

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 14

WCC No. 9801-8077

KELLY PATTEE

Petitioner

vs.

TWIN CITY FIRE INSURANCE COMPANY

Respondent/Insurer for

BEST PRODUCTS, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: During settlement conference, insurer was aware of claimant's extreme distress over delays in receipt of her benefits. The parties agreed on a structured settlement, with the first payment to be made within a week of entry of a stipulated judgment. The adjuster requested issuance of the request, but the request was delayed within the insurer's hierarchy. Claimant did not receive the first settlement check until nearly three weeks after entry of judgment. Claimant requests a penalty and attorneys fees for unreasonable delay in payment of benefits.

Held: Where insurer agreed to send settlement checks within one week, but took three weeks, there was unreasonable delay. Claimant was not entitled to attorneys fees under section 39-71-611, MCA (1991), however, because that section requires unreasonable denial or termination of benefits, which did not occur in this matter.

Topics:

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Section 39-71-611, MCA (1991). Where insurer agreed to send settlement checks within one week, but took three weeks, there was unreasonable delay. Claimant was not entitled to attorneys

fees under section 39-71-611, MCA (1991), however, because that section requires unreasonable denial or termination of benefits, which did not occur in this matter.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Section 39-71-2907, MCA (1991). Where insurer agreed to send settlement checks within one week, and adjuster knew claimant was already emotionally distraught over delays in receiving benefits, the insurer's failure to get settlement checks to claimant's attorney until two weeks after due date constituted unreasonable delay. Twenty-percent penalty imposed on \$20,000 insurer check insurer was to pay jointly to claimant and her attorney and \$13,250 check insurer was to pay to claimant's attorney where money to attorney was still benefits, not attorneys fees ordered by the Court.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: Section 39-71-612, MCA (1991). Where insurer agreed to send settlement checks within one week, but took three weeks, there was unreasonable delay. Claimant was not entitled to attorneys fees under section 39-71-612, MCA (1991), however, because that section requires a dispute over the amount of compensation due, which did not occur in this matter.

Attorney Fees: Unreasonable Denial or Delay of Benefits. Where insurer agreed to send settlement checks within one week, but took three weeks, there was unreasonable delay. Claimant was not entitled to attorneys fees under section 39-71-611, MCA (1991), however, because that section requires unreasonable denial or termination of benefits, which did not occur in this matter. Claimant was also not entitled to attorneys fees under section 39-71-612, MCA (1991) because that section requires a dispute over the amount of compensation due.

Penalties: Insurers. Where insurer agreed to send settlement checks within one week, and adjuster knew claimant was already emotionally distraught over delays in receiving benefits, the insurer's failure to get settlement checks to claimant's attorney until two weeks after due date constituted unreasonable delay. Twenty-percent penalty imposed on \$20,000 insurer check insurer was to pay jointly to claimant and her attorney and \$13,250 check insurer was to pay to claimant's attorney where money to attorney was still benefits, not attorneys fees ordered by the Court.

¶1 The trial in this matter was held on February 2, 1999, in Billings, Montana. Petitioner, Kelly Pattee (claimant), was present and represented by Mr. James G. Edmiston, III. Respondent, Twin City Fire Insurance Company(Twin City), was represented by Mr. William O. Bronson. No transcript of the trial has been prepared.

¶2 Exhibits Exhibits 1 through 10 were admitted without objection.

¶3 Witnesses and Deposition: Claimant and Linda Slavik were sworn and testified. In addition, the parties submitted the deposition of Lindell L. Gumper, Ph.D., which was taken in a prior proceeding between the parties, *Pattee v. Twin City Fire Insurance*, WCC No. 9801-7894. The deposition was offered as background to claimant's and Ms. Slavik's testimony.

¶4 Issues Presented: As set forth in the Pre-trial Order, the following issues are presented for decision:

1. Whether Petitioner is entitled to an award of the twenty (20%) percent penalty.

2. Whether Petitioner is entitled to an award of attorney fees and costs pursuant to Sections 39-71-611/612, MCA (1991).

¶5 Having considered the Pre-trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the parties' arguments, the Court makes the following:

FINDINGS OF FACT

¶6 Claimant suffered an industrial injury on or about March 16,1993. (Ex. 7.) At that time Twin City provided coverage for claimant's employer. Twin City admitted liability and paid claimant medical and compensation benefits.

¶7 In **January 1998 the** claimant petitioned the Court for further benefits. *Pattee v. Twin City Fire Insurance*, WCC No. 9801-7894.

¶8 On September 24, 1998, a settlement conference was conducted by the Court's hearing examiner, Ms. Clarice V. Beck. Petitioner was present and represented by her current attorney. Twin City's claims adjuster, Linda Slavik (Slavik), was present, as was Twin City's current attorney.

¶9 At the time of the settlement conference, Slavik was already aware, or was made aware

during the conference, that claimant was extremely distressed by what she believed to be delays in her benefits.

¶10 During the settlement conference the parties reached an agreement which provided for an immediate cash payment of \$20,000 to claimant and \$13,250 to her attorney for attorney fees. The agreement also called for two subsequent cash payments to claimant of \$35,000 each on claimant's 55th and 65th birthdays.

¶11 During the conference, the claimant and her attorney emphasized that, in light of the previous delays in benefits and the claimant's fragile emotional state, the first cash payments needed to be made immediately. Slavik, on behalf of Twin City, agreed that the first cash payments would be made within one week of the settlement agreement. When questioned by claimant or her attorney whether Twin City could meet the one week deadline, Slavik assured claimant that it could.

¶12 The parties' agreement was reduced to two writings. The first was a Stipulation For Entry Of Judgment executed by the parties' attorneys on September 24, 1998, the same day as the settlement conference. (Ex. 1.) That stipulation provided for the entry of judgment in accordance with the parties' settlement agreement and expressly provided that the initial cash payments of \$20,000 to claimant and \$13,250 to her attorney be paid within one week. Paragraph 1 of the stipulation provided in relevant part:

The Insurer Twin City Fire Insurance shall pay the sum of \$20,000.00 **in cash within one week** jointly to the Petitioner and her attorney, James G. Edmiston, and \$13,250.00 to James G. Edmiston for attorney fees....

¶13 A Judgment incorporating the terms of the stipulation, including the immediate payments reflected in the preceding paragraph, was entered and filed on September 29, 1998. A date stamped copy of the Judgment, which is found in Exhibit 7, indicates that a copy was received by counsel for Twin City on September 30, 1998.

¶14 The specific phrasing of the paragraph concerning payment of the \$20,000 to claimant and \$13,250 to her attorney is arguably ambiguous about the deadline for payment of the \$13,250. The "within one week" proviso attaches to the \$20,000 obligation but arguably not the \$13,250 obligation. However, the discussions of the parties leading up to the execution of the Stipulation for Entry of Judgment show that the parties intended the one week deadline to attach to both obligations.

¶15 On Friday, September 25, 1998, Slavik made a computer entry in Twin City's computer system requesting the \$20,000 and \$13,250 checks.

¶16 On September 25, 1998, Slavik was Twin City's sole adjuster for workers' compensation

claims in Montana and worked out of her home in Great Falls.

¶17 Slavik was away from home and her home office from September 27 through October 7, 1998. She was initially in San Antonio, Texas, then in Denver, Colorado, for training. During that time she did not have access to her office computer and did not follow-up to make sure that the checks had been processed and sent.

¶18 Slavik's September 25th request for the checks was erroneously forwarded by Twin City to Slavik's former supervisor in California for final approval. When Slavik returned home on October 8th she discovered the error. She immediately talked to her present supervisor and requested that the checks issue immediately.

¶19 On October 9th Slavik determined that the checks had been issued and mailed that day.

¶20 Slavik assumed that the checks would reach claimant's attorney early the next week. She did not request that they be sent by overnight mail.

¶21 The checks in fact did not arrive at the office of claimant's attorney until October 16, 1998.

¶22 The delay in payment was Unreasonable under the circumstances of this case. Twin City made an express commitment to make the payments in cash within seven days of the settlement conference and agreed that the deadline be incorporated into the JUDGMENT of this Court. It was aware of claimant's anxiety over prior delays in benefits and her anxiety that the payments be made within the seven days agreed to by Twin City. Under those circumstances, Twin City was required to take greater precautions to assure that it complied with the deadline.

CONCLUSIONS OF LAW

I. Applicable Law

¶23 Claimant's industrial injury occurred on March 16, 1993. Her claim is governed by the 1991 version of the Workers' Compensation Act (WCA). *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

II. Penalty

¶24 Section 39-71-2907, MCA (1991), provides that an insurer which unreasonably refuses or delays benefits shall be liable for a 20% penalty. The section provides in relevant part:

39-71 -2907. Increase in award for unreasonable delay or refusal to pay. (1) The

workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

The Court has found that Twin City unreasonably failed to timely make "agreed-upon payments" of \$20,000 to claimant and \$13,250 to her attorney. The only remaining issue is whether the penalty attaches to the full amount which was delayed or only to the \$20,000. That question arises because the penalty may only be imposed with respect to delayed benefits.

¶25 If the attorney fees payable under the agreement were imposed under section 3971-611, MCA (1991), or 39-71-612, MCA (1991), then no penalty would be due on the \$13,250. Attorney fees awarded under those sections are not benefits. However, the attorney fees payable in this case were paid out of benefits owed claimant. The Court did not award the attorney fees. There is no concession by Twin City **that it had acted** unreasonably, thereby entitling claimant to an add-on attorney fee. Lacking a Court award or agreement to pay add-on attorney fees, the claimant was liable to her attorney for the payment of his fees, hence the check cut to her attorney represented benefits due her. The penalty applies to the \$13,250.

III. Attorney Fees

¶26 While entitled to a penalty, claimant is not entitled to attorney fees since neither section 39-71-611 or 39-71-612, MCA, authorizes attorney fees under the circumstances of this case. Section 39-71-611, MCA (1991), provides for attorney fees where the insurer has unreasonably denied or terminated benefits. The benefits at issue in this case were neither denied nor terminated. Section 39-71-612, MCA (1991), applies to disputes over the amount of compensation due. Here the amount due was conceded.

JUDGMENT

¶27 Twin City shall pay claimant a penalty in the amount of \$6,650.

¶28 Claimant is not entitled to attorney fees.

¶29 Claimant is entitled to her costs in an amount to be determined in accordance with the rules of this Court.

¶30 This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶31 Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 9th day of February, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Edmiston, III
Mr. William O. Bronson
Submitted: February 2, 1999