

SJR 30 Briefing Paper

Attorney Fee Payments on Medical Disputes

In

Workers' Compensation Cases

Submitted to Jerry Keck, Administrator
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By

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Attorney Fee Payments on Medical Disputes In Workers' Compensation Cases

Background

Although the Workers' Compensation system "is intended to be primarily self-administering...and designed to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities"¹, there are times when reasonable parties may disagree about the benefits to which an injured worker may be entitled and an employer and insurer may be obligated to pay under the Act. In such cases, the injured worker needs assistance from an attorney. If successful in obtaining previously denied or otherwise unpaid benefits for the worker, the attorney is generally entitled to a fee for those services. To do otherwise would have the effect of preventing workers from obtaining services of an attorney, since most attorneys cannot afford to be in business without charging for their services. This could also create an unintended incentive for employers and insurers to deny more medical benefits as a cost containment strategy.

Most state jurisdictions have specific sections in their statutes that address the payment of fees to a workers' attorney. These are usually: (1) paid by the worker out of the proceeds of any award the attorney is successful in obtaining for the worker; (2) paid by the employer and insurer over and above the benefits paid to the worker; or (3) paid in part by the worker and in part by the employer and insurer.²

Public Policy Issues in Cases Where Only Medical Benefits are Awarded

Regardless of how a jurisdiction may handle the payment of attorney fees when the worker is awarded benefits, it becomes problematic when the only benefits awarded are for the payment of medical bills and services. In those cases, there are no "cash" benefits from which an injured worker can pay attorney fees. This creates the situation where a worker may not be able to find an attorney to represent them because the worker may not have money with which to pay attorney fees. In those cases, most states find another solution. In Montana, a fairly unique (among workers' compensation jurisdictions) result was created by case law where the attorney fee is paid out of the payment to be made to the

¹ Montana Code Annotated 2009, 39-71-105(4)

² See *Workers' Compensation Laws – 2nd Edition*, published by the Workers Compensation Institute, 2009; and *Workers' Compensation Law: A State By State Analysis*, Workers' Compensation Practice Group, published by ALFA, 2009

providers of the medical treatment or services.³ This has the effect of reducing the payment to the healthcare providers and may also create an incentive for employers and insurers to deny or delay the payment of medical expenses to a worker as a means to reduce their costs.

However, to revise the payment of attorney fees so they are paid by the employer or insurer would increase claim costs at a time when the legislature is looking to decrease those costs in order to reduce overall premium costs for employers in Montana.

Current Practice in Other States

Most states have established provisions that require the employer and insurer to pay the attorney fees in cases where the issue in dispute is the payment of medical benefits (See attached table entitled "*Attorney Fees in Medical Disputes among All States Reporting*"). Although there are still states that pay no attorney fees in these cases (Alabama and Kentucky for example), they are the minority in the states that responded to a survey on this subject, as are the states that have the health care providers pay the fees (see in addition to Montana, Michigan and Pennsylvania). Thirty-nine percent (39%) of the states answering the survey have the attorney fees paid by the employer or insurer (a total of 11 out of 28). This increases to 61% (17 out of 28) if you add in the states where the employer or insurer are ordered to pay the attorney fees under certain conditions (such as a decision of the fact finder of unreasonable denial or delay, etc.). In seven jurisdictions (25%), the injured worker is required to pay the attorney fees in these cases and in two jurisdictions (New Jersey and New Mexico) they are usually split between the employer/insurer and the injured worker.

Recommendation

If the goal of workers' compensation reform in Montana is to reduce costs to employers and at the same time increase benefits to workers, revising this area of the current law may not help accomplish either of those objectives.

However, a separate study of medical care access for injured workers⁴ indicates that Montana probably does not have enough primary care physicians to provide convenient access to injured workers; and policymakers should be very careful not to further discourage health care providers from treating injured workers. Shifting the payment of attorney fees from the healthcare provider to the employer/insurer would be a benefit to the medical community and may offset some of the difficulty they may have with implementation of any proposed utilization and treatment guidelines. Shifting the payment of attorney fees from the physician to the employer/insurer at about the same time as implementing

³ See *Lockhart v. New Hampshire Insurance Company*, 295 Mont. 467,984 P.2nd 744, No. 98-518

⁴See SJR30 briefing paper entitled *Injured Worker Medical Care Access and Satisfaction with Care in the Montana Workers' Compensation System* dated 12/2/09.

treatment guidelines may offset any increased costs for employers and insurers; may reduce disincentives for medical providers to treat injured workers; and ensure workers can obtain legal assistance when they need it.

According to Oregon (the only state that was able to report the number of disputes over medical issues and the costs of the attorney fees related to those), the average annual cost of these attorney fees when the fees are limited to a \$2,000 maximum (they will be increasing that to \$3,000 on January 1, 2010) is less than \$100,000 per year and averaged only 1,635 cases a year for the last five years. Additionally, by crafting the language so that the employer/insurer are assessed attorney fees only after the filing of a petition for mediation, such disputed medical benefits would create an incentive for employers and insurers to resolve the dispute prior to the filing of a petition if they believe they have a less than 55% chance of prevailing at hearing, thereby avoiding the payment of attorney fees and limiting attorney involvement at the same time. Lastly, placing a maximum limit on attorney fees, such as 20% to 25% of the amount of medical benefits paid up to a maximum of \$3,000 per case, would eliminate the situation other states have had where an attorney fee of ten times or greater of the medical payments requested can be claimed.

Therefore, in order to create more appropriate incentives for a self-executing system and still limit the cost increase related to this issue, **it is my recommendation that a provision be added to the Montana workers' compensation statute that directs the payment of the workers' attorney fees in cases where the dispute involved the payment of medical care or medical services to be paid by the employer or insurer under certain conditions.**

- 1. If such medical payments are made after the filing of a petition for mediation, attorney fees shall be limited to 20% of the medical payments paid with a minimum of \$500 and a maximum of \$2,000.**
- 2. If medical payments are paid after the filing of a petition for hearing in the WC Court, attorney fees shall be limited to 25% of the medical payments paid subject to a minimum of \$500 and a maximum of \$3000.**
- 3. If the insurer pays or submits a written offer of payment of medical benefits, the insurer is not obligated to pay attorney fees unless the award granted by the workers' compensation judge is greater than the amount paid or offered by the insurer.**

I also recommend that the provision requiring the payment of attorney fees by the employer/insurer upon the WC Court's finding of unreasonable delay apply in these cases without applying the maximum cited above.