

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1993 MTWCC 8

WCC No. 9308-6867

---

IN RE THE MATTER OF ATTORNEY FEES PAID  
REGARDING THE CLAIM OF SHARON YOUNG

STATE COMPENSATION INSURANCE FUND

Petitioner

vs.

FRANK C. RICHTER

Respondent.

---

ORDER DENYING MOTION TO DISMISS FOR LACK OF JURISDICTION;  
ORDER DENYING RENEWED MOTION TO DISMISS;  
ORDER DENYING MOTION FOR SUMMARY JUDGMENT

The matters before the Court are a MOTION TO DISMISS FOR LACK OF JURISDICTION filed by respondent on August 26, 1993, and a RENEWED MOTION TO DISMISS and MOTION FOR SUMMARY JUDGMENT filed by respondent on October 5, 1993. No brief supporting the first motion was filed. A brief was filed in support of the second set of motions.

Petitioner's failure to file a supporting brief at the time he filed his first motion to dismiss is "deemed an admission that the motion is without merit." In any event, the Court has jurisdiction over the subject matter alleged in the petition.

Petitioner, State Compensation Insurance Fund (State Fund), seeks to recover attorney fees paid to the respondent, an attorney, with respect to benefits which the State Fund alleges were fraudulently obtained by Sharon Young. There is no allegation that respondent was aware of the fraud or that he was in any way culpable. Nonetheless, this Court has previously held that an insurer may recover fees paid to an attorney in connection with benefits which have been fraudulently obtained by a claimant, at least where the fees were imposed in addition to the claimant's benefits and paid directly to the attorney. ***State Compensation Insurance Fund v. Donald E. Chapman and Richard J. Pyfer,***

WCC No. 9207-6543 (September 1, 1993). The cited decision is supported by Montana Supreme Court decisions requiring repayment of attorney fees where there has been an overpayment of disability benefits, ***Champion International Corp. v. H.L. McChesney***, 239 Mont. 287, 779 P.2d 527 (1989), and where an award of benefits was subsequently reversed on appeal, ***Reil v. State Compensation Mutual Insurance Fund***, 254 Mont. 274, 837 P.2d 1334 (1992). Thus, it is clear the Court has jurisdiction to consider petitioner's claim and that the motion to dismiss should therefore be denied.

The time for petitioner to respond to the motion for summary judgment has not yet expired. Nonetheless, the Court will rule on the motion to avoid unnecessary expense and work by petitioner's counsel.

The motion for summary judgment is based on numerous facts which do not appear from the face of the petition. The facts are recited in respondent's supporting brief and in documents which are attached to the brief as exhibits. Any factually based motion for summary judgment must be founded on sworn evidence, i.e., affidavits, depositions, answers to interrogatories, and responses to requests for admission. See *Rule 56, Mont. R. Civ. P.* The Court cannot consider unsworn recitations of facts or documents which have not been authenticated. The motion must therefore be denied. Respondent may renew the motion at a later time based on affidavits, depositions and/or responses to written discovery.

For the foregoing reasons, IT IS HEREBY ORDERED that the respondent's MOTION TO DISMISS FOR LACK OF JURISDICTION and RENEWED MOTION TO DISMISS are **DENIED**.

IT IS FURTHER ORDERED that respondent's MOTION FOR SUMMARY JUDGMENT is **DENIED WITHOUT PREJUDICE** to his renewing the motion based on affidavits, depositions and/or responses to written discovery.

DATED in Helena, Montana, this 8th day of October, 1993.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. Charles G. Adams  
Mr. Loren H. Torkelson