

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 92

WCC No. 9403-7030

VERNON L. INGEBRETSON

Petitioner

vs.

LOUISIANA-PACIFIC CORPORATION

Respondent/Insurer/Employer.

ORDER GRANTING ATTORNEY FEES AND COSTS

Summary: On several grounds, respondent disputed amount of attorney fees sought by claimant after Worker's Compensation Court's finding of unreasonable failure to pay TTD benefits was affirmed on appeal.

Held: (1) Claimant's first attorney was entitled to fees even though representation was later assumed by other attorneys where the first attorney's work contributed to claimant's success and there is no allegation of duplicated effort. (2) Under section 39-71-614, MCA (1991), and regulations adopted by the Department of Labor and Industry, the maximum recovery for attorneys fees is \$75. (3) Where ARM 24.29.3802(2) provides that an attorney representing a workers' compensation claimant shall submit a written attorney fee agreement to the DOL "within thirty days of undertaking representation of the claimant," no recovery is allowed for work performed more than 30 days prior to execution and submission of the fee agreement. (4) Claimant's attorneys were entitled to fees for the time spent in pursuing attorneys fees prior to remand of the case by the Supreme Court where that same effort went toward proving entitlement to a penalty, but fees were not allowed for time spent post-remand in establishing the amount of fees to be awarded by the Court.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-614, MCA (1991). Claimant's first attorney was entitled to fees even though representation was later assumed by other attorneys where the first

attorney's work contributed to claimant's success and there is no allegation of duplicated effort.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-614, MCA (1991). Under section 39-71-614, MCA (1991), and regulations adopted by the Department of Labor and Industry, the maximum recovery for attorneys fees is \$75.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-614, MCA (1991). Where ARM 24.29.3802(2) provides that an attorney representing a workers' compensation claimant shall submit a written attorney fee agreement to the DOL "within thirty days of undertaking representation of the claimant," no recovery is allowed for work performed more than 30 days prior to execution and submission of the fee agreement.

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-614, MCA (1991). Claimant's attorneys were entitled to fees for the time spent in pursuing attorneys fees prior to remand of the case by the Supreme Court where that same effort went toward proving entitlement to a penalty, but fees were not allowed for time spent post-remand in establishing the amount of fees to be awarded by the Court.

Constitutions, Statutes, Regulations and Rules: Administrative Regulations (non-Workers' Compensation Court). Where ARM 24.29.3802(2) provides that an attorney representing a workers' compensation claimant shall submit a written attorney fee agreement to the DOL "within thirty days of undertaking representation of the claimant," no recovery is allowed for work performed more than 30 days prior to execution and submission of the fee agreement.

Attorney Fees: Amount. Under section 39-71-614, MCA (1991), and regulations adopted by the Department of Labor and Industry, the maximum recovery for attorneys fees is \$75.

Attorney Fees: Cases Awarded. Claimant's first attorney was entitled to fees even though representation was later assumed by other attorneys where the first attorney's work contributed to claimant's success and there is no allegation of duplicated effort.

Attorney Fees: Cases Awarded. Claimant's attorneys were entitled to fees for the time spent in pursuing attorneys fees prior to remand of the case by the Supreme Court where that same effort went toward proving entitlement to a penalty, but fees

were not allowed for time spent post-remand in establishing the amount of fees to be awarded by the Court.

Attorney Fees: Fee Agreement. Where ARM 24.29.3802(2) provides that an attorney representing a workers' compensation claimant shall submit a written attorney fee agreement to the DOL "within thirty days of undertaking representation of the claimant," no recovery is allowed for work performed more than 30 days prior to execution and submission of the fee agreement.

In its Findings of Fact, Conclusions of Law and Judgment issued December 14, 1994, this Court determined that claimant is entitled to reasonable attorney fees and costs in an amount to be determined at a later time. The basis of this finding is set forth in Conclusion of Law 5, as follows:

5. The Occupational Disease Act provides that the practice and procedures prescribed in the Workers' Compensation Act apply to occupational disease claims. § 39-72-402(1), MCA. Section 39-71-611, MCA, provides:

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 attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

Since LP was unreasonable in refusing to pay claimant temporary total disability benefits after his termination, claimant is entitled to attorney fees and costs.

Before this Court could fix the amount of attorney fees and costs, Louisiana-Pacific (L-P) appealed. On August 10, 1995, the Supreme Court affirmed this Court's decision, including the award of attorney fees and costs. We must now determine the amount of attorney fees and costs due claimant.

Claimant's attorneys submitted an Affidavit for Fees and Costs on August 28, 1995. They state that their usual and customary fee is \$100.00 per hour, but request payment at an enhanced hourly rate of \$200.00 per hour. (*Id.* at 5) They also submitted (1) an itemized statement for a total of 157.05 hours spent in the case (*Id.*, Ex. A), (2) an attorney

fee statement in the amount of \$1,800.00 for prior services rendered by David W. Harman (Affidavit in Support of Attorney Fees), and (3) costs in the amount of \$112.43 (Affidavit for Fees and Costs at 5).

L-P does not dispute the costs but does dispute the amount of attorney fees sought by claimant. It contests several aspects of the attorney fee claim. First, it resists payment of the fees of claimant's prior attorney, David W. Harman. Next it contests the rate charged by claimant's current attorneys. Third, it contends that hours worked prior to execution of a written attorney fee agreement should be disregarded. Finally, it argues that attorney fees should not be awarded with respect to time spent pursuing attorney fees. (Louisiana-pacific Corporation's Objections to Petitioner's Claimed Costs and Attorney Fees.) No hearing was requested and the dispute has been submitted for decision on the parties' briefs.

1. Mr. Harman's fees

Claimant was initially represented by David W. Harman. Harman has submitted an affidavit itemizing 24 hours of work at a rate of \$75 an hour for a total of \$1,800. He states that he represented claimant under an attorney fee agreement approved by the Department of Labor. He represented claimant in initial communications with L-P and through the mediation process. Claimant's present attorneys, the law firm of McGarvey, Heberling, Sullivan and McGarvey, then took over representation of claimant.

L-P argues that Harman's voluntary resignation from the case "should be deemed a forfeiture of his claim for attorney fees against L-P." (Louisiana-pacific Corporation's Objections to Petitioner's Claimed Costs and Attorney Fees at 8.) It cites no authority and provides no logical explanation for its position. It does not argue that Harman's services duplicated the later services of the McGarvey firm, nor that his hours and charges were unreasonable.

Harman handled the first phase of claimant's case through mediation; the McGarvey firm took over and handled the actual litigation. His services were pursuant to an approved written agreement. His work contributed to the claimant's ultimate success and his fee is properly assessed against L-P.

2. Hourly rate

L-P argues that the hourly rate for attorney fees is limited to \$75 an hour. The Court agrees.

The law in effect at the time of the injury govern the award of attorney fees. *Caldwell v. Great Western Sugar Co.*, 229 Mont. 448, 746 P.2d 627 (1987). Claimant submitted his

occupational disease claim on June 2, 1993, and the 1991 attorney fee provisions therefore apply. The calculation of attorney fees is governed by section 39-71-614, MCA (1991), which provides:

39-71-614. Calculation of attorney fees -- limitation. (1) The amount of an attorney's fee assessed against an insurer under 39-71-611 or 39-71-612 must be based exclusively on the time spent by the attorney in representing the claimant on the issues brought to hearing. The attorney must document the time spent, but the judge is not bound by the documentation submitted.

(2) The judge shall determine a reasonable attorney fee and assess costs. The hourly rate applied to the time spent must be based on the attorney's customary and current hourly rate for legal work performed in this state, **subject to a maximum established by the department.**

(3) This section does not restrict a claimant and an attorney from entering into a contingency fee arrangement under which the attorney receives a percentage of the amount of compensation payments received by the claimant because of the efforts of the attorney. However, an amount equal to any fee and costs assessed against an insurer under 39-71-611 or 39-71-612 and this section must be deducted from the fee an attorney is entitled to from the claimant under a contingency fee arrangement. [Emphasis added.]

Section 39-71-613, MCA (1991), authorized the Department of Labor and Industry to regulate attorney fees. Thus, any award must be calculated by multiplying the hours worked by the attorneys by either the attorneys' customary and current hourly rate or "a maximum established by the department," whichever is lesser. § 39-71-614(2), MCA.

Claimant's attorneys work principally on a contingent fee basis. They acknowledge that they charge \$100 an hour for the small amount of hourly work they do. Nonetheless, they argue that for a "high risk" situation such as presented in this case, they should be allowed \$200 an hour. Their argument is without merit. The \$100 an hour they charge to clients they represent on an hourly basis constitutes their customary and current hourly rate.

Moreover, the \$100 an hour rate exceeds the \$75 maximum established by the Department. The \$75 maximum was adopted in 1988 (1988 MAR at 2390), and is set forth in ARM 24.29.3802, which provides in relevant part:

24.29.3802 ATTORNEY FEE REGULATION (1) This rule is promulgated under the authority of 39-71-203 and 39-71-613, MCA, to implement

regulation of the fees charged to claimants by attorneys in workers' compensation cases as provided in 39-71-613, MCA.

(2) An attorney representing a claimant on a workers' compensation claim shall submit to the division within thirty days of undertaking representation of the claimant, in accordance with 39-71-613, MCA, on forms supplied by the division, a contract of employment stating specifically the terms of the fee arrangement. An attorney substituting for another attorney previously representing a claimant must submit a new contract conforming with this rule within thirty days of undertaking representation of the claimant.

...

(4) The fee schedule set forth in subsection (3) [contingent percentage fee arrangement] does not preclude the use of other attorney fee arrangements, such as the use of a fee system based on time at a reasonable hourly rate **not exceeding \$75.00 per hour**, but the total fee charged may not exceed the schedule set forth in subsection (3) except as provided in subsection (7). When such fee arrangement is utilized, the contract of employment shall specifically set forth the fee arrangement, such as the amount charged per hour. [Emphasis added.]

(7) For good cause shown, **the division** may approve a variance providing for fees in excess of the guidelines of fees as set forth in subsections (3) and (4). [Emphasis added.]

While the Department cited section 39-71-613, MCA, rather than 39-71-614, MCA, as the basis for its rule, that citation does not preclude application of the \$75 maximum to attorney fees awarded under section 39-71-614, MCA. The latter section only states that the Court is bound by any maximum the Department sets. Section 39-71-613, MCA, broadly authorizes the Department to adopt rules regulating attorney fees, so that section is the statutory source of its regulatory authority over attorney fees and was properly cited by the Department when adopting its rule. Thus, the Department has adopted a maximum hourly fee. Pursuant to section 39-71-614, MCA, the award of attorney fees by the Court is limited to that cap.

Claimant's citations to three Supreme Court decisions as authority for the Court to disregard the \$75 cap are inapposite. The three cases -- *Meidinger v. Western Energy Co.*, 254 Mont. 18, 834 P.2d 1382, (1992), *Bowen v. Super Value Stores*, 229 Mont. 84, 745 P.2d 330 (1987) and *Davis v. Jones*, 229 Mont. 158, 745 P.2d 362 (1987) -- apply to pre-1987 attorney fee provisions. Those pre-1987 provisions contained no similar restriction on the Court's authority to determine the amount of attorney fees, and the Supreme Court properly held that the Department could not unilaterally restrict the Court's power to make attorney fee determinations. The attorney fee provisions were amended

in 1987, and specifically precluded the Court from awarding attorney fees based on hourly rates which exceed the maximum hourly rate fixed by the Department. Claimant's attorneys are therefore limited to \$75 an hour.

3. Hours billed prior to execution of attorney fee agreement

ARM 24.29.3802(2) provides that an attorney representing a claimant shall submit a written attorney fee agreement to the Department "within thirty days of undertaking representation of the claimant" The fee agreement between claimant and the McGarvey firm, a copy of which is attached to the Affidavit for Fees and Costs, was executed and submitted to the Department on March 24, 1994. The Department's date stamp indicates it was received March 28, 1994.

In light of the 30-day submission requirement, no fees will be allowed for work performed more than 30 days prior to the execution and submission of agreement. Therefore, all fees on work performed prior to February 22, 1994, amounting to 2.8 hours, are disallowed.

4. Time spent pursuing attorney fees

L-P argues that the claimant is not entitled to attorney fees for the time spent in preparing the claim for attorney fees and costs before the Court. Some of the objectionable time was spent before remand and some after.

Claimant's attorneys may recover for time spent addressing the attorney fee issue prior to remand. To prove entitlement to attorney fees, they were required to prove unreasonableness on the part of L-P. That same proof also established claimant's entitlement to a penalty.

However, claimant's attorneys are not entitled to fees for time spent to establish the amount that should be awarded by the Court. See *Baeta v. Don Tripp Trucking*, 254 Mont. 487, 489, 493, 839 P.2d 566, 567, 569 (1992). The time summary submitted by claimant's attorneys show that since remand they have expended 6.25 hours pursuing attorney fees.¹ These hours will be excluded accordingly.

5. Calculation of attorney fees

The summary of hours submitted by the McGarvey firm shows 157.05 total hours expended in this case. L-P does not contend that the hours expended were unreasonable.

¹This time does not include any time they may have spent in replying to L-P's objections.

However, pursuant to the foregoing discussion, 2.8 and 6.25 hours must be excluded, leaving 148 hours. The 148 hours multiplied by \$75 an hour yields attorney fees of \$11,100 for work by the McGarvey firm. As previously determined, an additional \$1,800 must be awarded for Mr. Harman's work.

ORDER

IT IS HEREBY ORDERED that the insurer pay costs in the amount of \$112.43, attorney fees in the amount of \$11,100.00 to the McGarvey, Heberling, Sullivan and McGarvey Law Firm and attorney fees in the amount of \$1,800.00 to David W. Harman.

This Order is certified as final for purposes of appeal.

Dated in Helena, Montana, this 6th day of November, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Jon L. Heberling
Mr. Jerry W. Schuster
Mr. David W. Harman - Courtesy Copy
Submitted: October 10, 1995