

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 23

WCC No. 2000-0201

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ANN BUSTELL

Petitioner

vs.

AIG CLAIMS SERVICE, INCORPORATED and  
THE INSURANCE COMPANY OF PENNSYLVANIA

Respondents/Insurers.

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FINAL ORDER REGARDING ATTORNEY FEE AWARD, INCLUDING  
APPORTIONMENT TO *LOCKHART* LIEN

**Summary:** The Court previously ordered the insurer to pay \$66,794 in attorney fees. Subsequent to the award, questions arose concerning the allocation of the award and the timing of its payment.

**Held:** Attorney fees awarded against an insurer must be credited *pro rata* against fees due the claimant's attorney both from the claimant and from medical providers subject to *Lockhart* liens. The amount of the credit must be determined by dividing the amount of the attorney fee award by the claimant's estimated lifetime benefits. The resulting percentage is the percentage by which the *Lockhart* lien must be reduced and also the percentage by which the fees owed by the claimant with regard to non-medical benefits must be reduced.

**Topics:**

**Attorney Fees: Allocation of Award.** Attorney fees awarded against an insurer must be credited *pro rata* against fees due the claimant's attorney both from the claimant and from medical providers subject to *Lockhart* liens. The amount of the credit must be determined by dividing the amount of the attorney fee award by the claimant's estimated lifetime benefits. The resulting percentage is the percentage by which the *Lockhart* lien must be reduced and also the percentage by which the fees owed by the claimant with regard to non-medical benefits must be reduced.

**Attorney Fees: Medical Benefits.** Attorney fees awarded against an insurer must be credited *pro rata* against fees due the claimant's attorney both from the claimant and from medical providers subject to *Lockhart* liens. The amount of the credit must be determined by dividing the amount of the attorney fee award by the claimant's estimated lifetime benefits. The resulting percentage is the percentage by which the *Lockhart* lien must be reduced and also the percentage by which the fees owed by the claimant with regard to non-medical benefits must be reduced.

**Attorney Fees: Lien.** Attorney fees awarded against an insurer must be credited *pro rata* against fees due the claimant's attorney both from the claimant and from medical providers subject to *Lockhart* liens. The amount of the credit must be determined by dividing the amount of the attorney fee award by the claimant's estimated lifetime benefits. The resulting percentage is the percentage by which the *Lockhart* lien must be reduced and also the percentage by which the fees owed by the claimant with regard to non-medical benefits must be reduced.

¶1 This Court previously awarded the claimant attorney fees in the total sum of \$66,794. That amount is payable by the insurer and is to be credited by the claimant's attorney against the attorney fees otherwise due him under his attorney fee contract with the claimant.

¶2 Following the award of attorney fees, a question arose concerning what portion of the fees should be credited against the *Lockhart* lien on medical benefits. Medical benefits are payable directly to medical providers, but in *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, 295 Mont. 467, 984 P.2d 744, the Supreme Court held that attorney fees with respect to medical benefits obtained through the efforts of an attorney must be paid out of the medical benefits, thus reducing proportionately the amounts actually payable to medical providers. I previously held that the *Lockhart* lien applies to future as well as past medical benefits. *Bustell v. AIG Claims Service, Inc. and The Insurance Co. of Pennsylvania*, 2003 MTWCC 50.

¶3 The insurer herein denied liability altogether. After trial, this Court held that the claim is compensable and ordered the respondent insurer to pay both indemnity and medical benefits. *Bustell v. AIG Claims Service, Inc. and The Insurance Co. of Pennsylvania*, 2002 MTWCC 26. The difficulty in allocating the attorney fee award against the fees otherwise payable by the claimant and the medical providers arises from the fact that the claimant is permanently totally disabled and will be entitled to both future indemnity and medical benefits.

¶4 As of November 11, 2003, the respondent had paid the following benefits:

<b>BENEFITS RECEIVED AS OF 11/11/2003</b>	
Indemnity Benefits	\$287,985.00
Domiciliary Care	\$156,485.00
Medical Benefits	\$565,743.00
<b>TOTAL</b>	<b>\$1,010,213.00</b>

Based on her estimated life expectancy, the claimant's future entitlement as of November 11, 2003,<sup>1</sup> was projected as follows:

<b>ESTIMATE OF FUTURE BENEFITS AS OF 11/11/2003</b>	
Indemnity Benefits	\$309,359.00
Domiciliary Care	\$4,472,856.00
Medical Benefits	\$1,598,400.00
<b>TOTAL</b>	<b>\$6,380,615.00</b>

Thus, as of November 11, 2003, the claimant's estimated lifetime benefits, which includes both the amounts already received and the estimate of her future entitlement was as follows:

<b>ESTIMATED LIFETIME BENEFITS (Benefits already received plus estimated future benefits)</b>	
Indemnity Benefits	\$597,344.00
Domiciliary Care	\$4,629,341.00
Medical Benefits	\$2,164,143.00

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<sup>1</sup>The future estimate was provided on November 24, 2003; however, no additional benefits had been paid as of the time of the estimate. The estimate was therefore applicable as of November 11, 2003.

<b>TOTAL</b>	\$7,390,828.00
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¶5 As noted earlier, the attorney fee award against the insurer was \$66,794. That award amounts to .90374% of the claimant's projected lifetime benefits ( $\$66,794 \div \$7,390,820$ ), or approximately 9/10 of one cent for every dollar of paid and projected benefits. The attorney fees due the claimant's attorney under his contingent fee agreement with the claimant is 25%. That same percentage applies to medical benefits. *Lockhart, supra*. Thus, the net effect of the attorney fee award against the insurer is to reduce the amount payable by the claimant to her attorney from 25% to 24.09626%. Similarly, the amount of *Lockhart* fees payable out of past and future medical benefits is reduced to 24.09626%. To simplify calculations, the percentage is hereby rounded to 24.1%. The effect of rounding is *de minimus*.

¶6 The award of attorney fees was made on an hourly basis and is not contingent on future benefits payable to the claimant. It is therefore due in full at the present time.

¶7 The award has not yet been paid because the parties have been awaiting the Court's instructions with respect to allocation of the award. The insurer has been withholding 25% from medical benefits and remitting that full 25% to the claimant's attorney. The Court was advised by counsel in a telephone conference held April 28, 2005, that \$5,112.86 of the attorney fees remitted should be credited to the attorney fee award based on the 24.1% formula set forth above. That \$5,112.86 should then be refunded to the medical providers whose benefits were reduced by the 25%.

¶8 Accordingly, the insurer still owes the claimant's attorney \$61,681.14 ( $\$66,794 - \$5,112.86$ ), and will be paying that amount to him shortly. The remaining \$5,112.86 should be refunded to medical providers who have already been paid benefits subject to the 25% reduction for the *Lockhart* lien. The refunds should be in the amount of .9% (25% - 24.1%). Thus, a provider who received \$75 out of \$100 owed it in benefits, the other \$25 being withheld and paid over to the claimant's attorney, would be entitled to a \$0.90 refund. The total of such payments should equal \$5,112.86 unless there are accounting errors in the figures furnished to the Court. If accounting errors are discovered later on, the parties will advise the Court and adjustments can be made at that time.

¶9 In accordance with this decision, the lien on future medical payments is reduced to 24.1%, which amount shall be withheld by the insurer and paid over to the claimant's attorney. I make no provision for increasing the percentage should future medical benefits exceed the present estimate. I do not do so because the claimant's attorney will presently receive .9% with respect to estimated future medical benefits. That current payment should offset any future loss of fees respecting medical benefits which exceed the current estimate.

¶10 Finally, assuming the attorney fees the claimant has paid to her attorney have been at the 25% rate provided by the fee agreement, the claimant is entitled to a .9% refund of those fees. Future attorney fees will be payable at 24.1%. In the event that her future indemnity benefits exceed the present estimate, then the rate shall increase back to the 25% once the estimate is exceeded.

DATED in Helena, Montana, this 3<sup>rd</sup> day of May, 2005.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. Paul E. Toennis  
Mr. Donald R. Herndon  
Submitted: April 26, 2005