IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 55A-1

WCC No. 9110-6271

LINDA MILLER

Petitioner

vs.

WESTERN GUARANTY FUND SERVICES

Respondent/Insurer for

MAURINE FRASURE d/b/a O'HAIRE MOTOR INN RESTAURANT

Employer.

ORDER AWARDING ATTORNEY FEES AND COSTS

This Order accompanies this Court's Findings of Fact, Conclusions of Law and Judgment issued today, July 26, 1996. The attorney fees and costs determined herein are set forth in the final judgment.

I. Attorney fees

The attorney fee agreement between claimant and her attorney provides for the attorney to receive 25% of any recovery. (Exhibit A to Petitioner's Claim for Award of Attorneys' Fees and Costs.) Claimant requests that the 25% be applied to all disability benefits awarded, as well as to "all medical benefits paid on Petitioner's behalf since the time the insurer began asserting that liability should be denied, and 25% of the amount of all future medical benefits paid by the insurer." (Petitioner's Claim for Award of Attorneys' Fees and Costs at 11; bolded in original.) She further requests that the Court order payment of an additional $4,590 to compensate her counsel for the "Expense of Defending Against Frivolous or Unwarranted Motions by the Insurer . . . ." (*Id*. at 6,11; bolded and underlined in original.)

The contingent fee agreement cannot be applied to medical benefits since claimant's entitlement to medical benefits was not an issue presented for adjudication. Moreover, according to claimant's own phrasing of her request, Western continued to pay medical benefits even as it asserted that she is not disabled on account of her industrial injury.

The contingent fee agreement can, however, be applied to the permanent partial disability benefits awarded by the Court. The contingency applies to the entire amount of the award,

without consideration of any settlement offers, since Western denied liability for any permanent disability benefits. § 39-71-703, MCA (1983); *Hartman v. Staley Continental,* 236 Mont. 141, 148, 768 P.2d 1380, 1385 (1989); *Carroll v. Wells Fargo Armored Service Corp.,* 240 Mont 151, 156-157, 783 P.2d 387, 391 (1989).

There is a strong presumption favoring application of the contingent fee agreement, however, that presumption is not conclusive. *Wight v. Hughes Livestock Co., Inc.,* 204 Mont. 98, 115, 664 P.2d 303, 312 (1983). Where the contingent fee agreement does not provide a reasonable fee, the Workers' Compensation Court may disregard the agreement and award what is reasonable. *Id*. The Court's reasons for not following the agreement must be stated with particularity. *Id*.

In determining a reasonable fee, the Court must consider the ten factors prescribed in *Wight*. Those factors are:

> (1) The anticipated time and labor required to perform the legal service properly.
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> (2) The novelty and difficulty of legal issues involved in the matter.
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> (3) The fees customarily charged for similar legal services.
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> (4) The possible total recovery if successful.
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> (5) The time limitations imposed by the client or circumstances of the case.
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> (6) The nature and length of the attorney-client relationship.
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> (7) The experience, skill and reputation of the attorney.
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> (8) The ability of the client to pay for the legal services rendered.
>
> (9) The risk of no recovery.
>
> (10) The market value of the lawyer's services at the time and place involved.

204 Mont. at 114, 664 P.2d at 312.

The alternative to awarding fees on a contingency basis has typically been an award on an hourly basis. In this case, however, claimant's attorney has not provided a complete hourly history of his work and seeks a hybrid solution involving part contingent fee, part hourly payment. While his approach is novel, I find that it is a reasonable one which will provide an appropriate fee in this case. Specific factors which persuade me that a simple contingency award is inadequate are as follows:

> 1) The amount of attorney time spent litigating this case has been extraordinary and could not have been reasonably anticipated at the time the contingent fee agreement was executed. The Court file, which is indicative of the contentious nature of the proceeding, is now four bulging volumes. In part the amount of time

expended by claimant's counsel is due to the vigorous defense mounted by the insurer. While Judge Reardon found that the insurer's conduct in this case was not unreasonable and does not warrant a penalty, it is also clear that the insurer's aggressive defense increased the amount of time and effort necessary to prosecute claimant's case and that a 25% contingent fee is insufficient compensation for that additional time and effort.

2) At least one novel and difficult issue was involved in the litigation, that being the deposition of Western's claims adjuster. Claimant ultimately prevailed on that issue. There were a myriad of other issues raised in the case, many by Western. Some of those may have been novel and/or difficult. I decline to go through each one to determine if it meets those criteria since it is sufficient that there was at least one.

3) On an hourly basis, claimant's attorney charges from $95 to $125 depending on the client. (Exhibit C to Petitioner's Claim for Award of Attorneys' Fees and Costs.) He has certified that his average hourly rate is approximately $100 and such rate is reasonable in workers' compensation matters. (*Id.*) Western does not controvert his statements and based on this Court's own familiarity with current billing rates, the hourly rate appears reasonable.

4) The possible total recovery was substantial. At the time of trial claimant was 41 years old and she was seeking permanent total disability benefits. Through age 64, those benefits, if awarded, could have amounted to approximately $173,000. Her maximum possible entitlement to permanent partial disability benefits was $69,150, making a possible total recovery of approximately $243,000.

5) Based on the history of this litigation, no time limitations were imposed on either counsel. This case has been in litigation since October 1, 1991. Nearly five years later, it appears unlikely that even this decision will fully resolve matters between these parties.

6) Claimant has a long-term relationship with her attorneys, commencing in 1986. The law firm has also represented her in other matters.

7) Claimant's counsel is an able and respected attorney with long experience in workers' compensation matters.

8) Claimant cannot otherwise afford counsel.

9) The range of possible recoveries was from zero to full permanent total disability benefits. Western urged zero and there was a possibility that Western could have prevailed.

10) The market value of the services of claimant's attorney is $100 per hour.

Although a simple contingency fee is inadequate, the Court is not free to arbitrarily set the fees. It must have some reasonable bench mark for the fees awarded. Claimant has provided a reasonable bench mark in the form of her counsel's time spent on several matters. Those matters were:

> a) Western's motion to dismiss the petition because there was no dispute and the petition failed to contain required allegations. (Motion to Dismiss Petition for Hearing and Award of Fees and Costs, October 21, 1991.) As the caption of the motion indicates, Western went so far as to seek attorney fees and costs based on the mere filing of the petition, a gutsy request on its part and certainly a clear foreshadowing of the aggressive defense put on over the next four and a half years. On November 15, 1991, this Court summarily denied the motion based on a decision published in 1985.
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> b) Western's motion for a protective order filed December 26, 1991. The motion requested the Court to bar claimant's access to the insurer's claims files without even an *in camera* inspection of the files as provided by the Court rules. Claimant was forced to respond to the motion just to support the Court applying its own rule.
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> c) Western's motion for a protective order precluding claimant from taking the claims adjuster's deposition within the State of Montana. The protective order was granted but the Supreme Court ultimately held that the adjuster's deposition should have been taken in Montana. In the meantime, claimant was forced to travel to Colorado, where the adjuster lived, to take the deposition.
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> d) Western's deposition of Dr. Avery and the "rebuttal" depositions of Maurine Frasure, Mike Brumble and Ray Walters. Judge Reardon sustained claimant's objections to consideration of the depositions and excluded them.
>
> e) Two motions by Western to reopen the trial, both of which were denied.

The foregoing matters are examples of the aggressive defense of the case. Indeed, after reviewing the files in this matter I can only observe that the proceedings in this case more resemble a street brawl, initiated by Western, than any reasoned approach to litigation. I therefore find that a reasonable fee can only be achieved by awarding claimant additional fees based on the number of hours expended by claimant's counsel on the above matters.

The hours spent on those matters are listed in Exhibit C to Petitioner's Claim for Award of Attorneys' Fees and Costs. Total hours for each matter are as follows:

Motion to Dismiss	5.8
Motion for Protective Order regarding insurer's files	6.5

Motion for Protective Order regarding place of deposition of Western's adjuster	9.3
Excluded depositions	4.8
Motions to Reopen	8.7
TOTAL HOURS	35.1

At $100 an hour, claimant is entitled to $3,510 in addition to the contingent amount.

The contingent fee in this case is a two-part calculation because of evidence establishing that claimant could not work full time during the first four weeks of her reemployment. For those four weeks she is entitled to the maximum possible permanent partial disability benefits, which is $138.30. The four-week total is $553.20. The benefits due claimant for the remaining 496 weeks is $50,924.32. The total of these amounts is $51,477.52, 25% of which is $12,869.38.

Adding the additional hourly amount to the contingent amount, I award claimant reasonable attorney fees in the amount of $16,379.38, which shall be paid in a lump sum.

II. Costs

Claimant requests reimbursement for the following costs:

Deposition of Dr. John Avery:	$ 61.50
Deposition of Dr. James Mungas:	$ 52.50
Travel Expense and related expenses for William Bronson, travel from Great Falls, Montana to Denver, Colorado for Deposition of James Doerfler	$ 547.34
"Rebuttal" Depositions of Maurine Frasure, Mike Brumble, and Ray Walters	$ 73.50
Deposition of Star Jackman	$ 61.75
Deposition of Linda Hunt	$ 55.25
Trial Transcript	$ 1,222.50

(Ex. B to Petitioner's Claim for Award of Attorneys' Fees and Costs.) Without exception, Western objects to these costs.

Depositions of Drs. Avery and Mungas: These depositions were taken at the behest of Western, which characterizes their purpose as to show

that the nature of the injury that had been sustained by the Claimant was, relatively speaking, an insignificant one, and furthermore, that there was not a causal relationship between her present symptomotology [sic] and her industrial accident.

(Objection to Petitioner's Claim for Award of Attorneys' Fees and Costs (May 31, 1994) at 4 *and see* Respondent's Objections (May 21, 1996) at 1.) Western then asserts, "The carrier prevailed on the issue . . . ." (*Id.*) Contrary to Western's assertion, claimant has prevailed in showing a causal relationship between her current symptomatology and her industrial injury and that her condition is significant. She also prevailed on her claim that she is permanently disabled and entitled to permanent benefits, albeit for partial disability. Western denied liability for *any* permanent disability benefits. To now claim that it prevailed on these issues is utter nonsense. The costs of these depositions shall be reimbursed.

Travel to Doerfler Deposition: Western claims that travel was unnecessary because claimant could have taken a telephone deposition and she did not prevail on matters relating to the Doerfler deposition. Telephone depositions, however, were not a matter of right and a party is generally entitled to personally confront witnesses either at trial or deposition. It was Western's failure to comply with the law requiring a resident adjuster that resulted in the need to depose a non-resident adjuster. It was Western's refusal to make the adjuster available for deposition in Montana that forced her to seek his deposition in Colorado. It shall pay the travel expenses of claimant's counsel.

Rebuttal Depositions: Western asserts that the cost for copies of these depositions should be denied because the depositions were taken at its behest, the claimant "determined whether or not she wanted copies," (*id.* at 5), and the depositions were refused by the Court. What Western overlooks, however, is that it aggressively advocated their use by the Court and that claimant was successful in her objections to them. Western obviously intended to rely upon them. Claimant would have been remiss had she not obtained copies in anticipation that she would have to reply to Western's use of the depositions. Western shall reimburse claimant for the costs of these transcripts.

Jackman and Hunt Depositions: These depositions were used at trial. Claimant prevailed in this proceeding and the transcription costs of the depositions are recoverable even though the depositions were taken at the behest of Western. Western shall reimburse claimant for the costs of the copies of the these transcripts.

Trial Transcript: The trial transcript was used by the parties in preparing proposed findings of fact. Prior to three years ago, it was common practice for attorneys practicing before this Court to order transcripts and use them in preparing their proposed findings. Prior to the Supreme Court's decision in *Baeta v. State Compensation Mutual Ins. Fund,* 254 Mont. 487, 839 P.2d 566 (1992), it was this Court's practice to award the cost of a trial transcript to a successful claimant. *See Byun v. Montana Schools Group Insurance Authority,* WCC No. 9407-7085, Order Awarding Costs (December 4, 1995). *Baeta* put an end to that practice. However, *Baeta* was then overruled by *Kloepfer v. Bechtel Construction Co.,* 272 Mont. 78, 899 P.2d 1081 (1995). Transcripts are no longer regularly used to prepare proposed findings of fact and this Court will no longer routinely award the cost of a transcript. *Byun*. However,

this case was tried in 1992, at a time when transcripts were routinely used. Claimant has prevailed in this case. Therefore, Western shall reimburse claimant for the cost of the transcript.

In summary, Western shall pay all of the costs itemized by claimant, in the total sum of $2,074.34.

ORDER

1. Western shall pay claimant attorney fees of $16,379.38. The fees shall be paid in a lump sum.

2. Western shall pay claimant her costs in the total sum of $2,074.34.

DATED in Helena, Montana, this 29th day of July, 1996.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. William O. Bronson
Mr. K. Dale Schwanke
Submitted: June 17, 1996