

1993 MTWCC 8

1 IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2 IN RE THE MATTER OF ATTORNEY
3 FEES PAID REGARDING THE CLAIM
4 OF SHARON YOUNG,

5 STATE COMPENSATION INSURANCE FUND,

6 Petitioner,

WCC No. 9308-6867

7 vs.

8 FRANK C. RICHTER,

9 Respondent.

FILED

OCT - 8 1993

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

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

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

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

23 Petitioner, State Compensation Insurance Fund (State Fund),
24 seeks to recover attorney fees paid to the respondent, an attorney,
25 with respect to benefits which the State Fund alleges were
26 fraudulently obtained by Sharon Young. There is no allegation that
27 respondent was aware of the fraud or that he was in any way
28 culpable. Nonetheless, this Court has previously held that an
29 insurer may recover fees paid to an attorney in connection with
30 benefits which have been fraudulently obtained by a claimant, at
31 least where the fees were imposed in addition to the claimant's
32 benefits and paid directly to the attorney. *State Compensation
33 Insurance Fund v. Donald E. Chapman and Richard J. Pyfer*, WCC No.
34 9207-6543 (September 1, 1993). The cited decision is supported by
35 Montana Supreme Court decisions requiring repayment of attorney
36 fees where there has been an overpayment of disability benefits,
37 *Champion International Corp. v. H.L. McChesney*, 239 Mont. 287, 779
38 P.2d 527 (1989), and where an award of benefits was subsequently
39 reversed on appeal, *Reil v. State Compensation Mutual Insurance*

1 *Fund*, 254 Mont. 274, 837 P.2d 1334 (1992). Thus, it is clear the
2 Court has jurisdiction to consider petitioner's claim and that the
3 motion to dismiss should therefore be denied.

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


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

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

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

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

27 (SEAL)

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29 _____
30 JUDGE

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