39-71-905, MCA, the section was previously amended in 1979. 1979 Mont. Laws ch. 397, § 76. Presumably, it is the applicable section; if not the parties can request reconsideration and advise the Court of what version of the section applies.