

May 20, 2005

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LETTER DECISION

J. G. Shultz
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RE: HF No. 128, 1997/98 – Lori Scott v. Photos to Go and Heritage Companies

Dear Counsel:

I am in receipt of Claimant's Brief in Support of Motion for Award of Attorney Fees and Costs, Attorney's Affidavits in Support of Motion for Award of Attorney Fees, Sales Tax and Costs, Employer/Insurer's Brief in Opposition to Motion For Award of Attorney Fees, and Claimant's Reply Brief in Support of Motion for Award of Attorney Fees and Costs. I have considered the entire file designated as HF No. 128, 1997/98. The Findings of Fact and Conclusions of Law and Judgment and Order of the Honorable Max Gors, Sixth Circuit Court Judge, are hereby incorporated by this reference as if set forth in full.

At the outset, Employer/Insurer assert that Claimant's request for attorney fees pursuant to SDCL 58-12-3 was not made within the designated time period set forth in SDCL 58-12-3.1. Claimant made her request for attorney fees in her Petition for Hearing. The very general requirement concerning a request for attorney fees "can be met by a request for attorney fees in the petition." Lewis v. SD State Dept. of Transp., 2003 SD 82, ¶25. Claimant made a second request for attorney fees shortly after the Decision by the Department of Labor. These requests were timely.

Pursuant to the Circuit Court's Order, the issue on remand is limited to what attorney "fees and costs incurred in this case were reasonable." In support of her request,

Claimant's counsel submitted Affidavits explaining what fees and costs incurred are reasonable.

Employer/Insurer objected to the amount requested in the Affidavit, citing generally to Biegler v. American Family Mutual Insurance Company, 2001 S.D. 13, 621 N.W.2d 592. Employer/Insurer argues that the Affidavit does not set forth the portion of the billing associated with the claim giving rise to the attorney fees award. Employer/Insurer argued that the finding as to the unreasonable and vexatious nature of the denial of medical benefits precludes attorney fees on the issue of temporary total disability benefits.

Employer/Insurer's argument is rejected. Employer/Insurer initially accepted the compensability of Claimant's injuries sustained in a car accident on March 7, 1996. Employer/Insurer later terminated Claimant's benefits, including temporary total disability benefits, based on the opinions of Dr. Bert. On February 17, 1997, Employer/Insurer issued a denial of future workers' compensation benefits, relying on Dr. Bert's opinions. That letter states in full:

This letter is to inform you that we intend on maintaining our denial of additional benefits as Dr. Bert has given the medical opinion that no further treatment would be necessary for your Workers' Compensation injury you sustained on March 7, 1996.

Therefore, any bills with the date of service after November 5, 1996 should be forwarded to your health care provider.

According to the State Statute 62-7-35, you have the right to a hearing before the Department of Industry, Labor and Human Relations, Workers' Compensation Division [sic], if you believe you can show that you are entitled to such benefits, either medical treatment or compensation payment. You have two years from the date of this letter to file [a] petition for hearing with the Department of Labor. If you want to apply for a hearing, you should write to the Division of Labor and Management at 700 Governors Drive, Pierre, SD 57501-2277.

(emphasis added). Obviously, this denial goes to all workers' compensation benefits, not just medical benefits. A denial of medical benefits in this case led to the denial of temporary total disability benefits because Employer/Insurer did not accept the opinion of the physician who ordered Claimant off work. They denied the claim in its entirety. Finally, Claimant's request for attorney fees included all issues, not just the denial of medical benefits.

Claimant's counsel presented two Affidavits setting forth the amount requested for attorney fees, tax, and costs. A signed affidavit describing the work done, the date and time spent, and stating that the rate is customary for the area ". . . is more than sufficient to justify the . . . award of attorney fees." Continental Grain Co. v. Brandenburg, 1998 SD 118, ¶36, 587 N.W.2d 196. The Affidavits submitted meet these criteria. In

deciding what is a reasonable attorney fee, the trial court should consider several parameters which affect the value of legal services, such as:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.

Model Rules of Professional Conduct, Rule 1.5, cited in Duffey v. Seventh Judicial Circuit Court, 2004 SD 19, ¶8, 670 N.W.2d 360; and City of Sioux Falls v. Kelley, 94 SDO 145, 513 N.W.2d 97 (SD 1994). It is the Department's understanding that Employer/Insurer did not intend to dispute these criteria, thus there was no need for a hearing on the issue of the amount of reasonable attorney fees. Considering the relevant criteria, the amount requested is reasonable based upon the following findings/conclusions:

1. The skill required to pursue the issues presented by this matter is commensurate with the rates recited in the Affidavit.
2. The hourly rates are customary.
3. The amount of recovery is substantial compared to the fees and costs requested.
4. Time limitations in this matter are not significant.
5. The professional relationship between Claimant and her counsel extended throughout this case.
6. There is no question as to the experience, reputation, and ability of Claimant's counsel.
7. The fee agreement presents no issues at this time.

Attorney fees are awarded in the amount of \$15,146.56 and costs in the amount of \$1,405.57.

Counsel for Claimant shall submit Proposed Findings of Fact and Conclusions of Law and a Proposed Final Order consistent with this decision. Employer/Insurer shall have ten days to submit its objections thereto.

Sincerely,

Heather E. Covey
Administrative Law Judge