IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2018 MTWCC 15

WCC No. 2017-4048

JOHN WEBSTER

Petitioner

vs.

LIBERTY NORTHWEST INS. CORP.

Respondent/Insurer.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, AND GRANTING IN PART AND DENYING IN PART PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT[1]

Summary: Petitioner petitioned this Court for a ruling that his attorney earned fees on the reopening of his medical benefits and that Respondent unreasonably refuses to honor his attorney's *Lockhart* lien. On the latter basis, Petitioner requests a penalty and attorney fees. Respondent moves for summary judgment on the basis that a claimant's attorney cannot obtain fees by doing the work pursuant to which medical benefits that were terminated by operation of law were reopened; rather, Respondent asserts that a claimant's attorney is entitled to fees only when an insurer denies liability for the medical benefits and the claimant thereafter obtains the medical benefits due to his attorney's efforts. Respondent also argues that Petitioner's attorney did not do enough legal work to earn attorney fees. Petitioner cross-moves for summary judgment on the relief requested in his Petition for Hearing.

Held: Respondent's Motion for Summary Judgment is denied, and Petitioner's Cross-Motion for Summary Judgment is granted in part and denied in part. An insurer's denial of liability is not a condition precedent to a *Lockhart* lien; the relevant inquiry is whether the attorney did the work that resulted in the additional medical benefits. And here, Petitioner is receiving two years of additional medical benefits entirely due to his attorney's efforts, which were far more than "initiating a process." Petitioner's attorney

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[1] Respondent's original motion is entitled Respondent's Motion to Dismiss and Alternately [sic] Motion for Summary Judgment and Brief. This Court previously denied Respondent's Motion to Dismiss in an unpublished Order, Docket Item No. 28.

obtained the evidence necessary to reopen Petitioner's medical benefits and then successfully petitioned the Department to reopen his medical benefits. However, Respondent's legal argument with respect to there being a condition precedent to a *Lockhart* lien is not unreasonable because this is an issue of first impression and there is a conflict within the Department of Labor & Industry's Attorney Retainer Agreement, and within its rule governing attorney fees. Thus, Respondent is not liable for a penalty or Petitioner's attorney fees.

¶ 1 Petitioner John Webster petitioned this Court for a ruling that his attorney earned fees on the reopening of his medical benefits and that Respondent Liberty Northwest Ins. Corp. (Liberty) unreasonably refused to honor his attorney's *Lockhart* lien.[2] On the latter basis, Webster requests a 20% penalty under § 39-71-2907, MCA, and attorney fees under § 39-71-611, MCA.

¶ 2 Liberty moves for summary judgment on the basis that Webster's attorney did not earn fees, because Liberty never denied payment, and because she did not do enough legal work to earn them.

¶ 3 Webster cross-moves for summary judgment on the relief requested in his Petition for Hearing.

¶ 4 The following issues are before this Court:

Issue One: Is Webster's attorney entitled to *Lockhart* fees on Webster's reopened medical benefits?

Issue Two: Is Webster entitled to a penalty and his attorney fees?

UNDISPUTED FACTS

¶ 5 On February 27, 2012, Webster suffered an industrial injury in the course of his employment with Pavlik Electric (Pavlik), which Liberty insured.

¶ 6 Liberty accepted liability for the injury, and paid temporary total disability and medical benefits.

¶ 7 Webster has not settled any part of his claim.

¶ 8 Webster retained attorney Leslae Dalpiaz because his medical benefits were going to terminate on February 27, 2017, under § 39-71-704(1)(f)(i), MCA, which provides that medical benefits terminate 60 months from the date of injury unless reopened. On October 12, 2016, they executed the standard Attorney Retainer Agreement drafted by the Department of Labor & Industry (Department), under which Dalpiaz's fee would be a

[2] *Lockhart v. N.H. Ins. Co.*, 1999 MT 205, 295 Mont. 467, 984 P.2d 744.

percentage "of the amount of additional compensation payments the claimant receives due to the efforts of the attorney." As to medical benefits, the Attorney Retainer Agreement states:

> 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.

¶ 9 On December 20, 2016, Dalpiaz sent a letter to Liberty in which she set forth her evaluation of the claim, arguing that Webster was entitled to have his medical benefits reopened under § 39-71-717, MCA, and made a settlement offer.

¶ 10 On December 28, 2016, Liberty rejected the offer and made a counter-offer. Liberty's adjuster, Justin Fosse, stated: "If this offer is not accepted, we would want to wait until his medical is indeed extended and an updated treatment plan is received before considering settlement."

¶ 11 On January 4, 2017, Dalpiaz rejected Liberty's counter-offer and indicated she would be filing a petition to reopen Webster's benefits with the Department. She inquired with Fosse if Liberty "would agree to file a joint petition." Fosse notified Dalpiaz that Liberty "would not be interested in a Joint Petition."

¶ 12 Fosse did not conduct any investigation as to whether Jeffrey LaPorte, MD, of Missoula Bone & Joint — Webster's treating physician — thought Webster required medical treatment for his industrial injury in order to allow him to continue to work, the standard for reopening medical benefits under § 39-71-717, MCA.

¶ 13 Two weeks before Webster's January 25, 2017, appointment with Dr. LaPorte, Dalpiaz wrote to Dr. LaPorte and asked him to explain what medical treatment Webster was likely to require in the future and whether such medical treatment would be required to allow him to continue working as an electrician.

¶ 14 Dr. LaPorte responded on January 26, 2017, providing detailed medical information and opinions about Webster's future medical treatment. Dr. LaPorte also referred Webster to foot and ankle orthopedic specialist Glenn Jarrett, MD, at Missoula Bone & Joint, for further evaluation. Dr. LaPorte concluded his letter by recommending that "Webster keep his case open for possible future medical care. This is important in an effort to enable him to continue in his current profession."

¶ 15 On February 3, 2017, Fosse noted in Webster's claim file that based upon Dr. LaPorte's letter, "it appears appropriate" for Webster "to have medical benefits extended" and further noted that he expected Dalpiaz to file a petition for extended benefits with the Department. However, Liberty did not stipulate to extending Webster's medical benefits.

¶ 16 On February 7, 2017, Dalpiaz filed a Petition to Reopen Closed Medical Benefits on Webster's behalf.[3] Dalpiaz attached a letter to John Schumpert, MD, the Medical Director for the Department, explaining that it was Webster's position that medical benefits should remain open under § 39-71-717(2), MCA, because they were necessary for him to continue working. Dalpiaz also attached Dr. LaPorte's letter as the medical evidence supporting Webster's petition.

¶ 17 On February 10, 2017, the Department notified Webster that it had received his Petition to Reopen Closed Medical Benefits, and asked Liberty to send it Webster's medical records.

¶ 18 Dr. Jarrett evaluated Webster on February 23, 2017. He confirmed Webster's ongoing medical problems and outlined his opinions regarding future treatment options.

¶ 19 On February 27, 2017, Webster's medical benefits terminated pursuant to § 39-71-704(1)(f)(i), MCA.

¶ 20 On April 11, 2017, the Department granted Webster's petition, thereby reopening his medical benefits for an additional two years, until February 26, 2019, pursuant to § 39-71-717(8), MCA.

¶ 21 On April 18, 2017, Fosse sent Dalpiaz an email in which he stated he had requested Webster's most recent medical records from Missoula Bone & Joint. Dalpiaz responded with an email, indicating that she wanted a copy of these medical records. In addition, Dalpiaz notified Fosse that she was "asserting a Lockhart Lien on all future medical care received."

¶ 22 Liberty refused to honor Dalpiaz's *Lockhart* lien. Fosse asserted that Dalpiaz was not entitled to a fee under *Montana Contractor Compensation Fund v. Liberty Northwest Ins. Corp.* (*In re Rusco*);[4] his response to Dalpiaz's email states:

> In terms of the Lockhart lien, I have reviewed your stance with my manager and at this time, we do not feel the Lockhart lien would apply. [Webster's] benefits were never denied, they were simply set to close due to the 5 year statue [sic]. While you did assist in initiating the reinstatement process, the

[3] Section 39-71-717(5), MCA, allows a claimant to file his petition starting 90 days before the benefits are to terminate.

[4] 2003 MTWCC 54.

> Rusco decision states "initiating a process" and/or "setting in motion" a process doesn't warrant Lockhart benefits.

¶ 23 Dalpiaz responded in a letter to Liberty's Team Manager Gary Holt, asserting that she was entitled to attorney fees under the Montana Supreme Court's decision in *Dildine v. Liberty Northwest Ins. Corp.*[5] Dalpiaz explained the reasons she was entitled to fees as follows:

> First, my client came to me with the purpose of getting assistance in keeping his medical care open. Second, I contend that I did far more than simply "initiating the process."
>
> As you are aware, the statute requires that in order to successfully obtain an order reopening benefits, the claimant has to show that he is either permanently disabled or needs the care to continue or return to employment. After reviewing Mr. Webster's medical record I determined there was not sufficient documentation to substantiate the burden required by the Department and hence I contacted Dr. LaPorte, explained what was required of the statute and then followed up with a letter that he responded to. Then, I submitted this along with the supplemental notes from Dr. Jarrett for review, a second opinion that I also orchestrated for my client. In the interim, I contacted the Department on two occasions until we finally received word that the petition had been granted and my client's medical benefits were to remain open for an additional two years.
>
> Frankly, I do not think we would have been successful had I not obtained Dr. LaPorte's opinion with regard to my client's need for future care. I contend it is this outcome that the court will look at in supporting our argument that I did far more than "initiate the process." In fact, my participation was the key to obtain [sic] a successful order. Without my efforts, my client would not have been the recipient of an additional two years of medical care.

¶ 24 Holt responded with an email in which he attached this Court's decisions in *Dildine v. Liberty Northwest Ins. Corp.*[6] and *In re Rusco*, implying that Dalpiaz did not do sufficient work to earn a fee.

¶ 25 Liberty did not appeal the Department's decision to keep medical benefits open and has paid Webster's medical benefits incurred after February 27, 2017. But it has not honored Dalpiaz's *Lockhart* lien.

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[5] 2009 MT 87, 350 Mont. 1, 204 P.3d 729.

[6] 2008 MTWCC 14.

LAW AND ANALYSIS

¶ 26 This case is governed by the 2011 version of the Workers' Compensation Act since that was the law in effect at the time of Webster's 2012 industrial accident.[7]

¶ 27 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law.[8] The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

Lockhart v. New Hampshire Ins. Co.

¶ 28 The issues in the case fall under the Montana Supreme Court's decision in *Lockhart*. In *Lockhart*, the Montana Supreme Court addressed the issue of "whether the attorney's lien statute codified at § 37-61-420, MCA, applies to medical benefits recovered due to the efforts of the attorney in a workers' compensation case."[9] The court answered this question in the affirmative. The court reaffirmed that under the attorney fee lien statute, an attorney has a lien on all "proceeds,"[10] and followed its decision in *Kelleher Law Office v. State Compensation Ins. Fund* that, "[i]n the context of workers' compensation cases, it is well settled that attorney fee liens attach to all compensation upon the filing of an attorney retainer agreement with the Department of Labor and Industry."[11] The court also followed its decision in *Carlson v. Cain*, and reaffirmed that medical benefits are "compensation benefits."[12] Thus, the court explained that because the Attorney Retainer Agreement drafted by the Department allows for an attorney's contingency fee to be taken from "the amount of additional compensation payments the claimant receives due to the efforts of the attorney," an attorney is entitled to a fee on medical benefits if such benefits are obtained due to the attorney's efforts.[13]

Issue One: Is Webster's attorney entitled to *Lockhart* fees on Webster's reopened medical benefits?

¶ 29 Section 39-71-704, MCA, provides that an insurer is liable for medical benefits. However, § 39-71-704(1)(f)(i), MCA states:

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[7] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

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

[9] *Lockhart*, ¶ 12.

[10] *Lockhart*, ¶ 25 (quoting § 37-61-420(2), MCA).

[11] *Lockhart*, ¶ 26 (citing 213 Mont. 412, 416, 691 P.2d 823, 825 (1984)).

[12] *Lockhart*, ¶ 25 (citing 216 Mont. 129, 136-39, 700 P.2d 607, 612-14 (1985)).

[13] *Lockhart*, ¶¶ 15, 25 (quoting § 39-71-613, MCA).

> The benefits provided for in this section terminate 60 months from the date of injury or diagnosis of an occupational disease. A worker may request reopening of medical benefits that were terminated under this subsection (1)(f) as provided in 39-71-717.

¶ 30 In turn, § 39-71-717, MCA, sets forth the standards under which medical benefits can be reopened for two-year intervals, and the procedure a claimant must follow. Subsection (2) states, in relevant part: "Medical benefits may be reopened only if the worker's medical condition is a direct result of the compensable injury or occupational disease and requires medical treatment in order to allow the worker to continue to work or return to work." Subsections (3) and (7) state that to reopen medical benefits, a claimant must petition the Department, triggering an analysis by the medical review panel, or, if both parties agree, the Department's medical director, to decide by a preponderance of the evidence whether to reopen the claimant's medical benefits. Subsection (6) provides that the worker or insurer may submit additional evidence. Subsection (9) provides that a party who disagrees with the medical review panel's decision may petition this Court to resolve the dispute, and that the medical review panel's decision is presumed to be correct and can be overcome only by clear and convincing evidence.

¶ 31 Liberty does not dispute that Dalpiaz obtained the evidence to prove that Webster required ongoing medical treatment to continue working and that she thereafter successfully petitioned the Department to reopen Webster's medical benefits pursuant to § 39-71-717, MCA. However, Liberty argues that Dalpiaz did not earn attorney fees for two reasons. However, neither of Liberty's arguments has merit.

¶ 32 First, Liberty argues that, as a matter of law, a condition precedent to a *Lockhart* lien is an insurer's denial of liability, either for the entire claim or for the medical benefits at issue. In support of its position, Liberty points to the language in the Attorney Retainer Agreement stating that an attorney is not entitled to a fee on medical benefits unless the insurer denied liability. Liberty maintains that Webster's medical benefits terminated by operation of law and attributes the termination to the 2011 Montana Legislature because it enacted the 60-month benefit period provided for in § 39-71-704(1)(f)(i), MCA. Thus, because the termination of Webster's medical benefits had nothing to do with a denial of liability on its part, Liberty argues that Dalpiaz is not entitled to a fee, and that her *Lockhart* lien is therefore invalid.

¶ 33 As Webster points out, Liberty's first argument is not supported under *Lockhart*. While *Lockhart* involved two cases in which the insurers had denied liability,[14] the Supreme Court did not hold that an insurer's denial of liability was a condition precedent to a *Lockhart* lien, nor even infer that. Instead, the court focused on whether the claimant's attorney did the work from which the claimants obtained additional benefits.

[14] *Lockhart*, ¶¶ 4-10.

The issue the court decided was "whether the attorney's lien statute codified at § 37-61-420, MCA, applies to medical benefits recovered due to the efforts of the attorney in a workers' compensation case."[15] The court explained, "The attorney retainer agreement, drafted by the Department of Labor and Industry pursuant to § 39-71-613, MCA, allows for an attorney's contingency fee to be taken from 'the amount of additional compensation payments the claimant receives due to the efforts of the attorney.' "[16] Thus, the holding of *Lockhart* is: "the attorney lien codified at § 37-61-420, MCA, applies to medical benefits recovered due to the efforts of an attorney in a workers' compensation case . . . ."[17]

¶ 34 Moreover, in *Dildine*, the Supreme Court again ruled that the relevant inquiry is whether the attorney did the work that results in the additional medical benefits. Liberty initially denied liability for Dildine's occupational disease but, after Dildine's attorney filed another claim and sent demand letters, it accepted liability.[18] However, Liberty asserted that Dildine's attorney was not entitled to a fee under *Lockhart* because it asserted that it accepted liability not because of the efforts of Dildine's attorney, but because of " 'its own examination of the facts and case law.' "[19] Dildine asserted that her attorney was entitled to a fee under *Lockhart* because she obtained medical benefits due to his efforts.[20] Dildine argued: " 'Liberty wants the attorney's right to charge fees to hinge *not* upon the attorney's efforts, but upon the insurer's motivations for first denying medical benefits . . . . The insurer's motivations are not a proper basis for deciding the attorney's entitlement to a fee.' "[21] The Supreme Court agreed with Dildine, explaining that under *Lockhart* an attorney is entitled to a fee on medical benefits when the attorney's efforts lead to the benefits, regardless of the insurer's proffered reason why it decided to pay the additional benefits.[22]

¶ 35 To be sure, this case demonstrates that there is conflict within the Department's form Attorney Retainer Agreement, and within ARM 24.29.3802, the Department's rule on attorney fees. Liberty is correct that the form Attorney Retainer Agreement drafted pursuant to this rule provides that an attorney is not entitled to a fee on medical benefits unless the insurer has denied liability, either for the claim or the medical benefits at issue.[23] But Dalpiaz is correct that the Attorney Retainer Agreement also provides that an attorney is entitled to a contingency fee on benefits "the claimant receives due to the

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[15] *Lockhart*, ¶ 12.

[16] *Lockhart*, ¶ 15 (quoting § 39-71-613, MCA).

[17] *See Lockhart*, ¶ 35 (Gray, J., specially concurring).

[18] *Dildine*, ¶¶ 6 - 8.

[19] *Dildine*, ¶ 19.

[20] *Dildine*, ¶ 20.

[21] *Dildine*, ¶ 20.

[22] *Dildine*, ¶ 22.

[23] *See also* ARM 24.29.3802(5)(a).

efforts of the attorney."[24] This conflict is resolved by the law providing that a "statute controls over an administrative rule, at least to the extent of any inconsistency or conflict."[25] Section 39-71-613(2)(a), MCA, states that in regulating attorney fees in a workers' compensation claim, the Department is to consider, *inter alia*, whether the fees are based on "the benefits the claimant gained due to the efforts of the attorney." This statute does not state that an attorney is entitled to a fee only in cases in which the insurer denied liability. Thus, Webster is correct that the question to be answered in this case is whether Dalpiaz did the work that resulted in the reopening of his medical benefits, which, again, is the same question the Supreme Court asked in *Lockhart*.

¶ 36 That question takes this Court to Liberty's second argument. Liberty argues that under the facts of this case, Dalpiaz is not entitled to a fee. Liberty relies on *In re Rusco*,[26] and asserts that Dalpiaz did not do enough legal work to earn a fee; it argues that she merely "initiated a process." However, a comparison of Dalpiaz's efforts in representing Webster to the efforts of the attorneys in *Rusco* and *Dildine* shows that Liberty is taking that phrase out of context, and that Dalpiaz did more than enough legal work to earn a fee.

¶ 37 In *Rusco*, Rusco suffered a back injury in 1998, at which time Liberty was the insurer at risk.[27] He continued working with back pain but had an accident that caused a flare-up in 2000, at which time Montana Contractor Compensation Fund (MCCF) was the insurer at risk.[28] Because Rusco's physician told the employer that " 'his injury was the same injury he had been treating him for,' " Rusco's employer did not file a new claim.[29] Approximately five months later, Rusco's physician recommended surgery, which Liberty denied on the grounds that Rusco suffered a new injury in 2000.[30]

¶ 38 Rusco hired a law firm, but it was neither competent nor diligent. Rusco's attorneys did not identify that MCCF was the insurer at risk in 2000 and did not file a claim with MCCF.[31] Six months after Rusco hired his attorneys, they petitioned for mediation against Liberty.[32] MCCF learned of Rusco's 2000 incident when either the Department or Rusco's employer sent it a courtesy copy of Rusco's Petition for Mediation.[33] MCCF accepted the

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[24] *See also* ARM 24.29.3802(3)(a).

[25] *Williamson v. Mont. Pub. Serv. Comm'n*, 2012 MT 32, ¶ 16, 364 Mont. 128, 272 P.3d 71 (citation omitted).

[26] 2003 MTWCC 54.

[27] *In re Rusco*, ¶ 4.

[28] *In re Rusco*, ¶ 4.

[29] *In re Rusco*, ¶ 5.

[30] *In re Rusco*, ¶ 6.

[31] *In re Rusco*, ¶ 11.

[32] *In re Rusco*, ¶¶ 10, 18.

[33] *In re Rusco*, ¶ 10.

mediation request as a claim[34] and recognized that it was a *Belton*[35] case — i.e., a case in which the only issue was whether Liberty or MCCF was liable.[36] On its own, MCCF payed benefits under a reservation of rights, diligently investigated Rusco's claim, including scheduling the statement of Rusco's treating physician, and ultimately authorized Rusco's surgery.[37] Rusco's attorneys did not take any action to advance Rusco's case nor cooperate in MCCF's investigation; in fact, by failing to produce requested medical records and by failing to appear at Rusco's treating physician's statement when it was initially scheduled, Rusco's attorneys obstructed and delayed MCCF's investigation.[38] This Court ruled that Rusco's attorneys were not entitled to *Lockhart* attorney fees because Rusco did not obtain medical benefits due to their efforts.[39] Judge McCarter noted that it was a straightforward *Belton* case and reasoned: "I am not persuaded that the contribution of the claimant's attorneys was anything more than initiating a process which resulted in notifying MCCF of the alleged April 12, 2000 industrial accident and setting in motion a claim investigation necessary to determine liability and the benefits due claimant."[40]

¶ 39 In *Dildine*, the Montana Supreme Court distinguished *Rusco* and decided when a claimant's attorney obtains the evidence necessary to prove that the insurer is liable and advances his client's position, the attorney is entitled to a fee. Dildine's attorney provided Liberty with "necessary information and documents," sent demand letters to Liberty, discussed the claim with Liberty's adjuster, and filed a Petition for Hearing.[41] Liberty accepted liability during the litigation, but it refused to honor Dildine's attorney's *Lockhart* lien, arguing that its decision to accept liability was not the result of Dildine's attorney's work, but its own evaluation of the law and facts.[42] While agreeing that an attorney is not entitled to a fee when he merely "initiates a process" under *Rusco*, the Supreme Court held that Dildine's attorney's work was more than initiating a process and that his "efforts,

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[34] *In re Rusco*, ¶ 11.

[35] *Belton v. Carlson Transport*, 202 Mont. 384, 392, 658 P.2d 405, 409-10 (1983), *superseded by statute on other grounds as recognized in In Re Abfalder*, 2003 MT 180, ¶ 14, 316 Mont. 415, 75 P.3d 1246 (holding that when two insurers deny liability for a clam and assert that the other insurer is liable, the second insurer has a duty to pay benefits under a reservation of rights until the dispute is resolved); *see also* § 39-71-407(8), MCA ("If there is no dispute that an insurer is liable for an injury but there is a liability dispute between two or more insurers, the insurer for the most recently filed claim shall pay benefits until that insurer proves that another insurer is responsible for paying benefits or until another insurer agrees to pay benefits. If it is later proven that the insurer for the most recently filed claim is not responsible for paying benefits, that insurer must receive reimbursement for benefits paid to the claimant from the insurer proven to be responsible.").

[36] *In re Rusco*, ¶ 12.

[37] *In re Rusco*, ¶¶ 12, 13.

[38] *In re Rusco*, ¶¶ 10, 12, 13, 24.

[39] *In re Rusco*, ¶¶ 15-25.

[40] *In re Rusco*, ¶ 24.

[41] *Dildine*, ¶¶ 8, 21, 22.

[42] *Dildine*, ¶¶ 8, 19, 22.

if not exclusively then largely, led to Liberty's acceptance of liability."[43] Because the work of Dildine's attorney led to the payment of medical benefits, her attorney was entitled to a fee under *Lockhart*.

¶ 40 Here, Dalpiaz's efforts were far more than "initiating a process," as this Court used that phrase in *In re Rusco*, and her work was equivalent to Dildine's attorney's work. After reviewing Webster's medical records, Dalpiaz recognized that there was insufficient evidence to prove by a preponderance of the evidence that Webster required medical benefits for his injury to continue working, the standards in § 39-71-717(2) and (7), MCA. Like the attorney in *Dildine*, she obtained the necessary evidence for Webster to meet his burden of proof under § 39-71-717(2) and (7), MCA, by drafting a letter to Dr. LaPorte to obtain the medical opinion necessary to prove Webster's case.[44] After she received Dr. LaPorte's response, Dalpiaz prepared and filed Webster's Petition to Reopen Closed Medical Benefits, attaching her letter explaining Webster's position and attaching Dr. LaPorte's letter as supporting evidence. And, unlike what MCCF did in *In re Rusco*, Liberty did not investigate the issue on its own, despite having "an affirmative duty . . . to reasonably investigate and evaluate a claim."[45] Rather, it sat on the sideline while Dalpiaz did the legal work necessary to reopen Webster's medical benefits. The result of Dalpiaz's legal work was a decision reopening Webster's medical benefits for two years. It is evident that if Dalpiaz had not done this work, Webster would not have had his medical benefits reopened, as Liberty refused to stipulate to reopening his medical benefits even when Fosse recognized that, based on the letter that Dalpiaz obtained from Dr. LaPorte, it was "appropriate" to keep Webster's medical benefits open for two years. Dalpiaz has therefore earned attorney fees and her *Lockhart* lien is valid and enforceable.

¶ 41 Finally, this Court rejects Liberty's nonsensical arguments. Liberty argues that it lawfully relied upon § 39-71-704(1)(f)(i), MCA, and that if this Court awards Dalpiaz attorney's fees, it will invalidate this statute. However, Liberty either does not understand the issue in this case or is attacking a straw man. Webster is <u>not</u> arguing that Liberty violated the law by relying upon the 60-month rule in § 39-71-704(1)(f)(i), MCA, nor that this statute is invalid. Rather, Webster is arguing that because his attorney did the work that resulted in the reopening of his medical benefits for two additional years, she is entitled to attorney fees on those medical benefits under *Lockhart* and *Dildine*. Liberty also argues that if Dalpiaz's *Lockhart* lien is valid, it will be "punished" for relying upon § 39-71-704(1)(f)(i), MCA. However, this argument is without merit because it will not be

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[43] *Dildine*, ¶ 22.

[44] *See Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 49, 365 Mont. 405, 282 P.3d 687 (holding that claimants in cases arising after the 1995 amendments to § 39-71-407, MCA, must prove injury and causation by medical expertise or opinion).

[45] *Marcott v. La. Pac. Corp.*, 275 Mont. 197, 212, 911 P.2d 1129, 1138 (1996).

paying 20% more, as the attorney fees are 20% of the medical benefits for which Liberty is liable.[46]

¶ 42 Accordingly, Dalpiaz perfected a *Lockhart* lien and Liberty must honor it by remitting payment to Dalpiaz in the amount of 20% of Webster's reopened medical benefits.

Issue Two: Is Webster entitled to a penalty and his attorney fees?

¶ 43 If an insurer unreasonably refuses to pay benefits and this Court adjudges the claim compensable, this Court shall award the claimant his attorney fees.[47]

¶ 44 This Court may impose a 20% penalty on the "full amount of benefits due a claimant during the period of delay or refusal to pay" when "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."[48]

¶ 45 In *Briese v. Ace American Ins. Co.*, this Court ruled, "since the *Lockhart* lien constitutes a portion of the 'full amount of benefits due' Petitioner, he may seek a penalty pursuant to § 39-71-2907(1), MCA, for any alleged unreasonable delay or refusal to pay that portion of the benefit."[49]

¶ 46 The Montana Supreme Court has stated:

> [A]s a general rule, where a court of competent jurisdiction has clearly decided an issue regarding compensability in advance of an insurer's decision to contest compensability, the clear applicability of the earlier decision constitutes substantial evidence supporting a finding by the Workers' Compensation Court that the contest over compensability is unreasonable. Conversely, where the issue upon which an insurer bases its legal interpretation has not been clearly decided, the lack of clear decision may constitute substantial evidence supporting a finding by the

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[46] *Lockhart*, ¶¶ 22-24; *see also Dildine*, ¶ 12 (noting, "Dildine also emphasizes that Liberty is not required to pay any additional money, but rather the *Lockhart* lien only requires that Liberty pay Dildine the 20% out of her own medical benefits that Liberty has already agreed to pay.").

[47] § 39-71-611(1), MCA ("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 attorney fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.").

[48] § 39-71-2907(1)(b), MCA.

[49] 2009 MTWCC 5, ¶ 17.

Workers' Compensation Court that the insurer's legal interpretation is not unreasonable.[50]

¶ 47 While this Court rejects Liberty's legal arguments, they were not unreasonable under this standard. Liberty is correct that this Court has not previously decided the issue of whether a claimant's attorney is entitled to a fee when she does the work the results in the reopening of medical benefits that terminated under § 39-71-704(1)(f)(i), MCA. And, Liberty's argument was supported by language in the Attorney Retainer Agreement and ARM 24.29.3802(5)(a) regarding medical benefits. There was genuine doubt as to whether Dalpiaz's *Lockhart* lien was valid and enforceable. Accordingly, Webster is not entitled to a penalty or his attorney fees.

ORDER AND JUDGMENT

¶ 48 Respondent's Motion for Summary Judgment is **denied**.

¶ 49 Petitioner's Cross-Motion for Summary Judgment is **granted in part and denied in part**. As to his attorney's entitlement to *Lockhart* fees on Petitioner's reopened medical benefits, Petitioner's Cross-Motion for Summary Judgment is **granted**. As to his entitlement to a penalty and his attorney fees, Petitioner's Cross-Motion for Summary Judgment is **denied**.

DATED this 21st day of September, 2018.

(SEAL)

DAVID M. SANDLER
JUDGE

c: Leslae J. E. Dalpiaz
Larry W. Jones

Submitted: September 13, 2018

[50] *Marcott*, 275 Mont. at 205, 911 P.2d at 1134 (internal citation omitted). *See also Wommack v. Nat'l Farmers Union Prop. & Cas. Co.*, 2017 MTWCC 8, ¶ 89 (citation omitted) ("An insurer's legal interpretation may be incorrect without being unreasonable, and the existence of a genuine doubt, from a legal standpoint, that liability exists constitutes a legitimate excuse for denial of a claim.").