

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2006 MTWCC 7

WCC No. 2005-1294

RICK ARNESON

Petitioner

vs.

TRAVELERS PROPERTY CASUALTY

Respondent/Insurer.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Summary: Respondent moves for partial summary judgment with respect to Petitioner's claim for additional travel expenses and attorneys' fees.

Held: Summary judgment is granted. Mileage reimbursement is intended to cover the type of expenses that Petitioner is attempting to claim separately. With respect to attorneys' fees and costs, although Petitioner perfected a *Lockhart* lien on the medical benefits payments, Respondent paid the medical expenses prior to adjudication and therefore is not liable for attorneys' fees pursuant to RCM 92-616, -618 (1975).

Topics:

Benefits: Travel Expenses. Petitioner, relying on ARM 24.29.1409(1)(d), argued that in addition to reimbursement for travel expenses at the state rate, Respondent should pay for repairs to Petitioner's car, including oil changes and a new windshield, which were necessary for his travel. The Court determined that the examples of reimbursable expenses listed in the subpart of the ARM upon which Petitioner relied were dissimilar to the expenses Petitioner desired to claim under its auspices.

Benefits: Travel Expenses. Petitioner argued that in addition to reimbursement for travel expenses at the state rate, Respondent should pay for repairs to Petitioner's car, including oil changes and a new windshield, which were necessary for his travel. The Court determined that the

applicable statute allows only for reimbursement at the same rates as allowed for state employees, and Petitioner provided no evidence that state employees can claim such repairs as travel expenses.

Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.29.1409. Petitioner, relying on ARM 24.29.1409(1)(d), argued that in addition to reimbursement for travel expenses at the state rate, Respondent should pay for repairs to Petitioner's car, including oil changes and a new windshield, which were necessary for his travel. The Court determined that the examples of reimbursable expenses listed in the subpart of the ARM upon which Petitioner relied were dissimilar to the expenses Petitioner desired to claim under its auspices.

Attorney Fees: Lien. An attorney fee lien attaches upon the filing of an Attorney Retainer Agreement with the Department of Labor and Industry, *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, ¶ 26, 295 Mont. 467, 984 P.2d 744, and no additional notification is required to put an insurer on notice of a *Lockhart* lien on medical payments.

Attorney Fees: Lien. An attorney fee lien attaches upon the filing of an Attorney Retainer Agreement with the Department of Labor and Industry, *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, ¶ 26, 295 Mont. 467, 984 P.2d 744. However, where the language of the Agreement precludes the inclusion of medial benefits in the fee calculation *unless* the insurer denies all liability, or denies payment *and* the attorney obtains such benefit for the claimant, a delay in the payment of the medical bills is not sufficient to establish the entitlement to attorney fees.

Attorney Fees: Medical Benefits. Where the language of the Attorney Retainer Agreement precludes the inclusion of medial benefits in the fee calculation *unless* the insurer denies all liability, or denies payment *and* the attorney obtains such benefit for the claimant, a delay in the payment of the medical bills is not sufficient to establish the entitlement to attorney fees.

Attorney Fees: Unreasonable Denial or Delay of Benefits. The law does not recognize a “*de facto* denial,” or inexplicable delay, in the payment of medical benefits, as illustrated by *Galetti v. Montana Power Co.*, 2000 MT 234, 301 Mont. 314, 8 P.3d 821; *McNeel v. Holy Rosary Hosp.*, 228 Mont. 424, 427, 742 P.2d 1020, 1022 (1987); *Cosgrove v. Industrial Indem. Co.*, 170 Mont. 249, 552 P.2d 622 (1976); and *Yearout v. Rainbow Painting*, 222 Mont. 65, 719 P.2d 1258 (1986). Respondent's delay of over six months in

paying medical bills for which it was liable notwithstanding, Petitioner's situation is factually similar to the aforementioned cases and he is not entitled to attorneys' fees.

Attorney Fees: Unreasonable Denial or Delay of Benefits. While the Court recognizes that it is inequitable not to award Petitioner his attorney fees when Respondent failed to pay medical bills for which it was indisputably liable for six months, similar situations have previously been adjudicated by this Court and the Montana Supreme Court, and it is clear this is the legally correct result.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 1915-1977 Revised Codes of Montana: 92-618, RCM. Where Petitioner argued that prior to his filing a petition, Respondent failed to pay medical benefits for which it was liable, and Respondent paid the benefits after the petition was filed but prior to trial, Petitioner cannot recover attorney fees under 92-618, RCM, because the statute requires that there must be a controversy in the amount due, the judge must adjudicate the controversy, and the judge must award more than the insurer paid or offered to pay.

¶1 Petitioner petitioned this Court to order Respondent to pay certain medical bills and travel expenses, along with costs, attorneys' fees, and a penalty.

¶2 Soon after Petitioner filed his Petition for Trial, Respondent paid the outstanding medical bills. Respondent then filed its response and, shortly thereafter, moved for summary judgment on the issues of attorneys' fees and travel expenses.

UNCONTESTED FACTS

¶3 The parties have agreed on the following uncontested facts, and the Court restates the Stipulated Agreed Facts filed December 7, 2005, as follows:

¶3a On July 23, 1976, Petitioner had a compensable claim as a result of his employment with General Constructors.

¶3b General Constructors was insured by Travelers Insurance Company¹.

¶3c For medical bills incurred from October 26, 2004, through July 6, 2005, Respondent paid \$157,457.64.

¹ a/k/a Travelers Property Casualty.

¶3d Respondent did not withhold payment for attorneys' fees from the \$157,457.64 amount.

¶3e Petitioner requested travel and lodging expenses for a trip to Seattle for medical care which occurred on April 29, 2005.

¶3f Respondent paid Petitioner for round trip mileage to Seattle, three days' meals, and two nights' lodging.

¶3g Respondent denied liability for payment of Petitioner's vehicle expenses including spark plugs, gasoline, oil change, oil and air filter changes, and tire work which totaled \$223.34.

¶3h Petitioner requested travel and lodging expenses for a trip to Seattle for medical care which occurred on June 25, 2005.

¶3i Respondent paid Petitioner for round trip mileage to Seattle, three days' meals, and two nights' lodging.

¶3j Respondent denied liability for payment of Petitioner's vehicle expenses including gasoline, tire work, and windshield repair which totaled \$943.26.

¶3k The 1975 workers' compensation laws apply in this matter.

¶3l The mediation procedures do not apply.

STANDARD OF REVIEW

¶4 The moving party must establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.²

SUMMARY JUDGMENT ISSUES

¶5 The following issues are appropriate for summary disposition as there are no material facts in dispute:

² ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

¶5a Whether Respondent is liable for the additional travel expenses requested by Petitioner; and

¶5b Whether Petitioner is entitled to his attorneys' fees and costs.³

ANALYSIS AND DECISION

¶6 The material facts are agreed upon by both parties. Petitioner recently required medical treatment, the root cause of which was a compensable injury he suffered in 1976.⁴ As a result of this recent treatment, Petitioner incurred medical bills in the amount of \$157,457.64.⁵

¶7 Although Respondent did not dispute its liability for these bills, it was inexplicably slow to pay them. Moreover, Respondent failed to transmit assurances to Petitioner's medical providers, resulting in Petitioner being harassed for payment.⁶ Petitioner's attorney sent numerous letters to Respondent requesting payment of the medical bills, to no avail.⁷ It was not until after Petitioner filed his Petition for Trial that Respondent finally paid Petitioner's medical bills in full.⁸

I. Respondent's Liability for Petitioner's Travel Expenses

¶8 In addition to the medical bills, Respondent reimbursed Petitioner at the state rate for lodging, meals, and mileage.⁹

³ The issue of Petitioner's entitlement to a penalty is not a subject of Respondent's motion and the Court does not address it in this Order.

⁴ Uncontested Fact, ¶ 3a.

⁵ Uncontested Fact, ¶ 3c.

⁶ Petitioner's Response to Respondent's Brief in Support of Motion for Summary Judgment and Counter Motion and Brief in Support of Summary Judgment at 2; Respondent's Responses to Petitioner's First Set of Discovery Requests at 2, attached to Petitioner's Response to Respondent's Brief in Support of Motion for Summary Judgment and Counter Motion and Brief in Support of Summary Judgment as Ex. 3.

⁷ See Ex. 1 to Petitioner's Response to Respondent's Brief in Support of Motion for Summary Judgment and Counter Motion and Brief in Support of Summary Judgment.

⁸ Petitioner's Response to Respondent's Brief in Support of Motion for Summary Judgment and Counter Motion and Brief in Support of Summary Judgment at 1.

⁹ Uncontested Facts, ¶¶ 3e-f, h-l.

¶9 Petitioner argues that in addition to the reimbursement he has received for lodging, meals, and mileage, Respondent should pay for repairs to Petitioner's car, including oil changes and a new windshield, which were necessary for his travel.¹⁰ Petitioner relies upon ARM 24.29.1409(1)(d), which states reimbursement for travel expenses includes "[m]iscellaneous transportation expenses, such as taxi fares or parking fees"

¶10 Respondent has moved for summary judgment on this issue, arguing that the maintenance work to Petitioner's car is not reimbursable under this ARM. Respondent asserts that wear and tear is factored into the set per-mile reimbursement rate. In support of this argument, Respondent notes that the reimbursement rate of 37.5 cents per mile is more than the cost of gasoline. If this rate was not intended to cover wear and tear, Respondent argues, "mileage" would be reimbursed in the same manner as other expenses. Specifically, the party would submit receipts for gasoline purchases which would then be reimbursed.¹¹

¶11 Respondent further argues that Montana bases its rates upon the federal regulations, and 41 C.F.R. § 301-10.304 (2002) states that reimbursable expenses include parking fees, ferry fees, bridge, road, and tunnel fees, but do not include "[c]harges for repairs, depreciation, replacements, grease, oil, antifreeze," and it is exactly such expenses for which Petitioner seeks reimbursement in this case.¹²

¶12 The authority upon which Petitioner relies is a subpart of an ARM which lists examples dissimilar to the expenses Petitioner desires to claim under its auspices. Furthermore, the applicable statute allows only for reimbursement at the same rates as allowed for state employees. Petitioner provides no evidence that state employees can claim such repairs as travel expenses in addition to mileage.

¶13 With no material facts in dispute, this issue is appropriate for summary disposition as a matter of law. The Court finds Respondent's interpretation of the applicable law persuasive. Respondent is, therefore, granted summary judgment on the issue of additional travel expenses. Accordingly, Petitioner's claim for the travel expenses enumerated above at ¶¶ 3g and 3j is denied.

¹⁰ Petition for Trial at 1-2; Petitioner's Response to Respondent's Brief in Support of Motion for Summary Judgment and Counter Motion and Brief in Support of Summary Judgment at 3.

¹¹ Respondent's Brief in Support of Motion for Summary Judgment at 5-6.

¹² *Id.* at 6.

II. Petitioner's Entitlement to Attorneys' Fees

¶14 Petitioner asserts that the 1975 statutes control this case because they were in effect at the time he suffered the compensable injury.¹³ In his petition, Petitioner prays for attorneys' fees and costs, pursuant to RCM 92-616 (1975).¹⁴ Petitioner subsequently argues that RCM 92-618 (1975) applies instead.¹⁵

¶15 Alternatively, Petitioner argues that he is entitled to attorneys' fees pursuant to a *Lockhart* lien.¹⁶ Respondent does not address the *Lockhart* lien assertion in its brief in support of summary judgment. In its response to Petitioner's petition, however, Respondent contends that Petitioner failed to notify Respondent of an intent to claim a *Lockhart* lien on medical payments before the payments were made to providers.

¶16 Petitioner counters that the *Lockhart* case holds that the attorney fee lien attaches upon the filing of an Attorney Retainer Agreement ("Agreement") with the Department of Labor and Industry. Petitioner asserts his Agreement was approved on May 10, 2002, and on file at all times pertinent to his petition, thus resulting in a *Lockhart* lien attaching to the medical benefits paid by Respondent.¹⁷

¶17 Respondent replies that the issue of a *Lockhart* lien was not raised until June 14, 2004.¹⁸ However, under the procedure set forth in *Lockhart*, it is clear that filing the

¹³ This case is governed by the 1975 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Petitioner's industrial accident. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¹⁴ Petitioner's original citation in his petition was to RCM 92-661. However, this was obviously a typographical error as a statute numbered "661" does not exist. RCM 92-616 (1975) is an attorneys' fees statute cited by Respondent that Petitioner subsequently argues is inapposite to the matter at bar.

¹⁵ Petitioner's Response to Respondent's Brief in Support of Motion For Summary Judgment and Counter Motion and Brief in Support of Summary Judgment at 3.

¹⁶ See *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, 295 Mont. 467, 984 P.2d 744.

¹⁷ Attorney Retainer Agreement, attached to Petitioner's Response to Respondent's Brief in Support of Motion for Summary Judgment and Counter Motion and Brief in Support of Summary Judgment as Ex. 4.

¹⁸ The actions which gave rise to this lawsuit had not occurred by June 14, 2004. This Court believes Respondent meant June 14, 2005, the date upon which Respondent's attorney avers she informed Petitioner's attorney that the medical bills paid as of that time totaled approximately \$160,000. Perhaps it was during this conversation that Petitioner's attorney reminded Respondent's attorney about the *Lockhart* lien. However, the record is silent as to whether Petitioner ever mentioned the *Lockhart* lien aside from the filing of his Attorney Retainer Agreement with the Department of Labor and Industry.

Agreement with the Department of Labor and Industry was sufficient notice to perfect the lien. In pertinent part, the Court in *Lockhart* addressed this issue as follows:

In the context of workers' compensation cases, it is well settled that attorney fee liens attach to all compensation upon the filing of an attorney retainer agreement with the Department of Labor and Industry. See *Kelleher Law Office v. State Compensation Ins. Fund* (1984), 213 Mont. 412, 416, 691 P.2d 823, 825. A proper and timely retainer agreement was filed in these cases [consolidated in *Lockhart*] and thus, an attorney fee lien has attached as a matter of law to all medical benefits paid.¹⁹

¶18 Petitioner's attorney had perfected a *Lockhart* lien on May 10, 2002, when he filed the Agreement. However, language within the Agreement itself precludes the inclusion of medical benefits in the fee calculation under circumstances such as the one before this Court. The Agreement states in pertinent part:

The amount of medical and hospital benefits received by the claimant shall not be considered in calculating the fee, unless the workers' compensation insurer has denied all liability, including medical and hospital benefits, in the claimant's case, or unless the insurer has denied the payment of certain medical and hospital costs and the attorney has been successful in obtaining such benefits for the claimant.²⁰

¶19 The language of the Agreement specifically excludes medical benefits *unless* the insurer denies all liability, or denies payment, *and* the attorney obtains such benefit for the claimant. In the case at hand, both parties concede the insurer did not deny liability. Respondent asserts it did not deny payment.²¹ Petitioner argues Respondent's failure to respond to his repeated pleas for payment, to pay the bills, or write letters of assurance in spite of six months of Petitioner's requests amounts to a *de facto* denial of payment, and the fact that Respondent did not pay until Petitioner's attorney filed a petition in this Court clearly demonstrates that Petitioner's attorney obtained the benefit for Petitioner.²²

¹⁹ *Lockhart*, ¶ 26.

²⁰ Attorney Retainer Agreement, attached to Petitioner's Response to Respondent's Brief in Support of Motion for Summary Judgment and Counter Motion and Brief in Support of Summary Judgment as Ex. 4.

²¹ Respondent's Brief in Support of Motion for Summary Judgment at 4-5.

²² Petitioner's Response to Respondent's Brief in Support of Motion for Summary Judgment and Counter Motion and Brief in Support of Summary Judgment at 2.

Petitioner further claims that §§ 39-71-611 and -612,²³ MCA (2003), provide for attorneys' fees and costs if the conduct of the insurer is unreasonable. Respondent's actions having been unreasonable, Petitioner concludes, attorneys' fees and costs are warranted in this case.

¶20 Prior to filing his Petition for Trial, Petitioner and his attorney both attempted via numerous telephone calls and letters to get Respondent to pay the medical bills or at a minimum give the medical providers written assurances that Respondent would pay.²⁴

¶21 Respondent admits that it did not correspond with Petitioner's medical providers or pay the bills until after the Petition for Trial was filed.²⁵ Although it concedes there was "some delay" in the payment of the medical bills, Respondent argues that Petitioner cannot establish that a denial of the medical benefits occurred.²⁶

²³ Section 39-71-612, MCA, is the descendant of RCM 92-618 and states in pertinent part:

(1) If an insurer pays or submits a written offer of 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 offered by the insurer, reasonable attorney fees and costs 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.

(2) An award of attorney fees under subsection (1) may be made only if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

²⁴ Petitioner's Response to Respondent's Brief in Support of Motion for Summary Judgment and Counter Motion and Brief in Support of Summary Judgment at 1.

²⁵ Respondent's Responses to Petitioner's First Set of Discovery Requests at 2, attached to Petitioner's Response to Respondent's Brief in Support of Motion for Summary Judgment and Counter Motion and Brief in Support of Summary Judgment as Ex. 3.

²⁶ Respondent's Brief in Support of Motion for Summary Judgment at 4.

¶22 Respondent claims that the law does not recognize a “*de facto denial*” of payment, and draws this Court’s attention to *Galetti*,²⁷ *McNeel*,²⁸ *Cosgrove*,²⁹ and *Yearout*.³⁰ Respondent states that in those cases, even when acceptance of a claim was made on the courthouse steps, attorneys’ fees could not be awarded because of the specific language of the applicable statute. This language, Respondent asserts, has been consistent since 1947 and has required a denial of benefits and a determination from the Workers’ Compensation Court in order for attorneys’ fees to be awarded. Respondent further points out that Petitioner cites no case law in support of his contention that a “*de facto denial*” is a cognizable claim.

¶23 Respondent argues that the Court has consistently required a final adjudication before attorneys’ fees could be awarded. Respondent points out that in *Galetti*, a concession that happened at the commencement of a hearing was not sufficient for the Court to award attorneys’ fees.³¹

¶24 In *Cosgrove*, the defendant insurance company terminated the claimant’s benefits and continued them only after claimant’s attorney filed a lawsuit. A Workers’ Compensation Court Hearing Examiner determined that the applicable statutes did not permit claimant to recover attorneys’ fees. On appeal, claimant’s attorney argued that but for his efforts and the hearing demanded, the claimant would not have been placed back on temporary total compensation, and thus to allow the defendant to escape payment of the attorneys’ fees because it paid benefits only after the lawsuit was filed would defeat the purpose of the statute and the legislative intent behind it. The Montana Supreme Court disagreed, stating, “[w]hatever it was that motivated defendant to resume payment of compensation, it is clear that the Division has no authority to require payment of attorney fees by defendant unless that authority is found within the terms of section 92-616”³²

²⁷ *Galetti v. Montana Power Co.*, 2000 MT 234, 301 Mont. 314, 8 P.3d 812.

²⁸ *McNeel v. Holy Rosary Hosp.*, 228 Mont. 424, 427, 742 P.2d 1020, 1022 (1987).

²⁹ *Cosgrove v. Industrial Indem. Co.*, 170 Mont. 249, 552, P.2d 622 (1976).

³⁰ *Yearout v. Rainbow Painting*, 222 Mont. 65, 719 P.2d 1258 (1986).

³¹ *Galetti*, ¶ 16.

³² *Cosgrove*, 170 Mont. at 253, 552 P.2d at 624. RCM 92-616 (1975) states:

In the event the insurer denies the claim for compensation or terminates compensation benefits, and the claim is later adjudged compensable . . . the insurer shall pay reasonable costs and attorneys’ fees as established by the division.

¶25 Respondent further cites *McNeel*, in which an insurer denied liability, but later agreed to pay temporary total disability benefits and medical expenses provisionally, while not admitting liability and reserving all defenses. The insurer accepted liability on the eve of the hearing, months after the dispute began. *McNeel* moved the Workers' Compensation Court for reasonable attorneys' fees and expenses, which the Court denied based on § 39-71-611, MCA (2003),³³ and the fact that the claim was settled prior to hearing. *McNeel* appealed. The Montana Supreme Court upheld the denial, stating that although *McNeel* had a credible argument and that it would be equitable or fair to pay her attorneys' fees, the law did not allow their award. "If an insurer denies liability for a claim for compensation, the insurer is liable for attorney's fees if the claim is later *adjudged* compensable It is clear from the language of the statute that there must be an adjudication of compensability before an award of attorney's fees is authorized."³⁴

¶26 In *Yearout*, the Court stated a petitioner can only obtain attorneys' fees when there is an adjudication, even though the insurer may not have accepted liability but for the efforts of the workers' compensation attorney. At the start of *Yearout*'s hearing, the State Compensation Insurance Fund (Fund) announced that it was conceding liability and that it would not only pay medical and compensation benefits, but also a twenty percent penalty pursuant to § 39-71-2907, MCA, for unreasonable delay or refusal to pay benefits. *Yearout*'s counsel argued that *Yearout* was also entitled to attorneys' fees; the Fund disagreed. Following further briefing by the parties, the Workers' Compensation Court ruled in favor of the Fund. *Yearout* appealed, arguing that he was forced to file a Petition for Hearing and invoke the power of the Workers' Compensation Judge. In its opinion, the Montana Supreme Court quoted the rationale of the Workers' Compensation Court:

[T]he claimant herein argues that but for counsel's efforts, the defendant would not have accepted liability. The record in this proceeding supports that conclusion. It is clear to the Court that but for counsel's efforts the insurer would not have pursued investigation of this claim. The necessary depositions would not have been taken and the defendant's denial likely would have been unchanged. Yet, reluctantly the Court must agree with the

³³ Section 39-71-611, MCA (2003), is the descendant of RCM 92-616 and states in pertinent part:

- (1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:
 - (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
 - (b) the claim is later adjudged compensable by the workers' compensation court; and
 - (c) in the case of attorney fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

³⁴ *McNeel* (citing *Yearout*), 228 Mont. at 427, 742 P.2d at 1022 (emphasis in original).

defendant that there has been no adjudication which would allow this Court to assess an attorney fee against the insurer.³⁵

¶27 The Montana Supreme Court agreed. Although it further noted that the award of attorneys' fees would be equitable, the Court concluded that without an adjudication of compensability, there could be no award of attorneys' fees pursuant to § 39-71-611, MCA.³⁶

¶28 Petitioner's situation is factually similar to the cases cited by Respondent. Respondent correctly asserts that the case law is clear on this issue, and Petitioner is not entitled to attorneys' fees pursuant to §§ 39-71-611, -612, MCA (2003).

¶29 Alternatively, Petitioner argues that he is entitled to attorneys' fees pursuant to RCM 92-618(1) (1975), which states that if an insurer tenders payment of compensation under Title 92, but controversy relates to the amount of compensation due, and the award is greater than the amount tendered, a reasonable attorneys' fee, based upon the difference between the amount settled for and the amount tendered, may be awarded.

¶30 Petitioner asserts this statute applies when an insurer either fails to pay certain benefits or pays less than the benefit to which a claimant was entitled. Petitioner argues his claim was accepted, multiple demands for medical payments were made, and no payment or explanation for nonpayment was provided. Petitioner summarizes his argument as follows: "RCM 92-618 clearly allows for an attorney fee based solely on the difference between the amount settled for or awarded and the amount paid. Prior to the filing of the petition nothing was paid. After the petition was filed, the settlement amount of \$150,000.00 was paid. Therefore the attorney fee is based on the \$150,000.00 pursuant to RCM 92-618."³⁷

¶31 Respondent responds that under RCM 92-618, there must be a "controversy" in the amount due, the Workers' Compensation Judge must adjudicate the controversy, and the Judge must award more than the insurer paid or offered to pay in order for attorneys' fees to be awarded. In the current case, Respondent argues, the amount was never in controversy, the Judge did not adjudicate, and, therefore, there was no award capable of exceeding the amount the insurer paid.³⁸

¶32 Respondent's argument that no controversy or adjudication occurred is correct. The Court recognizes that, given Respondent's inexplicable delay in paying the medical bills for

³⁵ *Yearout*, 222 Mont. at 67, 719 P.2d at 1259.

³⁶ *Id.*

³⁷ Petitioner's Final Brief in Support of Motion for Summary Judgment and in Opposition to Respondent's Motion and Brief in Support of Summary Judgment at 2. (Emphasis in original.)

³⁸ Reply Brief in Support of Motion for Summary Judgment and in Opposition to Petitioner's Counter Motion and Brief in Support of Summary Judgment at 3.

which it was liable, the failure to award attorneys' fees to Petitioner is an inequitable result. Similar situations have been recognized as such by both this Court and the Montana Supreme Court. However, both Courts have consistently concluded that the denial of attorneys' fees in situations such as the one at bar, inequitable though it may be, is the legally correct result.

¶33 Petitioner noted that RCM 92-618 was commonly referred to as the "five minute rule" by the plaintiffs' bar because it "allowed a plaintiff to file an action within five minutes of a dispute regarding a particular benefit or expense."³⁹ In the present case, however, Petitioner chose to patiently wait six months rather than five minutes. It is, to say the least, tragic and ironic that Petitioner is paying for his patience. While it is generally against public policy to have laws which encourage litigation as a first course of action rather than as a last resort, the statutes at issue in the present case do precisely that. Therefore, this Court has no choice but to grant summary judgment in Respondent's favor on the issue of Petitioner's request for attorneys' fees.

ORDER

¶34 Respondent's motion for partial summary judgment is **GRANTED**.

¶35 Petitioner's request for travel expenses, costs, and attorneys' fees is **DENIED**.

¶36 Petitioner's request for a penalty shall be set for trial. A new Scheduling Order will follow this Order.

DATED in Helena, Montana, this 28th day of February, 2006.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Mr. Steve Fletcher
Ms. Sara R. Sexe

³⁹ Petitioner's Final Brief in Support of Motion for Summary Judgment and in Opposition to Respondent's Motion and Brief in Support of Summary Judgment at 2.