IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9210-6615

JEAN K. LIVESAY

Petitioner

vs.

NATLSCO/KEMPER

Respondent/Insurer for

SKAGGS, ALPHA BETA

Employer.

* * * * * * * * * * * *

ORDER ADOPTING FINDINGS OF FACT
AND CONCLUSIONS OF LAW OF
HEARING EXAMINER AND ENTERING JUDGMENT

* * * * * * * * * * * *

The above-entitled matter was considered upon a stipulated record by Court-appointed Hearing Examiner, CLARICE V. BECK, who considered the evidence and prepared and submitted Findings of Fact and Conclusions of Law and Proposed Judgment for consideration by the Court.

Thereupon, the Court considered the record in the above-captioned matter, considered the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and does hereby make and enter the following Order and Judgment.

IT IS HEREBY ORDERED the Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner are adopted.

IT IS FURTHER ORDERED that Judgment be entered as follows:

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. The claimant is not entitled to attorney fees, costs, or a penalty.

3. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

4. Any party to this dispute may have 20 days in which to request a rehearing from this Order Adopting Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and Entering Judgment.

DATED in Helena, Montana, this 28th day of January, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9210-6615

JEAN K. LIVESAY

Petitioner

vs.

NATLSCO/KEMPER

Respondent/Insurer for

SKAGGS ALPHA BETA

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED JUDGMENT

This case is submitted on briefs, a copy of the Department of Labor and Industry file, the deposition of Jon Rogers and stipulated exhibits A-G and I-Z. There is no exhibit "H" and exhibits AA and BB were withdrawn.

As framed by the Pretrial Order, the sole issue before the court is as follows:

"Is Petitioner entitled to attorney fees and a penalty."

Benefits are not at issue. Rather, petitioner contends that the insurer acted unreasonably in the adjusting of her claim by (a) denying until one day prior to a mediation conference that she is entitled to an impairment award upon reaching age 65; (b) making only five payments

of benefits during the period from August 1990 to May 1992; (c) interfering with her social security payments; and (d) harassing her primary medical doctor. (Pretrial Order.)

A review of the record yields the following sequence of events and facts.

Findings Of Fact

1. Claimant was injured on August 13, 1990. At the time of the injury the claimant's employer was insured by the Natlsco/Kemper, which accepted liability for the claim.

2. Following her accident, claimant continued to work. She was not treated for her injury until August 24, 1990, when she was seen by S.J. Score, D.C. On December 1, 1990, Dr. Score took her off work.

3. Natlsco/Kemper correctly initiated temporary total benefits on December 11, 1990 at the rate of $235.74 per week. On January 21, 1991, the claimant was released and did return to work on a part-time basis. Appropriate wage supplement benefits were thereafter paid to claimant.

4. On January 24, 1991, Natlsco/Kemper notified claimant that it would no longer pay for chiropractic care. It recommended that she make an appointment with Dr. Batey, M.D., should she require further medical services. Claimant then saw Dr. Batey in February of 1991. He ordered an MRI, which he reported as abnormal, and referred her to Dr. Hunter, an orthopedic surgeon.

5. Dr. Hunter examined claimant on March 1, 1991, and diagnosed a spinal stenosis. He prescribed physical therapy. The therapy was unsuccessful and was terminated on March 6, 1991, after three treatments.

6. By letter dated April 16, 1991, Dr. Hunter notified Natlsco/Kemper that he had taken the claimant off work as of February 22, 1991. He indicated that he was unable to predict when claimant might be able to return to work. Dr. Hunter also prescribed chiropractic treatment and Dr. Cougill, a chiropractor began treating claimant on April 17, 1991.

7. A myelogram and a CT scan were done on April 22, 1991.

8. All medical, physical therapy and chiropractic bills appear to have been paid during this period of time, except for a $70.00 chiropractic bill (which may have been paid) for Dr. Cougill. The claimant presented no evidence showing non-payment of medical or chiropractic bills.

9. In July 1991, the insurer requested that claimant be examined by a medical panel, but an examination was never scheduled.

10. Claimant reached maximum medical improvement on August 12, 1991.

11. By letter dated September 4, 1991, claimant was notified that temporary total disability benefits would be terminated as of September 18, 1991. The notice was based on claimant's reaching maximum medical improvement. Natlsco/Kemper had also ascertained and confirmed that claimant had elected to receive, and was receiving, early social security retirement benefits.

12. On October 22, 1991, claimant hired attorney Hugh Massman, to represent her in her workers' compensation claim.

13. In March of 1992, the Social Security Administration determined that claimant was entitled to social security disability benefits retroactive to May, 1991. The social security determination found that claimant was totally disabled as of November 30, 1990. Mr. Massman did not represent claimant with regard to her social security claim.

14. On March 20, 1992, Mr. Massman wrote a demand letter to Natlsco/Kemper offering to settle the case.

15. On April 24, 1992, Natlsco/Kemper conceded that the claimant was permanently totally disabled. However, after taking claimant's social security disability benefits into consideration, it calculated that it had overpaid claimant $1,117.50. There is no dispute regarding the overpayment and the parties have agreed that it will be deducted from the impairment award.

16. On June 15, 1992, in a letter to Mr. Massman, Dr. Hunter stated that the claimant had a 10 percent whole person impairment rating. In a letter dated August 12, 1992, Mr. Massman made demand upon Natlsco/Kemper for payment of an impairment award in the amount of $7,475.00.

17. By letter dated August 25, 1992, Natlsco/Kemper refused payment of the impairment award. The claimant then filed a request for mediation. A mediation conference was scheduled for October 16, 1992.

18. On October 15, 1992, Natlsco/Kemper notified claimant that it would accept liability for the impairment award and stated that the award would be paid, less the social security offset of $1,117.50, when the claimant reached age 65. The total amount due claimant is $6,357.40.

19. Claimant filed her petition for hearing with the Workers' Compensation Court on October 30, 1992.

20. During adjustment of the claim, claims' adjuster Jon Rogers wrote a number of letters to medical providers. The letters were reasonable in tone and reasonably related to the claim matters.

21. Correspondence between Natlsco/Kemper and the Social Security Administration was reasonably related to adjustment of the claim. The correspondence did not interfere with or delay the claimant's benefits.

Conclusions of Law

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. This is a case in which the mediation procedure mandated by the legislature was successful. Indeed, the disputes between the insurer and the claimant were resolved **prior** to mediation. While the claimant may believe that she should not have to pay her attorney for pursuing her claims, the legislature has established clear guidelines for any award of attorney fees. Under the law in effect at the time of the claimant's injury, attorney fees are recoverable only where the insurer denies liability or terminates benefits and there is an actual adjudication of compensability, section 39-71-611, MCA (1989) and see ***Lasar v. E.H. Oftedal & Sons,*** *222 Mont. 251, 252-3, 721 P.2d 352 (1986);* ***Yearout v. Rainbow Painting,*** *222 Mont. 65, 68, 719 P.2d 1258 (1986);* or the amount of benefits is in dispute and the dispute is presented to the Workers' Compensation Court, and the case goes to hearing, section 39-71-612, MCA (1989). In addition to these requirements, the insurer's conduct must be adjudged unreasonable. Sections 39-71-611(1)(c) and 39-71-612(2), MCA(1989). The sections governing attorney fees provide:

> **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:
>
> (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
>
> (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.
>
> . . .
>
> **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.

. . .

Since benefits were either paid or conceded prior to the commencement of any action in this Court, the Court is powerless to award attorney fees whether or not the insurer's actions were unreasonable. Moreover, as discussed hereinafter, claimant has failed to show that the insurer's actions were in fact unreasonable.

3. Section 39-71-2907, MCA, sets out the Court's authority regarding the imposition of a penalty.

> **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.
>
> . . .

While the section appears to contemplate an "order" for benefits as a prerequisite to any penalty, the Supreme Court has determined the section to be ambiguous and allowed imposition of the penalty in cases where the insurer delays payment until claimant takes the case to trial. The Supreme Court in ***Handlos v. Cyprus Industrial Minerals,*** *243 Mont. 314, 317, 794 P.2d 702 (1990),* concluded "that the penalty under section 39-71-2907, MCA, is available where an insurer unreasonably delays paying a claim until the claimant takes the case to **trial**. We hold that section 39-71-2907, MCA, allows the Workers' Compensation Court to award a penalty when payment of benefits has been unreasonably delayed until **mid-trial.**" It is unnecessary for this Court to determine if the section also allows recovery of a penalty where benefits are paid prior to mediation, because the claimant has failed to prove that the insurer's conduct in this case was unreasonable.

4. Claimant's first claim for a penalty and attorney fees is based on the insurer's refusal to acknowledge her entitlement to an impairment award until a day before mediation. The insurer's position was based on language in section 39-71-703, MCA, indicating that an impairment award is not available to workers who are permanently totally disabled. The section provides:

> **39-71-703. Compensation for permanent partial disability -- impairment awards and wage supplements.** (1) The benefits available for permanent partial disability are impairment awards and wage supplements. A worker who has reached maximum healing and **is not eligible for permanent total disability benefits** but who has a medically determined physical restriction as a result of a work-related injury may be eligible for an impairment award and wage supplement benefits as follows:
>
> . . .

The record clearly shows that the adjuster notified Mr. Massman of his interpretation of the statute and requested Mr. Massman to provide him with statutory or case law authority to the contrary. The adjuster contacted the Department of Labor and Industry in August of 1992 for an opinion, and also sought legal advice regarding statutory interpretation. All of this occurred over a three month period. The adjuster's initial interpretation of the statute was not patently implausible, and his search for outside advice was very reasonable.

On its face section 39-71-703, MCA would appear to preclude payment of an impairment award to claimant because she has been determined to be permanently totally disabled. The decision to make the award was apparently based on another section, 39-71-710, MCA, which provides:

> **39-71-710. Termination of benefits upon retirement.** (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive full social security retirement benefits, the claimant is considered to be retired. When the claimant is considered retired, the liability of the insurer is ended for payment of wage supplement, permanent total disability, and rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.
>
> (2) If a claimant who is eligible to receive social security retirement benefits and is gainfully employed suffers a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and medical benefits.

Literally construed, this section suggests that upon reaching age 65 a permanently totally disabled worker becomes entitled to an impairment award. Since the insurer has conceded liability for an impairment award once claimant has reached age 65, the Court

need not reconcile sections 39-71-703 and 710. For purposes of this decision, however, I find that the initial position of the insurer was not unreasonable.

Moreover, the acknowledgement of responsibility for the impairment award came prior to the time it was due. Claimant does not contend that the award is payable prior to her receipt of social security retirement benefits at age 65. At the time of the insurer's concession, claimant had not reached the age of 65. Therefore, she has not been denied any benefits to which she was entitled at the time of her demand. Thus, the entire matter is academic.

5. Claimant's second claim for a penalty and attorney fees is based on the insurer's termination of benefits when claimant reached maximum medical healing and she began receiving early social security retirement benefits.[(1)] While receiving retirement benefits the claimant was not entitled to workers' compensation benefits. Section 39-71-710, MCA (1989), quoted above. The insurer subsequently made payment for 31 weeks of permanent total disability benefits, but it did so in light of the change in Ms. Livesay's social security benefits from retirement to disability benefits. Upon hearing that claimant's social security benefits status had changed from retirement to disability, the adjuster correctly made payment of workers' compensation benefits.

6. Claimant's third basis for a penalty and attorney fees is the insurer's correspondence with the Social Security Administration. The insurer had a legitimate basis for its correspondence. Montana statutes provide for an offset of social security disability benefits against benefits due under the Montana Workers' Compensation Act, and further provide that benefits for termination of benefits upon an injured worker's retirement and receipt of social security retirement benefits. Sections 39-71-702(4) and 710, MCA (1989). Moreover, this Court's authority to award penalties and attorney fees is predicated on benefits due workers under the Montana Workers' Compensation Act. It has no power to penalize an insurer because it interfered, or attempted to interfere, with social security benefits.

The letters to the Social Security Administration requested information and provided that agency with information that the claimant was working. They did not cause any delay of the payment of worker's compensation benefits. Worker's compensation carriers and the social security administration must work together and freely exchange information.

7. Claimant's final basis for a penalty and attorney fees is the insurer's communications with her health care providers. In her briefs the claimant refers at great length to letters written by Mr. Jon Rogers, the insurer's adjuster. Mr. Massman characterizes the letters as "hostile, officious and [demonstrating] unreasonable conduct of the carrier . . . ." He challenges Mr. Roger's communications with Dr. Hunter, the Social Security Administration and the Department of Labor and Industry. I have read each of the letters and cannot agree with Mr. Massman's assessment. To the contrary, I view them as an effort by the adjuster to

do his job in adjusting the claim. An adjuster must communicate with health care providers in order to properly adjust a claim. I could find no instance wherein the recipient of a letter could have reasonably believed that he/she was being harassed.

8. In summary, the evidence submitted in this case fails to establish that Natlsco/Kemper unreasonably delayed payment of benefits. All breaks in the payment of benefits were logically explained by the claimant's return to work and her subsequent receipt of social security retirement benefits. It should be noted that the claimant has continued to receive her permanent total disability benefits in a timely fashion.

9. Claimant is not entitled to attorney fees, costs or a penalty.

Judgment

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. The claimant is not entitled to attorney fees, costs, or a penalty.

3. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

4. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact and Conclusions of Law and Judgment.

DATED in Helena, Montana, this 28th day of January, 1994.

(SEAL)

/s/ Clarice V. Beck
HEARING EXAMINER

c: Mr. Hubert J. Massman
Mr. Steven S. Carey

1. Eligible workers may elect to receive early social security retirement benefits upon reaching age 62. Otherwise, social security retirement benefits typically commence at age 65.