IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 40

WCC No. 2002-0552

PATSY SIAPERAS

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer for

PIZZA HUT, INCORPORATED

Employer.

ORDER DENYING ATTORNEY FEES AND PENALTY

Summary: Claimant, who suffered a back injury and underwent back surgery with instrumentation, sought payment of an impairment award even though she had recently undergone and not recovered from elective surgery to remove the instrumentation. In light of the undisputed opinion of her physician that her impairment rating was the same with or without the elective surgery, the Court strongly urged the insurer to pay the impairment award even though the claimant had not recovered from the elective surgery. The insurer complied and the claimant then sought attorney fees and a penalty.

Held: The insurer's denial of the impairment award was reasonable and the request for attorney fees and a penalty is denied.

Topics:

> **Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: Section 39-71-737, MCA (1995).** An insurer is not precluded from paying an impairment award concurrently with other classes of benefits. Therefore, it is not precluded from paying an award while claimant is receiving temporary total disability benefits. Claimant, however, must still be entitled to the award in order for it to be paid.
>
> **Benefits: Impairment Awards.** An insurer is not precluded from paying an impairment award concurrently with other classes of benefits. Therefore, it is not precluded from paying an award while claimant is receiving temporary total

disability benefits. Claimant, however, must still be entitled to the award in order for it to be paid.

Attorney Fees: Unreasonable Denial or Delay of Payment. While the prohibition against payment of concurrent benefits is inapplicable to impairment awards, § 39-71-737, MCA (1995), it was not unreasonable for an insurer to deny payment of an impairment award where the claimant was still recovering from elective surgery to remove instrumentation from a prior back surgery. Impairment by definition is not rateable until the claimant has reached maximum medical improvement, § 39-71-711, MCA (1995). Since attorney fees may be awarded only if the insurer acted unreasonably, §§ 39-71-611, -612, MCA (1995), and the insurer did not do so in this case, the claimant is not entitled to attorney fees.

Penalties: Insurers. While the prohibition against payment of concurrent benefits is inapplicable to impairment awards, § 39-71-737, MCA (1995), it was not unreasonable for an insurer to deny payment of an impairment award where the claimant was still recovering from elective surgery to remove instrumentation from a prior back surgery. Impairment by definition is not rateable until the claimant has reached maximum medical improvement, § 39-71-711, MCA (1995). Since a penalty may be awarded only if the insurer unreasonably delayed or denied benefits, § 39-71-2907, MCA (1995), and the insurer in this case did not do so, the claimant is not entitled to a penalty.

Constitutions, Statutes, Regulations and Rules: Montana State Constitution: Art. II, Sec. 16: Full Redress. "Full redress" refers to third party actions. Full redress is not required in cases covered by the Workers' Compensation Act and the "full redress" language does not require payment of a claimant's attorney fees.

¶1 Petitioner (claimant) is seeking attorney fees and a penalty with respect to an impairment award the Montana State Fund agreed to pay him after a conference call in which this Court strongly urged that the payment be made. Some background is necessary to appreciate the claimant's present request.

Factual Background

¶2 The essential facts of this case are undisputed. They are found in the pleadings and based upon my teleconference with counsel on May 22, 2002.

¶3 Claimant injured her back on August 17, 1996, while working for Pizza Hut, Incorporated, in Dillon, Montana. Pizza Hut was insured by the Montana State Fund, which accepted liability for her injury.

¶4 Claimant subsequently underwent back surgery with instrumentation. In early February 2002, pursuant to questions put to him by the State Fund, claimant's treating physician

opined that the claimant had reached maximum medical improvement (MMI) unless she chose to have the hardware in her back removed, in which case she would continue in non-MMI status until three months after hardware removal. The treating physician rated claimant's impairment at 15% "with or without instrumentation." Apparently, claimant had previously scheduled removal of the instrumentation but cancelled the procedure. But in February 2002, she indicated she wished to proceed after all with the removal of the hardware.

¶5 On April 11, 2002, claimant filed her petition with this Court. In her petition she indicated she had recently (in April) undergone removal of the instrumentation in her back and was still receiving temporary total disability benefits (TTD). Nonetheless, she demanded payment of a 15% impairment award.

¶6 The State Fund did not dispute the facts as set forth above, however, it denied that an impairment award was presently due since claimant had not reached MMI and would not do so for approximately another three months.

¶7 After reviewing the petition, I contacted counsel for both parties and ascertained that there was no disagreement that claimant would be due the 15% award after recovering from the April surgery. The only issue separating the parties was, as I indicated in my minute entry of that date, the "timing of the payment." In that light, I "strongly suggested if not directed" the State Fund to pay the impairment award, noting that section 39-71-737, MCA (1995), permitted the payment of "impairment awards . . . concurrently with other classes of benefits." The State Fund's adjuster, who participated in the telephone conference, acquiesced and the State Fund commenced paying the impairment award without further adieu. However, claimant is now seeking a penalty and attorney fees with respect to the impairment award.

Discussion

A.

¶8 An award of attorney fees and a penalty require proof that the State Fund acted unreasonably in denying claimant's request for the impairment award. §§ 39-71-611, -612, and 2907, MCA (1995). The timing of impairment awards is governed not only by section 39-71-737, MCA (1995), which allows payment of an impairment award concurrently with other classes of benefits, but also by section 39-71-711, MCA (1995), which provides in relevant part:

> 39-71-711. Impairment evaluation -- ratings. An impairment rating:
>
> (a) is a purely medical determination and **must be determined by an impairment evaluator after a claimant has reached maximum healing**;

On its face, the quoted provision requires a determination that claimant has reached "maximum healing" as a prerequisite to any impairment determination and thus to any impairment award. The section arguably precludes payment of the award in this case until claimant has recovered from her April surgery. Indeed, the State Fund could have reasonably litigated the timing of the impairment award to conclusion.

¶9 So why did I strongly urge the State Fund to pay the award? As I indicated in my minute entry of May 22, 2002, the parties agreed as to the amount of the award and disagreed only as to timing. The timing issue involved three months. Even if the State Fund were successful in its defense of the case, the payment would have been delayed by only three months. By the time this matter wound its way through the normal litigation process, that time would have elapsed. Meanwhile, both parties would have expended substantial time and expense in litigating the question. To what end? As already noted, section 39-71-737, MCA allows payment of an impairment award concurrent with other benefits, therefore it does not prohibit the payment requested in this case and no great overreaching principle is involved.

¶10 Moreover, claimant was arguably at MMI upon recovery from her original surgery, and therefore entitled to an impairment award at that time, since the second surgery was purely elective. Thus, she might be viewed as having reached MMI following the first surgery and then reverted to non-MMI status following the second surgery. But that sort of analysis would hardly benefit the claimant since it would have authorized the State Fund to cut off claimant's benefits upon her reaching MMI from her first surgery and reinstate them only upon claimant's undergoing the second surgery.

¶11 In any event, the case at hand is an unusual one. The State Fund did not act unreasonably and there is no basis for an award of attorney fees or a penalty.

B.

¶12 Claimant, however, makes the further argument that attorney fees are constitutionally required, hence the statutory limitation on attorney fees is unconstitutional. She relies on the "full redress" language of section 16, Article II of the 1972 Montana Constitution. "Full redress, however, refers to redress from third parties, not to the redress available from insurers providing coverage under workers' compensation laws. Attorney fees are not constitutionally mandated.

JUDGMENT

¶13 Claimant's request for an impairment award is moot as it has been paid.

¶14 Claimant's request for attorney fees and a penalty is **denied**.

¶15 The petition in this matter is **dismissed with prejudice.**

¶16 Claimant is **not** entitled to costs.

¶17 This JUDGMENT is certified as final for purposes of appeal.

¶18 Any party to this dispute may have 20 days in which to request a rehearing from this Order Denying Attorney Fees and Penalty.

DATED in Helena, Montana, this 20th day of August, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Robert C. Kelleher
Ms. Ann E. Clark
Submitted: June 24, 2002