

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 28

WCC No. 9806-7991

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GARY GALETTI

Petitioner

vs.

MONTANA POWER COMPANY

Respondent/Insurer/Employer.

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ORDER DENYING MOTION TO AMEND EXCEPT AS TO COSTS

¶1 On February 4, 1999, the Court entered its Findings of Fact, Conclusions of Law and Judgment in this matter. Petitioner (claimant) moves to amend them. The motion is **denied** except as to costs.

Discussion

¶2 The Court's prior decision is found at 1999 MTWCC 11 and a copy can be retrieved from the Court's WEB site [[http://jsd.dli.mt.gov/work\\_comp/table1.htm](http://jsd.dli.mt.gov/work_comp/table1.htm)].

¶3 Claimant urges that the Court erred in failing to award attorney fees, in failing to apply a 20% penalty to the full amount of approximately \$10,000 in medical benefits, and in failing to award costs.

I. Attorney Fees

¶4 In denying attorney fees, the Court applied section 39-71-611, MCA (1983), and the case law thereunder. Petitioner urges that section 39-71-612, MCA (1983), should be applied since MPC made a settlement offer. The offer, however, was on a non-acceptance basis; MPC never acknowledged that anything was due claimant.

¶5 Section 39-71-612, MCA (1983), provides for attorney fees based on the difference of the amount tendered or paid by the insurer and the amount ultimately received in settlement or ordered by the Court **but only** where the "controversy relates to the amount

of compensation due.” The section provides:

**39-71-612. Costs and attorneys' fees payable based on difference between amount paid by insurer and amount later found compensable.** (1) If an employer or insurer pays or tenders payment of compensation under chapter 71 or 72 of this title, **but controversy relates to the amount of compensation due** and the settlement or award is greater than the amount paid or tendered by the employer or insurer, a reasonable attorney's fee as established by the division or the workers' compensation judge if the case has gone to a hearing, based solely upon the difference between the amount settled for or awarded and the amount tendered or paid, may be awarded in addition to the amount of compensation. [Emphasis added.]

The controversy in this case did not relate to the amount due. MPC denied owing anything. The section is inapplicable and section 39-71-611, MCA (1983), applies instead. *Allen v. Treasure State Plumbing*, 246 Mont. 105, 111, 803 P.2d 644, 647 (1990). *Madill v. State Compensation Fund*, cited by claimant in support of his attorney fee claim, was decided under section 39-71-612, MCA, and is inapposite.

¶6 Claimant further argues that he is entitled to attorney fees even under section 39-71-611, MCA, since he prevailed with respect to his claim for medical benefits. As the Court noted in its prior decision, adjudication of the claim for medical benefits was unnecessary since MPC conceded liability for the benefits at the commencement at trial. The situation is identical to that in *Yearout v. Rainbow Painting*, 222 Mont. 65, 719 P.2d 1258 (1986), which the Court cited in its original decision but which petitioner has conveniently ignored in his supporting brief. In *Yearout*, as in this case, the insurer conceded liability at the commencement of trial and attorney fees were denied. Petitioner's argument that the Court made an adjudication is incorrect. The Court merely ascertained the scope of MPC's concession, specifically whether MPC was conceding that an internal accounting adjustment should be made as between its medical benefits and workers' compensation accounts.

## II. Penalty

¶7 Premised on language in the penalty statute requiring that the penalty be applied to the “full amount of compensation benefits due”, § 39-71-2907, MCA (1983), claimant argues that the Court erred in failing to award a penalty with respect to the “full amount” of medical expenses. His argument is without merit. MPC paid all but a small portion of claimant's medical expenses. Although payment was out of funds internally allocated by MPC for general medical benefits, to the extent that the funds were furnished by MPC rather than its employees, it discharged its obligation to pay claimant's medical expenses.

### III. Costs

¶8 The Court did overlook costs. Claimant prevailed with regard to the penalty and he is entitled to costs with respect to that issue.

### ORDER

¶9 Claimant is entitled to costs with respect to the penalty and shall submit a memorandum of costs in accordance with Court rules. Petitioner's Motion to Amend Is Otherwise **denied**.

DATED in Helena, Montana, this 19<sup>th</sup> day of April, 1999.

(SEAL)

Mike McCarter  
JUDGE

c: Mr. Chris J. Ragar  
Mr. W. Wayne Harper  
Date Submitted: March 25, 1999