IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2008 MTWCC 14

WCC No. 2005-1389

ROBIN DILDINE

Petitioner

vs.

LIBERTY NORTHWEST INSURANCE CORPORATION

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND DENYING RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Appealed to the Montana Supreme Court April 15, 2008

Summary: Petitioner moved the Court for summary judgment on the issue of her attorney's entitlement to a 20% fee on medical benefits pursuant to a *Lockhart* lien. Respondent cross-motioned for summary judgment, arguing that Petitioner's attorney was not entitled to the *Lockhart* fee because the attorney's efforts were not the cause of its acceptance of liability. Respondent further argued that this Court lacked jurisdiction to decide the issue of *Lockhart* liens in light of Justice Nelson's concurring opinion to the Montana Supreme Court's ruling in *Pinnow v. Montana State Fund.*

Held: Petitioner's motion is granted. As recently reiterated by the Montana Supreme Court in its majority opinion in *Pinnow v. Montana State Fund,* this Court has jurisdiction to decide disputes concerning attorney fees. Petitioner's attorney is entitled to a *Lockhart* fee because the Court finds that his efforts led to Respondent's acceptance of Petitioner's claim.

¶ 1 Petitioner moves the Court for summary judgment, arguing that her attorney, James G. Edmiston, is entitled to the 20% *Lockhart* fee currently being withheld by Respondent Liberty Northwest Insurance Corporation. Petitioner argues that pursuant to the Attorney Retainer Agreement approved by the Department of Labor and Industry, Edmiston has a lien which attaches to all compensation, including medical benefits,

pursuant to the Montana Supreme Court's decisions in *Lockhart v. New Hampshire Ins. Co.*[1] and *Kelleher Law Office v. State Compensation Ins. Fund.*[2]

¶ 2 Respondent cross-moves for summary judgment on two grounds. First, Respondent argues that Edmiston is not entitled to a *Lockhart* fee because Respondent conceded liability in this case based upon a decision issued by this Court after Respondent's initial denial rather than due to any efforts by Edmiston. Second, Respondent argues that this Court lacks jurisdiction to decide the attorney fees issue. Because this Court must have jurisdiction in order to decide the attorney fees dispute, I address the jurisdictional question first.

Issue 1: Whether this Court has jurisdiction to decide a dispute concerning *Lockhart* attorney fees.

¶ 3 Respondent argues that pursuant to the Montana Supreme Court's recent decision in *Pinnow v. Montana State Fund,*[3] this Court lacks jurisdiction to decide a dispute concerning an attorney's *Lockhart* lien. In *Pinnow,* the Supreme Court reaffirmed its earlier holding in *Kelleher* that payment of attorney's fees and related costs falls within this Court's jurisdictional grant contained in § 39-71-2905, MCA. In so holding, the Supreme Court then remanded the case back to this Court to "hear and decide the question of [the claimant's former attorney's] entitlement to the attorney's fees . . . ."[4]

¶ 4 Notwithstanding the majority's decision in *Pinnow*, Respondent points out that in his concurring opinion, Justice Nelson, joined by Chief Justice Gray and Justice Rice, "dispute the validity of the *Kelleher* rule on which *Lockhart* turned."[5] Respondent's point is well-taken insofar as it goes. However, in advancing its argument, Respondent ignores a fundamental rule of jurisprudence – when deciding which opinion to follow, the one with the most signatures at the end wins.

¶ 5 It is not this Court's prerogative to overrule the Montana Supreme Court. Therefore, pursuant to the current law as set forth in *Kelleher,* and reaffirmed most recently by the

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[1] *Lockhart*, 1999 MT 205, 295 Mont. 467, 984 P.2d 744.

[2] *Kelleher*, 213 Mont. 412, 691 P.2d 823 (1984).

[3] *Pinnow*, 2007 MT 332, 340 Mont. 217, 172 P.3d 1273.

[4] *Pinnow*, ¶ 35.

[5] [Respondent's] Supplemental Brief at 4.

Supreme Court in *Pinnow*, I conclude that this Court has jurisdiction to decide a dispute regarding *Lockhart* attorney fees.

Issue 2: Whether Petitioner's attorney is entitled to a 20% *Lockhart* fee on medical benefits paid on Petitioner's first claim.

SUMMARY JUDGMENT

¶ 6 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[6] The parties in this matter have filed a Statement of Stipulated Facts with attached exhibits for the Court's consideration of these motions. The facts set forth in the stipulation are sufficient for summary disposition of this matter.

STIPULATED FACTS[7]

¶ 7 Petitioner is employed by Hospital Laundry Services (HLS) in Billings, Montana, as a laundry worker. HLS was enrolled under Compensation Plan II of the Montana Workers' Compensation Act and its insurer is Respondent.

¶ 8 On March 10, 2005, a "Montana First Report of Injury" was filed on Petitioner's behalf by her employer. The "accident description" provided: "Robin L. Dildine has pain in her left shoulder that has been going on for a while, but it has gotten worse. The repetitive use of her arm and muscles has caused tears in the rottary cup [sic] area of her left arm."

¶ 9 Respondent denied Petitioner's claim by letter dated March 31, 2005, from Respondent's adjuster Chris Helmer to Petitioner.

¶ 10 Petitioner filed for mediation, pro sé, and a mediation conference was held on June 7, 2005.

¶ 11 Petitioner retained Billings attorney Paul Toennis to represent her on June 13, 2005, and his Attorney Retainer Agreement was approved by the Department of Labor on June 20, 2005.

¶ 12 Petitioner retained Edmiston to represent her on August 17, 2005.

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

[7] Statement of Stipulated Facts, Docket Item No. 13.

¶ 13 Edmiston sent an initial letter to Helmer dated August 17, 2005. Enclosed with the initial letter was another claim for compensation for Petitioner's "left shoulder, low back, CTS" as a result of a "repetitive injury."

¶ 14 Helmer replied by letter on August 18, 2005. A second letter was also sent on the same day.

¶ 15 Edmiston replied to Helmer on August 19, 2005.

¶ 16 Toennis withdrew as counsel for Petitioner by letter dated August 23, 2005.

¶ 17 Edmiston filed a Petition for Hearing with the Workers' Compensation Court on Petitioner's behalf, dated August 24, 2005.

¶ 18 Edmiston sent a letter on September 12, 2005, to Respondent regarding the applicability of a *Lockhart* lien.

¶ 19 On September 13, 2005, Respondent accepted liability for Petitioner's claim, stating that its decision was based on discussions between Respondent's counsel and its claims adjuster, Helmer, and in light of this Court's decision in *Mack.*[8]

DISCUSSION

¶ 20 Petitioner argues that her attorney is entitled to the 20% *Lockhart* fee currently being withheld by Respondent because the Attorney Retainer Agreement approved by the Department of Labor and Industry on August 19, 2005, provides for an attorney fee to be applied to all monies, including medical benefits, obtained for the claimant through the efforts of her attorney. Respondent replies that Edmiston is not entitled to the 20% *Lockhart* fee because Respondent ultimately accepted the claim due to this Court's decision in *Mack v. Montana State Fund,*[9] and not due to any efforts by Edmiston.

¶ 21 The Court begins its analysis of Issue #2 by looking to the bedrock case involving attorney fees and medical benefits in Montana. In *Lockhart v. New Hampshire Ins. Co.,* the Supreme Court concluded that, "There is no question that an attorney representing an injured claimant is entitled to collect an attorney fee based upon the amount of disputed medical benefits ultimately paid by the insurer."[10] The Supreme Court held that this

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[8] Ex. 13 to Statement of Stipulated Facts.

[9] *Mack*, 2005 MTWCC 48.

[10] *Lockhart*, 1999 MT 205, ¶ 26, 295 Mont. 467, 984 P.2d 744.

conclusion was based on the approved Attorney Retainer Agreement, drafted by the Department of Labor and Industry.[11]

¶ 22 Given the Supreme Court's guidance in *Lockhart,* I look to Petitioner's Attorney Retainer Agreement, which provides as follows:

> If the insurer has denied liability, the attorney fee shall apply to all monies, including medical benefits, obtained for the claimant through the efforts of the attorney.
>
> The following benefits shall not be considered as a basis for calculation of attorney fees:
>
> (1) The amount of medical and hospital benefits received by the claimant, unless the workers' compensation insurer has denied all liability, including medical and hospital benefits, 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.
>
> (2) Benefits received by the claimant with the assistance of the attorney in filling out initial claim forms only.
>
> (3) Any undisputed portion of impairment benefits received by the claimant based on an impairment rating.
>
> (4) Benefits initiated or offered by the insurer when such initiation or offer is supported by documentation in the claimant's file and has not been the subject of a dispute with the claimant.
>
> (5) Any other benefits not obtained due to the actual, reasonable and necessary efforts of the attorney.[12]

¶ 23 In *Montana Contractor Compensation Fund v. Liberty Northwest Ins. Corp. Re: Rusco*[13] (*Rusco),* this Court found that a claimant's attorney was not entitled to a *Lockhart* fee when the attorney filed a claim in a case in which it was not disputed that one of two

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[11] *Id.*

[12] Ex. 3 to Statement of Stipulated Facts.

[13] *Montana Contractor Compensation Fund v. Liberty Northwest Ins. Corp.,* 2003 MTWCC 54, ¶ 24.

insurers would ultimately be liable for benefits.[14] In finding that the claimant's attorney was not entitled to a *Lockhart* fee, this Court noted that the attorney simply directed the claimant to the proper insurer and the Court was "not persuaded that the contribution of the claimant's attorneys was anything more than initiating a process which resulted in notifying [one of the insurers] . . . and setting in motion a claim investigation necessary to determine liability and the benefits due claimant."[15]

¶ 24 Respondent argues that, "While *Lockhart* anchors down the trial and judgment end of the spectrum making clear when it is undeniable that a *Lockhart* lien has been perfected, *Rusco* anchors down the other side of the spectrum showing when it has not."[16] To the extent that Respondent argues that *Rusco* sets the floor for when a *Lockhart* lien may not be asserted, Respondent's point is well-taken. However, the chronology of events in this case to which both parties have stipulated simply is not analogous to *Rusco.*

¶ 25 This Court issued its decision in *Mack* on August 12, 2005. On August 17, 2005, Petitioner's counsel, Edmiston, wrote to Respondent's senior case manager, Helmer, and advised Helmer of his representation of Petitioner on her shoulder claim. Edmiston also advised Helmer of his representation of Petitioner on an occupational disease claim for her low back and carpal tunnel syndrome.[17] Edmiston requested that Respondent reconsider its earlier denial of Petitioner's shoulder claim. Helmer responded to Edmiston's letter on August 18, 2005. Helmer advised that, with respect to Petitioner's shoulder claim, the matter had been mediated and could proceed to this Court. Edmiston then filed a Petition for Hearing on August 25, 2005, requesting, *inter alia*, that Respondent be ordered to accept liability for Petitioner's claim. Respondent ultimately accepted liability for Petitioner's claim on September 13, 2005.

¶ 26 Unlike *Rusco*, it is clear that the efforts put forth by Edmiston in this case were more than simply "initiating the process" or filling out the initial claim forms. After being retained by Petitioner, Edmiston contacted Respondent's case manager and requested that Respondent reconsider its denial of liability. Respondent responded by continuing to deny liability and advised Edmiston that Petitioner's claim "can proceed to the Work Comp

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[14] *Id.*

[15] *Id.*

[16] Liberty's Cross Motion for Summary Judgment and Supporting Brief and Brief in Opposition to Petitioner's Motion at 4.

[17] Although the parties make reference to Petitioner's second occupational disease claim in the briefing of these cross-motions, Petitioner's second claim is not before this Court. Therefore, this Order confines itself to addressing Petitioner's shoulder claim only.

Court."[18] Effectively, Respondent told Edmiston to take it to court. Edmiston obliged and now Respondent argues to this Court that these efforts should not be compensated.

¶ 27 In *Lockhart*, the Supreme Court held: "There is no question that an attorney representing an injured claimant is entitled to collect an attorney fee based upon the amount of disputed medical benefits ultimately paid by the insurer."[19] In the present case, it is not disputed that, at the time Edmiston was retained by Petitioner, Respondent was denying **all** liability for Petitioner's shoulder claim. It is not disputed that Respondent continued to deny liability even after Edmiston was retained and requested that Respondent reconsider its earlier denial. It is not disputed that, because of Respondent's continued denial, Edmiston had to file a petition in this Court. Consistent with the Supreme Court's holding in *Lockhart* and the Attorney Retainer Agreement to which both Edmiston and Petitioner entered, therefore, Edmiston's efforts entitle him to a fee on the medical benefits paid.

JUDGMENT

¶ 28 This Court has jurisdiction to decide the issue of Petitioner's attorney's right to a *Lockhart* fee.

¶ 29 Petitioner's attorney is entitled to the 20% *Lockhart* fee currently being withheld by Respondent.

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

DATED in Helena, Montana, this 27th day of March, 2008.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: James G. Edmiston
Larry W. Jones
Submitted: January 8, 2008

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[18] Ex. 8 to Statement of Stipulated Facts.

[19] *Lockhart*, ¶ 25.