IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 67A

WCC No. 9401-6976

THOMAS H. MILLS

Petitioner

vs.

AMERICAN STORES COMPANY

Respondent/Insurer/Employer.

ORDER GRANTING ATTORNEY FEES AND COSTS

On August 1, 1994, this Court entered its Judgment which found, inter alia, that claimant is entitled to reasonable attorney fees and costs in an amount to be determined. Thereafter, claimant filed his Claim for Attorney Fees and Costs and Affidavit in Support Thereof. Respondent filed objections and the matter has now been fully briefed. Both parties agree that a hearing is unnecessary and that the Court may base its decision on their submissions to date.

Claimant initially sought $3,795.29 in costs. Included among those costs were $286.60 for telephone, photocopies and postage; $2,811.03 for "expert fees and expenses"; and $253.28 for mileage and per diem for two expert witnesses. All of these costs were later withdrawn with the exception of $112.60, representing a $10.00 witness fee for one of the experts and $102.60 for the witness' mileage from Missoula to Great Falls, where the trial was held. Witness fees in the statutory amount, along with travel, are recoverable. § 25-2-501, MCA. See ***Stevens v. State Compensation Insurance Fund***, *WCC No. 9304-6778 (March 11, 1994)*. The amended amount of $112.60 is therefore approved.

In addition, claimant continues to seek $444.50 reimbursement for the cost of the deposition transcripts of the two experts. One of those transcripts -- that of Mr. Goodrich -- was filed and considered by the Court in reaching its decision. The claimant, therefore, may recover the cost of the transcript of the Goodrich deposition. ***Stevens,*** *supra*. The transcript of Anne Arrington was not filed or used. Its cost is therefore not recoverable. ***Id.***

Claimant requests an attorney fee in the amount of $12,500.00 representing one hundred (100) hours of time at $125.00 per hour. Respondent objects to the amount requested. It argues that a $15,000.00 offer of settlement must be taken into account in fixing an

attorney fee, and that the Court must also consider that claimant did not prevail upon all issues. Finally, respondent also asserts that the hourly fee is not sufficiently supported and that the total hours are excessive.

The injury in this case occurred on May 19, 1986. The attorney fee statute in effect on that date therefore applies. ***Buckman v. Montana Deaconess Hospital,*** *224 Mont, 318, 730 P.2d 380 (1986).*

Section 39-71-614(1), MCA (1985), specifies the method the Court must use in calculating the amount of the attorney fee. The section provides:

> **Calculation of attorney fees.** (1) The amount of an attorney's fee assessed against an employer or insurer under 39-71-611 or 39-71-612 must be based exclusively on the time spent by the attorney in representing the claimant on the issues brought before the workers' compensation judge. The attorney must document the time spent and give the documentation to the judge. The judge shall determine a reasonable attorney fee and assess costs. He is not bound by the documentation submitted to him. The hourly fee the judge applies to the time spent must be based on the attorney's customary and current hourly fee for legal work performed in this state.

Claimant's attorney, Mr. D. Patrick McKittrick, presented an affidavit stating that his customary hourly rate is $125.00 an hour. After respondent objected to this rate on the ground that no verification of the rate had been provided, Mr. McKittrick supplied the Court with portions of two client letters in which he stated that his rate is $125.00 an hour. The Court finds the affidavit and documentation sufficient to establish $125.00 an hour as Mr. McKittrick's customary and current hourly fee.

Section 39-71-612(1), MCA (1985), provides:

> **Costs and attorneys' fees that may be assessed against an employer or insurer by workers' compensation judge.** (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, 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 tendered by the employer or insurer, a reasonable attorney's fee 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.

In this case the respondent made an offer of $15,000.00 to settle claimant's claim for permanent partial disability benefits. During the course of this proceeding respondent has been paying $30.86 weekly permanent partial benefits but has done so under a reservation

of rights. The Court awarded significantly more, thereby entitling claimant to an attorney fee.

Respondent argues that claimant is entitled to an attorney fee only with regard to the issues on which he prevailed, citing ***Worts v. Pacific Employers Ins. Co.,*** *249 Mont. 477, 817 P.2d 231 (1991) and* ***Buckman v. Montana Deaconess Hospital,*** *238 Mont. 516, 776 P.2d 1210 (1989).* It then asserts that claimant has not prevailed on a number of issues because he did not obtain as much as he sought.

Even though claimant was awarded less than he sought, he prevailed in this action. He sought permanent partial disability benefits in excess of respondent's offer, and was successful. The request for a lump sum, mentioned by respondent as an issue on which claimant did not prevail, was not an issue presented for trial.

Claimant, however, is not entitled to compensation for one hundred (100) hours. The number of hours expended must be reasonable and appropriate. Considering the issues and evidence presented in the case, the number of witnesses, and the complexity of the issues, the Court finds that seventy-five (75) hours was a reasonable time. Claimant is therefore entitled to $9,375.00 in attorney fees.

In summary,

IT IS HEREBY ORDERED that respondent pay costs in the amount of $112.60 plus the cost of the transcript of the Goodrich deposition.

IT IS FURTHER ORDERED that respondent pay claimant attorney fees in the amount of $9,375.00.

DATED in Helena, Montana, this 3rd day of November, 1994.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. D. Patrick McKittrick
Mr. Thomas A. Marra