**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1996 MTWCC 5**

**WCC No. 9506-7320**

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**GERALD MADILL**

**Appellant**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent.**

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ORDER ON APPEAL

**Summary:** Claimant sought attorneys fee award though case settled before reaching WCC.

**Held:** Under section 39-71-612, MCA (1979), DOL hearing officer properly denied attorneys fee award where case settled before reaching WCC and no controversy existed under statute based on factual and procedural posture of case. Note: this holding was reversed by the Montana Supreme Court in *Madill v. State Compensation Insurance Fund*, 280 Mont. 450, 930 P.2d 665 (1996).

This is an appeal from a determination by the Department of Labor and Industry denying appellant's claim for attorney fees and costs. Appellant, Gerald Madill (claimant), asks the Court to reverse the Department's decision and hold that he is entitled to attorney fees from the respondent, State Compensation Insurance Fund.

Facts

Claimant does not specifically challenge any of the Department's findings of fact. The facts, as found, are therefore adopted for purposes of appeal. They provide the following background.

On September 28, 1979, the claimant injured his knee in an industrial accident. Since the injury he has undergone repeated surgeries on his knee. He walks with a limp. His limp causes secondary back pain.

The State Fund insured claimant's employer and commenced temporary total disability benefits effective March 1980. While receiving those benefits, claimant retained the law firm of Graybill, Ostrem, Warner & Crotty to represent him with respect to his workers'

compensation claim. Gregory H. Warner, a partner in the firm, was assigned to the case and has represented claimant ever since. While Mr. Warner later left the law firm, he has continued to represent the claimant. No liens have been filed against the claim by his former law firm.

The fee agreement between claimant and Warner obligates claimant to pay Warner "20% of any settlement recovered without suit, and 33% of whatever may be recovered from said claim after suit or trial." (Ex. 2.) The agreement was approved by the Division of Workers' Compensation on August 29, 1980. (Ex. 4.)

Based on claimant having reached maximum healing and his graduation from a two-year college course in human services, on May 31, 1988 the State Fund reduced claimant's benefits from temporary total to permanent partial benefits. (Ex. 35.) The State Fund continued paying the benefits at the permanent partial rate until August 1989. During that time Warner provided the State Fund with an evaluation of a certified rehabilitation counselor stating that it would be "very difficult if not impossible" to find claimant a job in the **human services** field. (Ex. 33 at 4.) The State Fund responded that it would continue the permanent partial benefits until it was supplied with information which took into account claimant's employability at jobs for which he had transferrable skills. (Ex. 44.) On August 16, 1989, Warner provided the State Fund with information indicating that claimant was unemployable even considering his transferrable skills. (Ex. 45.) The State Fund immediately reinstated total disability benefits retroactive to May 31, 1988. It forwarded Warner a check for $3,560.32, representing the retroactive difference between total and partial disability benefits. (Ex. 47.)

On January 4, 1991, the State Fund conceded that claimant was permanently totally disabled. Shortly thereafter, on January 29, 1991, Warner wrote a letter to the State Fund representing that claimant was unable to meet monthly financial obligations and urging that it was in his best interest to lump sum his future benefits. (Ex. 58.) The State Fund responded with an offer of $64,000.00, which it believed was the net amount of claimant's future benefits discounted to present value. Warner disagreed with the State Fund's calculation, tendering his own calculation of $225,359.68. (Ex. 61.) The State Fund then sweetened its offer to $90,000.00 plus 20% to account for attorney fees, for a total offer of $108,940.80.

Warner, on behalf of claimant, then petitioned the Workers' Compensation Court for a lump-sum conversion of his future benefits. Minutes before the hearing was to commence, the parties reached an agreement calling for a partial lump-sum advance of $69,038.39 (WCC Tr. at 78-9; DLI Tr. at 17), of which $22,248.57 was designated for payment of attorney fees and costs over the period of the attorney/client relationship. (Ex. 71.) The balance of the advance was to pay claimant's debts and expenses. The advance was approved by the Department on January 3, 1992, and the petition was dismissed. (Ex. 73.)

The State Fund continues to pay claimant biweekly permanent total disability benefits.

Procedural History

On April 2, 1992, claimant filed a Petition for Attorney Fees and Costs with the Department. He sought an order directing the State Fund to reimburse him for attorney fees and costs he has incurred as a result of Warner's representation. According to the petition filed with the Department, claimant has incurred $17,381.25 in fees to date and $4,522.35 in costs, for a total of $21,903.60. This is somewhat less than the amount mentioned in his 1991 petition for a partial lump-sum advance. Claimant also sought an award of an additional 20% with respect to all biweekly benefits paid following the settlement.

The matter was assigned to a Department hearing examiner. A telephonic hearing was held on February 18, 1993. Proposed findings of fact and conclusions of law were thereafter submitted by the parties. The final brief was submitted on April 20, 1993. For whatever reason, the hearing examiner's Findings of Fact, Conclusions of Law, and Order were not issued until May 11, 1995. This appeal followed.

Standard of Review

The scope of review in this case is limited by section 2-4-704(2), MCA, which provides in relevant part:

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
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> (a) the administrative findings, inferences, conclusions, or decisions are:
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> (i) in violation of constitutional or statutory provisions;
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> (ii) in excess of the statutory authority of the agency;
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> (iii) made upon unlawful procedure;
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> (iv) affected by other error of law
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> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
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> (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
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> (b) findings of fact, upon issues essential to the decision, were not made although requested.

The hearing examiner's findings of fact may be overturned on judicial review only where they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *State Compensation Mutual Insurance Fund v. Lee Rost Logging,* 252 Mont. 97, 102, 827 P.2d 85 (1992) (quoting section 2-4-704(2)(a)(v), MCA.). However, the scope of review of the hearing examiner's conclusions of law is plenary: The Court must determine whether the hearing examiner's interpretation of the law is correct. *Steer, Inc. v. Department of Revenue,* 245 Mont. 470, 474, 803 P.2d 601 (1990).

Discussion

1. Inadequacy of claimant's Appeal of Findings of Fact, Conclusions of Law, and Order; hereinafter "notice of appeal."

In his notice of appeal the claimant states:

> The grounds for appeal include all of the record herein, cases and precedents cited in Petitioner's briefs, and upon the grounds that the State Fund's refusal to continue temporary total disability benefits and pay permanent total disability benefits was unreasonable and without support in the record.

(Notice of Appeal at 1.) The notice of appeal does not set forth any other specification of error.

Section 2-4-702(2)(b), MCA, provides that in any appeal from agency action:

> (b) The petition must include a concise statement of the facts upon which jurisdiction and venue are based, a statement of the manner in which the petitioner is aggrieved, and **the ground or grounds specified in 2-4-704(2)** upon which the petitioner contends he is entitled to relief. The petition must demand the relief to which the petitioner believes the petitioner is entitled, and the demand for relief may be in the alternative. [Emphasis added.]

This Court's procedural rules provide that the notice of appeal should specify:

> (a) the relief to which the appellant believes s/he is entitled;
>
> (b) the grounds upon which the appellant contends s/he is entitled to that relief.

ARM 24.5.350(1)(a) and (b). Claimant's notice of appeal, all three sentences of it, can certainly be deemed concise but it does not set forth any recognized grounds for appeal and is deficient on its face. Had respondent moved to dismiss, the Court would have granted the motion unless claimant had persuaded the Court there were good grounds to amend the notice to set forth recognizable grounds of appeal.

The claimant's assignment of error in his opening brief is a little better since he states his grounds for appeal as follows:

> Based upon the issues herein, it is submitted that the ruling of the DLI is in violation of the statutory provisions governing Claimant's right to benefits and provisions regarding attorney fees. The findings and determinations of the DLI are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

(Petitioner's Initial Brief at 3.) The clearly erroneous standard is applicable to the agency's findings of fact. *See Westmoreland Resources, Inc. v. Montana Department of Revenue,* 263 Mont. 303, 310, 868 P.2d 592,596 (1994) and *Baldridge v. Board of Trustees,* 264 Mont. 199, 205, 870 P.2d 711 (1993). Claimant does not take issue with any finding of fact so the standard is inapplicable in this case. Upon reading claimant's briefs, it is apparent that he is arguing that the hearing examiner misconstrued and misapplied the law to the facts found. The Court must therefore determine whether the hearing examiner's interpretation and application of the attorney fee statutes of the Workers' Compensation Act were correct.

*2. Merits of appeal.*

On appeal the claimant seeks an order directing payment of attorney fees based on the following amounts:

> 1) Twenty percent of $3,560.32, which is the difference between the permanent partial disability benefits paid to him between 1988 and 1989 and his total disability rate. Claimant's total disability status was restored in 1989. The restoration of benefits was made retroactive through the $3,560.32 lump-sum payment made by the State Fund in August 1989.
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> 2) Twenty percent of the difference between claimant's permanent partial and permanent total disability rates for the period August 1989 through December 1991. According to claimant, that difference is $55.63 per week for the period of 120 weeks.
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> 3) Twenty percent of the $69,038.39 lump-sum advance made to claimant in January 1992.
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> 4) Twenty percent of all benefits paid claimant subsequent to January 1992.

At the time of the claimant's injury,[(1)] the Workers' Compensation Act contained two separate provisions for attorney fee awards, just as it does today. Section 39-71-611, MCA (1979), governs attorney fees in denied liability cases and in cases where benefits have been terminated. *Allen v. Treasure State Plumbing,* 246 Mont. 105, 111, 803 P.2d 644, 647 (1990). Section 39-71-612, MCA (1979), applies in cases where the amounts due claimant are at issue. Since liability was never denied and benefits were never stopped, section 39-71-612, MCA, applies in this case.

Section 39-71-612, MCA (1979), provides:

> **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.
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> (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.

On appeal the claimant contends that "controversies" existed respecting the nature of claimant's disability (permanent total versus permanent partial) and his entitlement to the last partial lump sum. He argues that those controversies were settled and that he is therefore entitled to attorney fees. He cites the "net award concept," *Wight v. Hughes Livestock,* 204 Mont. 98, 103, 664 P.2d 303 (1983), as further authority for his position.

Section 39-71-612, MCA (1979), provides that any attorney fee award made under the section must be "based solely upon the difference between the **amount settled for or awarded and the amount tendered or paid**." (Emphasis added.) Cases involving attorney fee awards by the Workers' Compensation Court establish the parameters for determining what is considered "the amount tendered or paid."

At least until *Hilbig v. Central Glass Co.,* 249 Mont. 396, 816 P.2d 1037 (1991), it was clear that a settlement offer constitutes a tender under the statute, *McKinley v. American Dental Manufacturing Co.,* 232 Mont. 92, 754 P.2d 831, (1988), so long as the offer does not have conditions attached to it, *J&L Tire and Alignment Center v. Peak,* 247 Mont. 169, 805 P.2d 571 (1990). In *McKinley,* the Supreme Court considered whether an "eve-of-trial" offer of $40,940.00 constituted a tender for purposes of computing attorney fees under section 39-71-612, MCA (1983).[(2)] The majority acknowledged that '[t]he statute does not clarify whether the "amount tendered or paid" could refer to this late offer,' 232 Mont. at 97, 754 P.2d at 834, but held that the offer came too late to be considered. (The offer was made less than one week prior to the scheduled trial date. *Hilbig,* 249 Mont. at 405, 816 P.2d at 1042.) On the other hand, the majority reversed the Workers' Compensation Court's determination that attorney fees should be based on a $9,695.00 "floor offer" by the insurer. The so-called "floor offer" was the first offer made by the insurer. *McKinley* at 95,

754 P.2d at 833. Subsequent to that initial offer, and prior to the filing of the petition, the insurer had increased its offer to $36,927.80. The majority held that the subsequent offer was unconditional and constituted a "tender" for purposes of determining the amount of attorney fees due the claimant. In doing so it rejected the dissent's contention that only the "first, firm, specific and determinable offer" should be considered. 232 Mont. at 98, 754 P.2d at 835 (Hunt, J., dissenting).

In an earlier case, *Lasar v. E.H. Oftedal & Sons,* 222 Mont. 251, 721 P.2d 352 (1986), the Supreme Court held that the claimant was not entitled to any attorney fees where three weeks prior to trial the insurer conceded permanent total disability. The insurer in that case had accepted liability and was paying temporary total disability benefits when the claimant petitioned the Court asking that he be declared permanently totally disabled and that his benefits be converted to a lump sum. The insurer deposed claimant and then conceded he was permanently totally disabled. The case went to trial on the lump-sum request, which was denied. The Workers' Compensation Court also denied attorney fees and costs and the Supreme Court affirmed, holding that those requests had been "correctly denied." It distinguished the situation in *Krause v. Sears Roebuck & Co.,* 197 Mont. 102, 641 P.2d 458 (1982), where the insurer did not concede liability until the opening statement at trial. Thus, *Lasar* established that a tender, payment, or concession of liability made at least three weeks prior to trial is timely for purposes of section 39-71-612, MCA (1979).

The precedents involved in *McKinley* and *Lasar* were called into question by the Supreme Court's subsequent decision in *Hilbig*. Initially, the Court cited *McKinley* as precedent for rejecting the insurer's argument that an offer made *after trial* should be considered a tender for purposes of assessing attorney fees. It then went on to consider the amount of the contingent fee due the claimant, who sought 40% of the amount recovered "based on the order of the Supreme Court." The insurer argued that the 40% should not apply because it had paid some benefits and offered to pay other benefits prior to the Supreme Court decision but after the original Workers' Compensation Court decision. The Supreme Court was unable to ascertain what amounts had in fact been paid and noted that the offer to pay other amounts was a conditional one. It went on to say that "in spite of language previously used by this Court in *McKinley,* it [§ 39-71-612, MCA (1983)] did not provide that insurers could avoid payment of attorney fees to a successful claimant by offering benefits which have never actually been tendered or paid." 249 Mont. at 406; 816 P.2d at 1043. In subsequent discussion it held that a "naked" offer to pay does not constitute a tender. *Id.* at 407, 816 P.2d at 1044. '[T]o have a valid tender there must be "a bonafide, unconditional, offer of payment of the amount of money due, **coupled with an actual production of the money or its equivalent** [emphasis added]."' *Id*.

While *Hilbig* did not expressly overrule *McKinley*, it impliedly did so with respect to what constitutes a tender. On the other hand, in *Hilbig* the Court did not overrule or undermine the holding of *McKinley* concerning the time of the tender. In a subsequent case, *Field v.*

*Sears, Roebuck & Co.*, 257 Mont. 81, 847 P.2d 306 (1993), the Court reaffirmed its holding in *Lasar*, again holding that a concession of permanent total disability after the filing of the petition, but several weeks prior to the scheduled trial date, precluded recovery of attorney fees under section 39-71-612, MCA (1979).

In this case, prior to the commencement of any legal proceeding, the State Fund conceded liability for total disability benefits, thereby satisfying the "tender or payment" requirement. The payments and the concession of liability were made well within the time frames set out in *McKinley, Lasar,* and *Field*.

In *Field* the Supreme Court made note of the fact that in both that case and in *Lasar* the insurers conceded liability after they had obtained further information concerning disability. *Field,* 257 Mont. at 85, 847 P.2d at 309. In this case the State Fund converted claimant's benefits to permanent partial in 1987. When it received additional information that claimant was not employable even considering his transferable skills, it reinstated claimant's temporary total disability benefits retroactive to 1987. It then retained its own rehabilitation provider to perform an employability assessment. (Finding 24.) Thereafter, on January 4, 1991, it conceded that claimant was permanently totally disabled.

Ultimately, however, the Court in *Field* held that the issue of attorney fees did not turn on the need for additional information but rather on when liability was conceded. In this case, prior to any litigation, the State Fund conceded liability for total disability benefits. If the concession had come after claimant had filed a petition in this Court, but three or more weeks prior to trial, this Court would be precluded by *Field* and *Lasar* from awarding attorney fees. It would be inconsistent to require the Department to award attorney fees when the matter never even reached the Court.

Moreover, as the discussion in *Field* suggests, there must be a real and substantial controversy. Rejection of a demand based on lack of information, or where the demand is unsupported, does not create a controversy. While the initial demands of claimant herein were rejected, the State Fund indicated its willingness to reconsider claimant's disability status upon receipt of additional information. The use of the word "controversy" in the context of section 39-71-612, MCA, requires more than demands which are ultimately resolved by the exchange of information and by negotiation.

Claimant's request for fees with respect to the concession of permanent total disability is therefore **denied**.

Claimant is similarly not entitled to attorney fees with respect to the last partial lump-sum advance. The claimant's demand to the insurer and in his lump-sum petition to the Workers' Compensation Court was for a lump-sum conversion of **all** future benefits. Claimant dropped that demand at the time of trial and negotiated a partial lump-sum advance to pay debts and expenses. Claimant failed to establish that the State Fund

resisted his requests for the partial lump sum. Since the original demand, as well as the relief requested in the petition, differed from the partial lump sum ultimately advanced by the State Fund, claimant is not entitled to a fee with regard to the 1992 advance. *See Burkland v. COP Construction,* 224 Mont. 173, 728 P.2d 806 (1986).

We also note that approximately $22,000 of the final lump-sum advance was for attorney fees and costs for which claimant now seeks reimbursement. If claimant is entitled to reimbursement for attorney fees, then he should have sought them directly from the insurer in the first instance rather than obtaining them through a lump-sum advance and then compounding them by seeking an attorney fee on the attorney-fee advance.

Finally, in the proceeding below, the claimant presented evidence that in the early 1980's the State Fund routinely added attorney fees to its settlements. The evidence was apparently presented in an attempt to persuade the hearing examiner that attorney fees should be awarded. The argument has not been renewed on appeal and has not been considered.

ORDER

Finding no error of law, and that the decision below is not clearly erroneous,

IT IS HEREBY ORDERED that the hearing examiner's May 11, 1995 Findings of Fact, Conclusions of Law, and Order are **affirmed**.

Dated in Helena, Montana, this 11th day of January, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Gregory H. Warner
Mr. William O. Bronson
Ms. Christine L. Noland
Mr. Brian McCullough - Zipped
Submitted Date: October 12, 1995

1. The law in effect at the time of the claimant's injury applies. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 730 P.2d 380 (1986). Since claimant was injured in 1980, the 1979 Workers' Compensation Act applies.

2. The 1983 version of section 39-71-612 is identical to the 1979 version.