

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1998 MTWCC 78

WCC No. 9712-7892

BARBARA STUMVOLL

Appellant

vs.

DAVID W. LAURIDSEN

Respondent

STATE COMPENSATION INSURANCE FUND

Insurer.

ORDER ON APPEAL

Summary: Appellant signed Attorney Retainer Agreement providing that, in cases which are settled without an order of the workers' compensation judge or Supreme Court, the attorney will receive "twenty percent (20%) of the amount of additional compensation payments the claimant receives due to the efforts of the attorney." Through the efforts of the attorney, appellant's claim for benefits was reclassified from an occupational disease to an injury, making her eligible for permanent partial disability benefits. When claimant reached MMI, the attorney demanded permanent total disability benefits on her behalf. The insurer refused and mediation ensued. During the period of negotiation, the insurer continued temporary total disability benefits. Eventually, the insurer conceded claimant was permanently totally disabled. Appellant then discharged the attorney and maintained that her PTD benefits were not subject to the fee agreement. After a Hearing Officer for the Department of Labor Hearing Officer found the attorney was entitled to twenty percent of PTD benefits and of the impairment award, claimant appealed.

Held: While claimant is correct that her total disability benefits did not change after she reached MMI, she fails to acknowledge the whole picture. After she reached MMI, she was no longer entitled to temporary total disability benefits. Through the attorney's efforts, the insurer accepted her claim for PTD status. In *Madill v. State Compensation Ins. Fund*, 280 Mont. 280, 930 P.2d 665 (1997), the Supreme Court expressly held that where an insurer denies that a claimant is permanently totally disabled and the claimant's attorney thereafter obtains a concession that claimant is PTD, the attorney has obtained additional

benefits for claimant. Although Madill involved an award of attorneys fees against an insurer, the conclusion regarding attorneys efforts is indistinguishable from the issue in this case. Appeal denied.

Topics:

Attorney Fees: Fee Dispute. Under a standard fee agreement between claimant and her attorney, the attorney was entitled to receive "twenty percent (20%) of the amount of additional compensation payments the claimant receives due to the efforts of the attorney" if the matter was settled without an order of the workers' compensation judge or Supreme Court. Where the insurer had denied claimant was permanently totally disabled and the claimant's attorney thereafter obtained a concession that claimant is PTD, the attorney obtained additional benefits for claimant and was entitled to twenty-percent of PTD payments. See, *Madill v. State Compensation Ins. Fund*, 280 Mont. 280, 930 P.2d 665 (1997).

¶1 This is an appeal of a decision of the Department of Labor and Industry (Department) finding that David W. Lauridsen (Lauridsen) is due attorney fees from former client Barbara Stumvoll (Stumvoll). The facts are not in dispute.⁽¹⁾

Facts

¶2 Stumvoll was injured at work on September 24, 1992. She thereafter filed a claim for compensation. On February 22, 1993, the State Compensation Insurance Fund (State Fund) accepted the claim as an occupational disease and commenced paying temporary total disability benefits.

¶3 Stumvoll then enlisted the services of Lauridsen, signing an Attorney Retainer agreement on November 10, 1993. Lauridsen contacted the State Fund and demanded that her claim be accepted as an injury under the Workers' Compensation Act. The matter was mediated on January 27, 1994. On July 22, 1994, after Lauridsen petitioned the Workers' Compensation Court on Stumvoll's behalf, the State Fund accepted the claim as an industrial injury. It thereafter continued paying temporary total disability benefits at the same rate.⁽²⁾

¶4 On December 8, 1995, Lauridsen notified the State Fund that Stumvoll had reached maximum medical improvement and requested that she be determined to be permanently totally disabled. He attached a letter from Dr. John R. Dorr opining that Stumvoll was at maximum medical recovery and rating her as having a 20% impairment.

¶5 The State Fund declined to reclassify Stumvoll as permanently totally disabled, and Lauridsen sought another round of mediation. The mediation took place on January 31, 1996. On April 19, 1996, the State Fund reclassified Stumvoll as permanently totally disabled. The reclassification did not change Stumvoll's biweekly benefits since her rate

was the same for both temporary and permanent total disability purposes. Since the State Fund apparently continued paying temporary total disability benefits between December 8, 1995 and April 19, 1996, Stumvoll suffered no interruption in her benefits.

¶16 Immediately after the State Fund reclassified her, Stumvoll fired Lauridsen and contested his entitlement to any attorney fees.

¶17 Thereafter, Lauridsen requested that the Department determine his entitlement to attorney fees. On June 21, 1996, the Department issued an initial determination finding that Lauridsen was entitled to attorney fees with respect to Stumvoll's future compensation. Stumvoll then requested a contested case hearing.

The Decision Below

¶18 The controversy was submitted to a Department hearing officer on an agreed statement of facts and agreed exhibits. On November 25, 1997, the hearing officer issued his Findings of Fact; Conclusions of Law; Order. He held that Lauridsen was entitled to a 20% attorney fee on all permanent total disability benefits received by Stumvoll and on any impairment award. This appeal by Stumvoll followed. Her appeal is limited to attorney fees on permanent total disability benefits. She does not dispute Lauridsen's entitlement to fees on any impairment award.

Discussion

¶19 Initially, there is no dispute that Stumvoll entered into a valid attorney fee agreement. She signed the agreement and it was approved by the Department.

¶10 Rather, the controversy is over whether Lauridsen secured additional benefits for Stumvoll. The agreement provided for a contingent fee on "additional compensation payments the claimant receives due to the efforts attorney." With respect to benefits received without a court order, the agreement provided:

Claimant and attorney agree to a fee schedule as follows: For cases that have been settled without an order of the workers' compensation judge or Supreme Court, twenty percent (20%) of the amount of **additional compensation payments** the claimant **receives due to the efforts of the attorney**. [Emphasis added.]

Stumvoll argues that her benefits did not change as a result of Lauridsen's efforts. She received the exact biweekly compensation after each mediation that she had been receiving prior to mediation. She does acknowledge that Lauridsen is entitled to an attorney fee with respect to any permanent partial disability benefits she may receive,⁽³⁾ but disputes that he is entitled to anything with respect to permanent total disability benefits.

¶11 While claimant is correct that her total disability benefits did not change, she fails to acknowledge the larger picture. At the time she reached maximum medical improvement,

she was no longer entitled to temporary total disability benefits. Temporary total disability benefits were available to her only until she reached maximum medical improvement. § 39-71-701, MCA (1991). The State Fund's continuation of her temporary total disability benefits, while it refused her request for permanent total disability benefits, was a matter of grace, undoubtedly reflecting some uncertainty on the State Fund's part as to her status. The benefits took on an extra-legal status and could have been discontinued at any time.⁽⁴⁾

¶12 In *Madill v. State Compensation Ins. Fund*, 280 Mont. 280, 930 P.2d 665 (1997), the Supreme Court expressly held that where an insurer denies that a claimant is permanently totally disabled and the claimant's attorney thereafter obtains a concession that the claimant is, in fact, permanently totally disabled, the attorney has obtained additional benefits for the claimant. *Madill* involved an award of attorney fees awarded against an insurer. The attorney fee statute at issue in *Madill* provided for an award of attorney fees based on the "difference between the amount settled for or awarded and the amount tendered or paid" by the insurer. § 39-71-612, MCA (1979). In 1989, the insurer was paying claimant Madill temporary total disability benefits. As in this case, the insurer rejected a request that claimant be declared permanently totally disabled but continued paying temporary total disability benefits pending further evaluation. Sixteen months later, the insurer conceded that claimant was permanently totally disabled. The Supreme Court held that in conceding liability, the parties "resolved their dispute about the nature and duration of Madill's total disability." 280 Mont. at 460, 930 P.2d at 671 (October 26, 1997). The Court went on to hold that resolution of that dispute constituted additional compensation to the claimant and awarded attorney fees on the permanent total disability benefits.

¶13 This case does not involve an award of attorney fees against an insurer. However, the Supreme Court's determination that the change in benefit status from temporary total to permanent total disability constitutes additional benefits supports Lauridsen's claim in this case. I am unable to distinguish *Madill*. Indeed, it appears to be on all fours with the controversy in the present case.

ORDER

¶14 1. The decision below is **affirmed**.

¶15 2. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.358.

¶16 3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this ORDER ON APPEAL.

DATED in Helena, Montana, this 28th day of October 1998.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Michael G. Eiselein

Ms. Laurie Wallace

Mr. David A. Hawkins

Submitted: April 20, 1998

1. The parties submitted the case to the Department hearing officer on agreed facts contained in the Pre-Hearing Order docketed November 20, 1996, and upon agreed exhibits.
2. \$349.00 per week.
3. Permanent partial disability benefits are not available under the ODA. § 39-72-703, MCA (1991).
4. Discontinuing temporary total disability benefits was, of course, subject to the notice requirement of section 39-71-609, MCA (1991).