

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1997 MTWCC 9

WCC No. 9611-7654

ROSA M. MARTINEZ

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent/Insurer for

GEORGE HENRY'S RESTAURANT

Employer.

DECISION AND JUDGMENT

Summary: Claimant and insurer stipulated to uncontested facts and presented issues regarding payment of outstanding medical bills, attorneys fees and penalty. In colloquy at the commencement of trial, insurer's attorney conceded insurer had acted unreasonably during period after its response to mediator's recommendation. Insurer maintained it should pay penalty only upon benefits accruing after that point.

Held: Insurer is liable for penalty on all accrued, unpaid benefits based on unreasonable delay. Where insurer has conceded it delayed unreasonably after a particular point, the delay impacted all benefits accrued to that date, not merely benefits accruing after that date. Indeed, the delay is more unreasonable as to earlier accrued benefits as they were past due for a longer period. Attorneys fees awarded as well. Court retained continuing jurisdiction over medical bills disputes, but does not address those issues at present based on insurer's representation as to how it would handle that matter once records were received.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-611, MCA (1995). Insurer is liable for penalty on all accrued, unpaid benefits based on unreasonable delay. Where insurer has conceded it delayed unreasonably after a particular point, the delay impacted all benefits accrued to that date, not merely benefits accruing after that date. Indeed, the delay is more

unreasonable as to earlier accrued benefits as they were past due for a longer period. Attorneys fees awarded as well.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-2907, MCA (1995). Insurer is liable for penalty on all accrued, unpaid benefits based on unreasonable delay. Where insurer has conceded it delayed unreasonably after a particular point, the delay impacted all benefits accrued to that date, not merely benefits accruing after that date. Indeed, the delay is more unreasonable as to earlier accrued benefits as they were past due for a longer period. Attorneys fees awarded as well.

Attorneys Fees: Cases Awarded. Insurer is liable for penalty on all accrued, unpaid benefits based on unreasonable delay. Where insurer has conceded it delayed unreasonably after a particular point, the delay impacted all benefits accrued to that date, not merely benefits accruing after that date. Indeed, the delay is more unreasonable as to earlier accrued benefits as they were past due for a longer period. Attorneys fees awarded as well.

Attorney Fees: Unreasonable Denial or Delay of Payment. Insurer is liable for penalty on all accrued, unpaid benefits based on unreasonable delay. Where insurer has conceded it delayed unreasonably after a particular point, the delay impacted all benefits accrued to that date, not merely benefits accruing after that date. Indeed, the delay is more unreasonable as to earlier accrued benefits as they were past due for a longer period. Attorneys fees awarded as well.

Penalties: Insurers. Insurer is liable for penalty on all accrued, unpaid benefits based on unreasonable delay. Where insurer has conceded it delayed unreasonably after a particular point, the delay impacted all benefits accrued to that date, not merely benefits accruing after that date. Indeed, the delay is more unreasonable as to earlier accrued benefits as they were past due for a longer period. Attorneys fees awarded as well.

This matter came to trial on February 4, 1997, in Billings Montana. Petitioner, Rosa M. Martinez (claimant), was present and represented by Mr. Donald D. Sommerfeld. Respondent, State Compensation Insurance Fund (State Fund), was represented by Mr. Daniel J. Whyte.

Pretrial Order: At the commencement of trial the parties presented the Court with a Revised Pretrial Order. The revised Order was signed by both counsel and approved by the Court. It sets out the following agreed facts, stipulation, and issues:

C. UNCONTESTED FACTS

1. The Claimant suffered a compensable injury arising out of and in the course of her employment on November 27, 1995 while working for George Henry's Restaurant in Billings, Yellowstone County, Montana. As Claimant was in the process of taking her employer's mail to the U.S. Mail drop box (collection box) at the Buttrey's store near the intersection of 27th Street North and 6th Avenue North, she was struck by a car driven by Julie Sherod Brant. Claimant suffered a brain injury, an injury to her left arm, and an injury to her left leg.
2. On November 27, 1995, George Henry's Restaurant was enrolled under Compensation Plan No. III of the Workers' Compensation Act and its insurer was the State Compensation Mutual Insurance Fund (hereinafter referred to as State Fund or Respondent).
3. State Fund initially denied liability and did not pay benefits.
4. On August 27, 1996, a mediation conference was held and, on September 10, 1996, the worker's [sic] compensation mediator filed a Mediation Report and Recommendation. Claimant accepted the mediator's recommendation but State Fund did not.
5. On January 6, 1997, State Fund agreed to accept liability for the injuries which Claimant suffered on November 27, 1995.
6. By letter of January 6, 1997, State Fund agreed to pay the reasonable and necessary medical expenses related to Claimant's industrial injuries.
7. Claimant's pay stubs indicate that her gross pay for the four pay periods preceding the date of injury was \$1,200.00, which calculates to a weekly compensation rate of \$150.00.
8. At an average weekly wage of \$150.00, Claimant's benefit rate calculates to be \$100.01 per week.
9. By letter of January 6, 1997, State Fund also agreed to provide rehabilitation services to help Claimant secure alternative employment, if she is restricted from returning to her previous employment. (On January 14, 1997, State Fund sent a "Request for Services" form to Work Recovery Services, Inc. On January 24, 1997, Jim Fortune met with Claimant to begin the process of conducting an "initial assessment" and "time of injury job analysis".)
10. By letter of January 21, 1997, State Fund agreed to pay retroactive temporary total disability benefits, at the rate of \$100.01, from December 4, 1995 through May 7, 1996.

11. By letter of January 30, 1997, State Fund agreed to pay retroactive temporary total disability benefits, at the rate of \$100.01, from May 8, 1996 through February 4, 1997, and agreed to pay additional temporary total disability benefits until medical documentation is obtained which indicates that Claimant has reached maximum medical improvement and has been released to return to work.

D. STIPULATION BETWEEN THE PARTIES

1. It has been agreed that Claimant has not reached maximum medical improvement, has not been released to return to work and is still temporary totally disabled. Respondent has now paid temporary total disability benefits through 2/4/97 and has agreed to pay temporary total disability benefits until such time as Claimant reaches maximum medical improvement and has been released to return to work.

E. STATEMENT OF ISSUES TO BE DETERMINED BY THE COURT

1. Whether Respondent has paid all related medical expenses.
2. Whether Respondent should be ordered to pay Claimant's attorneys [sic] fees and costs.
3. Whether Respondent has been reasonable or unreasonable in the adjustment of this claim.
4. Whether Claimant is entitled to the imposition of a 20% penalty against Respondent.

(Revised Pretrial Order at 2-5.)

Exhibits: In addition to the Revised Pretrial Order the Court also received and admitted 30 agreed-to exhibits.

DISCUSSION

Following the presentation of the Revised Pretrial Order, the Court engaged counsel in discussion concerning the issues presented for trial. That discussion resulted in the Court issuing a bench ruling. The ruling was made as a matter of law and is memorialized herein. No evidence, other than the exhibits already submitted by the parties, was deemed necessary by the Court and none was taken.

As set forth in the Revised Pretrial Order, the parties now agree that on November 27, 1995, the claimant suffered a compensable industrial injury. (Agreed Fact 1.) On April 26, 1996, claimant forwarded a claim for compensation to the State Fund, which insured claimant's employer. (Agreed Fact 2; Exs. 1 and 2.) On May 28, 1996, the State Fund denied liability for

the claim. (Ex. 4.) The denial letter provided the following explanation for the State Fund's action:

After completing the investigation, it has been determined that State Fund is unable to accept liability for this claim. Based on the investigation findings, it has been determined that your client's injury did not arise out of employment nor was it in the course and scope of her employment with George Henry's restaurant.

(*Id.*)

Unable to resolve their dispute, claimant and State Fund submitted the matter to mediation. (Agreed Fact 4.) A mediation conference was held on August 27, 1996. The mediator issued her recommendation September 10, 1996. (*Id.*) The claimant accepted the recommendation, State Fund did not. (*Id.*) On October 9, 1996, Mr. Whyte wrote on behalf of the State Fund:

The State Fund has reviewed the Mediation Report and Recommendation of the Workers' Compensation Mediator Karen Doig dated September 10, 1996. As a result of this mediation report and recommendation, the State Fund has determined that it needs more time to investigate the matter of whether Ms. Martinez was in the course and scope of her employment when she was injured, and if so, whether the injuries she has complained of are related to that accident.

Because the State Fund needs more time to investigate this matter it is willing to pay, under a reservation of rights, temporary total disability benefits to Rosa M. Martinez for a brief period. From the time of this letter, Ms. Martinez will be paid temporary total disability benefits under a reservation of right until such time as the State Fund has completed its investigation.

With copy of this letter I am making Karen Doing, Workers' Compensation Mediator, aware of the State Fund's actions.

(Ex. 11.)

Thereafter, on November 15, 1996, the claimant filed her Petition for Hearing. (Court File.) A Scheduling Order was issued by the Court and the matter was set for trial during the week of February 3, 1997, in Billings. (Court File.)

On January 6, 1997, the State Fund reconsidered its position concerning the claim and notified claimant and her counsel that it "agrees to accept liability for her injuries suffered on November 27, 1995" and "will begin paying all reasonable and necessary medical bills related to the injury." (Ex. 13.) The letter also informed claimant and her counsel that the State Fund would calculate and pay any retroactive temporary total disability benefits due claimant and "will continue TTD from this point forward until she has been found to be at maximum medical improvement." (*Id.*)

With its January 6, 1997 acceptance letter, the State Fund deemed all issues resolved. (*Id.*) Claimant did not. She wanted a penalty and attorney fees, as well as certainty that all medical bills would be paid.

During discussion of the medical bills, Mr. Whyte assured claimant and the Court that all medical bills related to the industrial injury will be paid. However, some bills had not been paid because the State Fund had not received medical notes and information from the medical providers. (Exs. 9, 9 Supp. and 30.) Tiffany Jaeger, the claims adjuster, represented to the Court that most of those bills will be paid upon receipt of the medical notes and that the only medical expenses the State Fund may question relate to treatment of claimant's diabetes by Dr. Charles R. McClave on November 30, 1995 through March 25, 1996. Mr. Sommerfeld responded that Dr. McClave's bills were related to monitoring of claimant's diabetes while she was hospitalized on account of the injury and that claimant would not have been in the hospital were it not for the on-the-job injury. Ms. Jaeger indicated she wants to obtain the medical notes and review them so she can make a determination if in fact the expenses were related to the injury.

I informed the parties and counsel that the State Fund is bound by the representations concerning the medical bills. In light of those representations, I informed counsel that additional evidence concerning the medical bills was unnecessary. If after review, the State Fund declines payment of Dr. McClave's Bills, or if it fails to follow through on its agreement to pay the other outstanding medical bills, then those matters may be brought to my attention and I will consider them. I retain continuing jurisdiction for that purpose.

With respect to the claimant's requests for attorney fees and a penalty, Mr. Whyte acknowledged that "there is a period of time" during which the State Fund will "probably be found to be liable" for attorney fees and a penalty. He stated that the period ran from October 9, 1996, the date on which the State Fund rejected the mediator's recommendation, to January 6, 1997, the date on which it unequivocally accepted the claim. He informed the Court that the State Fund had agreed to pay the 20% penalty and attorney fees with respect to medical bills and compensation benefits incurred between October 9th and January 6th. He then stated that he had authority to "concede" that issue.

As I understood Mr. Whyte's statements, the State Fund was conceding that between October 9, 1996 and January 6, 1997, it unreasonably delayed payment of benefits, thereby subjecting it to liability for a penalty and attorney fees respecting benefits accruing *during that period*. I therefore questioned Mr. Whyte as to why a penalty and attorney fees should not be payable with respect to benefits accrued and medical bills incurred prior to October 9th. He responded that (1) the claim was not submitted until five months after the accident and the State Fund therefore could not have acted unreasonably during that period and (2) from the receipt of the claim until October 9th, the State Fund's denial was based on sound claims adjusting, i.e., the denial was reasonable during that period of time.

Following the foregoing colloquy, I ruled that the unreasonableness conceded for the October 9th to January 6th period extended to benefits that were payable prior to October 9th. The rationale for the ruling is simple: Had the State Fund accepted the claim on October 9th, it would have promptly paid all retroactive benefits due up to that date, including the medical bills incurred prior to October 9th. By failing to accept the claim on that date, the State Fund unreasonably delayed those benefits just as it had unreasonably delayed the benefits accruing during the October 9th to January 6th period. Indeed, because the benefits accruing prior to October 9th were already past due, the added delay with respect to them was more egregious than the delay with respect to benefits accruing after that date.

I make no finding as to the reasonableness of the State Fund's failure to accept liability prior to October 9th. Similarly, I make no independent factual determination as to whether the State Fund's failure to accept the claim on and after October 9th was unreasonable. My ruling as to the penalty and attorney fees is based solely on the State Fund's concession of liability for the penalty and attorney fees with respect to the October 9th to January 6th period and my conclusion that such concession, as a matter of law, must be extended to benefits accrued prior to October 9th.

Judgment is entered accordingly, as follows:

JUDGMENT

1. The State Fund shall diligently seek the medical records of the medical providers it has not yet paid. Upon receipt of such records, it shall pay the providers' medical bills with the possible exception of Dr. McClave's bills for November 30, 1995 through March 25, 1996. With respect to Dr. McClave's bills, the State Fund shall determine whether the bills are related to the injury. If it determines that the bills are not related, then it shall promptly notify claimant and her counsel of its determination.
2. The Court retains jurisdiction to determine any dispute arising with respect to Dr. McClave's medical bills and to enforce payment of the other medical bills.
3. The State Fund shall pay a 20% penalty with respect to all medical and compensation benefits incurred or accrued prior to January 6, 1997.
4. The State Fund shall pay claimant's attorney fees and costs in an amount to be determined by the Court. Claimant shall submit his memorandum of costs within 10 days of this decision. State Fund shall then have 10 days in which to file its objections, if any.
5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
6. Any party to this dispute may have 20 days in which to request a rehearing from this Decision and Judgment.

DATED in Helena, Montana, this 5th day of March, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Donald R. Sommerfeld

Mr. Daniel J. Whyte

Submitted: February 4, 1997