SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

KENNETH NOWELL, **HF NO. 232, 1997/98**
Claimant,

v. **DECISION**

AINSWORTH BENNING CONSTRUCTION,
Employer,

and

CNA INSURANCE COMPANY.,
Insurer.

This is a workers' compensation proceeding brought before the Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management on September 16, 2003, in Rapid City, South Dakota. Claimant Kenneth Nowell is represented by David M. Dillon. Patricia Meyers represents Employer/Insurer Ainsworth Benning Construction and CNA Insurance Company.

ISSUES:

Whether CNA's denial was unreasonable and vexatious in light of SDCL 62-7-38, warranting an award of attorney's fees under SDCL 58-12-3.

Whether the amount of attorney's fees requested by Claimant is reasonable under the standards of SDCL 58-12-3.

FACTS:

The Department's June 1, 2001, Decision is incorporated herein as if set forth in full. This matter initially involved Twin City Fruit Company and Wausau Insurance Company (hereafter Twin City Fruit) as well as Ainsworth Benning Construction and CNA Insurance Company (hereafter Ainsworth).

Claimant suffered a work-related injury to his back on June 1, 1988, while working for Twin City Fruit. Claimant filed a Petition for Hearing with the Department of Labor. In September of 1989, Twin City Fruit agreed that Claimant was entitled to permanent partial impairment in the amount of $8,486.40. On September 20, 1989, Claimant and Twin City Fruit entered into a Stipulation and Order of Dismissal, which stated:

> It is hereby stipulated by and between the parties hereto, through their respective attorneys, that the above-entitled workman's compensation action may be dismissed on its merits, with prejudice and without costs. It is understood that

> any consequential and related future medical costs, treatment and expenses shall remain open according to statute.

Claimant returned to work, eventually beginning employment with Ainsworth in 1992.

In February 1996, Claimant suffered an injury to his back while working for Ainsworth. Ainsworth paid all benefits connected with the 1996 injury until an independent medical examiner opined that Claimant's condition was the result of his 1988 injury. Specifically, Dr. Bert found: "[i]t is my opinion that Mr. Nowell had a temporary aggravation of his preexisting condition with respect to his L5-S1 prior herniated disc with subsequent scar tissue formation." On July 8, 1996, Ainsworth sent Claimant a denial letter, stating:

> At this time I would like to discuss with you your Independent Medical Examination that you had with Dr. Bert on June 26, 1996 and also your Workers' Compensation benefits.
>
> Most recently we have received the report from Dr. Bert and have sent you a copy for your review. Dr. Bert finds that your injury of February 21, 1996 is a temporary aggravation to your pre-existing injury of 1988 from Twin City Fruit Company. You have informed Dr. Bert that you have had ongoing low back pain since your original 1988 injury. Dr. Bert has found that you have reached Maximum Medical Improvement/end of healing for your February 26 [sic], 1996 injury. He finds that you have no new injury. Your MRI shows no evidence of any further injuries since your 1988 injury.
> . . .
>
> Because of Dr. Bert's medical examination and your ongoing and prior medical records, we will be discontinuing your Workers' Compensation benefits for your injury exacerbation of February 21, 1996. We have also canceled any authorization for ongoing treatment at the Black Hills Chronic Spine Center as we would find that we would not be responsible for your chronic pre-existing condition.

SDCL 62-7-38 was in effect at the time this denial letter was issued. Passed in 1994, the statute reads:

> In cases where there are multiple employer or insurers, if an employee claims an aggravation of a preexisting injury or if an injury is from cumulative trauma making the exact date of injury undeterminable, the insurer providing coverage to the employer at the time the aggravation or injury is reported shall make immediate payment of the claim until all employers and insurers agree on responsibility or the matter is appropriately adjudicated by the Department of Labor pursuant to this chapter.

Claimant filed his Petition for Hearing with the Department of Labor on February 6, 1998. Ainsworth filed its Answer on March 6, 1998. In April of 1998, Ainsworth joined

Twin City Fruit. Claimant amended his Petition for Hearing to include an aggravation/recurrence issue against Twin City Fruit on November 15, 1999. Both Ainsworth and Twin City Fruit answered the Amended Petition shortly thereafter. After appropriate prehearing proceedings, discovery, and hearing, the Department rendered its Decision finding that Claimant suffered an aggravation, not a mere recurrence of his 1988 back injury, and concluding that Ainsworth was responsible for payment of Claimant's workers' compensation benefits. The Department denied Claimant's requests for additional temporary total disability benefits and penalties under SDCL 62-4-10.1.

At issue is the timeliness of Ainsworth's payment of certain medical expenses. First, Claimant alleges that Ainsworth should never have stopped paying medical benefits after the IME indicated that the cause of Claimant's condition was his 1988 injury with Twin City Fruit. Claimant alleges that SDCL 62-7-38 mandated Ainsworth pay all benefits until the aggravation or recurrence issue was determined by the Department.

Second, Claimant alleges that Ainsworth vexatiously and/or unreasonably delayed payment of certain medical expenses. Claimant seeks attorney's fees pursuant to SDCL 58-12-3 for the late payment of these medical expenses.

All outstanding medical benefits have been paid by Ainsworth. Other facts will be developed as necessary.

Issue One

Whether CNA's denial was unreasonable and vexatious in light of SDCL 62-7-38, warranting an award of attorney's fees under SDCL 58-7-12.

SDCL 58-12-3 reads:

> In all actions or proceedings hereafter commenced against any employer who is self-insured, or insurance company, including any reciprocal or interinsurance exchange, on any policy or certificate of any type or kind of insurance, if it appears from the evidence that such company or exchange has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause, the Department of Labor, the trial court and the appellate court, shall, if judgment or an award is rendered for plaintiff, allow the plaintiff a reasonable sum as an attorney's fee to be recovered and collected as a part of the costs, provided, however, that when a tender is made by such insurance company, exchange or self-insurer before the commencement of the action or proceeding in which judgment or an award is rendered and the amount recovered is not in excess of such tender, no such costs shall be allowed. The allowance of attorney fees hereunder shall not be construed to bar any other remedy, whether in tort or contract, that an insured may have against the same insurance company or self-insurer arising out of its refusal to pay such loss.

SDCL 58-12-3 allows for an award of attorney's fees "if it appears from the evidence that such company or exchange has refused to pay the full amount of such loss, and that such refusal is vexatious or without reasonable cause."

> The general rule is "a failure to pay because of a good faith belief that no payment is due will not warrant a penalty [for unreasonable nonpayment of compensation.]" Larson's Workmen's Compensation Law § 83.41(b)(2) (1996). Although states' prerequisites vary for an imposition of such a penalty, the main inquiry is whether the insurer acted in good faith." For example, in All Nat'l Ins. Co., we stated: "'Where there [are] open question[s] of fact or law determinative of the insured's liability, the insurer, acting in good faith, may insist on judicial determination of such questions without subjecting itself to penalties for vexatious refusal to pay.'" 363 N.W.2d at 218 (quoting Taylor v. Commercial Union Ins. Co., 614 F.2d 160, 165 (8thCir 1980) (other citations omitted)). Furthermore, "'if there is a bona fide and reasonable factual ground for contesting the insured's claim, there is no failure to pay "without just cause or excuse."'" Id. (quoting St. Francis Hosp. v. Baldwin, 6 Kan. App. 2d 124, 626 P.2d 1229, 1232 (Kan 1981)).

Howie v. Pennington County, 1997 SD 45, ¶ 12.

Ainsworth relied on Dr. Bert's opinions when the July 8, 1996, denial was issued. Dr. Bert found that on February 21, 1996, Claimant suffered a temporary aggravation of his 1988 injury, that he had no permanent effects from the February 21, 1996, injury and that he had returned to his pre-injury condition. Despite the fact that Claimant ultimately prevailed in his argument that Ainsworth was responsible, Ainsworth acted in good faith when they relied upon Dr. Bert's opinion in denying further compensation. The denial was not unreasonable or vexatious.

The record reflects that Claimant made no meaningful effort to seek reimbursement from Ainsworth for medical expenses after the denial until he filed his Petition for Hearing with the Department of Labor on February 6, 1998. Claimant apparently did not seek reimbursement from Twin City Fruit, either. Ainsworth joined Twin City Fruit in April of 1998.

Ainsworth did not argue that SDCL 62-7-38 does not apply to the facts of this matter. Instead, Ainsworth argues that SDCL 62-7-38 was invoked by the filing of Claimant's Petition for Hearing on February 6, 1998. They argue that SDCL 62-7-38 does not require them to pay medical expenses incurred before the Petition for Hearing was filed. They paid Claimant's bills for medical services rendered after the Petition for Hearing was filed. They did not pay any expenses incurred by Claimant between the time of their denial and the filing of the Petition for Hearing. They make two arguments in defense of this failure to pay Claimant's medical expenses incurred between July 8, 1996 and February 6, 1998.

First, Ainsworth admitted that “the bills at issue here, incurred in 1997, were not paid until after hearing,” claiming that it was a “mistake” that they were not paid because the bills were simply “overlooked.” This argument of “mistake” is rejected. Claimant’s attorney sent twenty letters over a four-year period in an effort to get Claimant’s outstanding medical expenses paid. These bills were not “overlooked” or “mistakenly” not paid. They were ignored. This is vexatious and unreasonable.

Second, Ainsworth argues that SDCL 62-7-38 does not apply to expenses incurred between the July 8, 1996, denial and the February 6, 1998, Petition for Hearing is rejected. SDCL 62-7-38 requires “immediate payment of the claim.” The “claim” includes all medical expenses. Furthermore, the correspondence and hearing testimony demonstrate that Ainsworth agreed to pay medical expenses pursuant to SDCL 62-7-38. Certainly, Ainsworth did not admit liability by paying medical expenses before the Department’s decision of June 1, 2001. Ainsworth argued that the nonpayment was a “mistake” and that the bills were “overlooked.” Ainsworth did not have a good faith belief that SDCL 62-7-38 does not apply to the medical expense incurred between the denial and the Petition for Hearing. Their failure to pay Claimant’s medical expenses incurred between the denial and the Petition for Hearing was both unreasonable and vexatious. Under SDCL 58-12-3, Claimant is entitled to reasonable attorney’s fees incurred in seeking payment of the medical expenses.

Claimant’s Affidavit of Counsel itemizes the claim for attorney’s fees. Claimant also attached copies of correspondence regarding the outstanding medical bills to his post-hearing brief. It appears from this record that Claimant’s counsel contacted Ainsworth in writing about outstanding medical expenses on April 20, 1998; May 21, 1998; July 27, 1998; August 10, 1998; August 24, 1998; November 10, 1998; December 14, 1998; April 5, 1999; September 8, 1999; September 27, 1999; December 2, 1999; March 14, 2000; March 21, 2000; April 18, 2000; May 8, 2000; June 30, 2000; August 21, 2000; February 23, 2001; August 30, 2001; and October 2, 2001. Claimant is entitled to his fees for generating these letters. Claimant is also entitled to his fees for reviewing correspondence from Ainsworth regarding these expenses.

Issue Two

Whether the amount of attorney’s fees requested by Claimant is reasonable under the standards of SDCL 58-12-3.

Upon review of the record, the following fees are allowed because they specifically go to Claimant’s efforts to get his medical expenses paid:

Date	Description	Hours
4-20-98	PC to Ken Chleborad RE: Medical Bills	.20
5-21-98	PC to Chleborad RE: RX	.10
7-27-98	PC to Chleborad RE: RX Bill (revised outstanding medical status of payment)	.20

8-7-98	R/R Correspondence from Chleborad RE: med expenses	.10
8-24-98	PC to Chleborad RE: RX, revised medical O/S bill List	.10
9-30-98	TC Provider West River Anesth. RE: No payment on acct	.10
11-10-98	PC to Ken Chleborad RE: Rx fro Ken/Deposition	.10
12-14-98	PC to Chleborad RE: Rx needs to be paid to Dona	.10
4-5-99	PC to Ken Chleborad RE: Bill from WRA $912.50	.10
6-24-99	PC to Chleborad RE: Reports and bills	.10
9-27-99	PC to Ken Chleborad RE: Medical	.10
12-2-99	R/R Correspondence from CNA Insurance RE: Denial of Dr. Weber's Bill	.10
	PC to Chleborad RE: Denial and Bills	.10
1-13-00	R/R O/S Bill from Dr. Weber ($235.00)	.10
	PC to Chleborad & Dona RE: Dr. Weber's bill/MedList	
		.20
3-14-00	PC to Chleborad RE: Dr. Weber's bills	.10
4-18-00	R/R Medical bills and report from Dr. Weber dated 3-6-00	.10
	PC to Chleborad RE: Bill and Report	.10
5-8-00	PC to Chleborad RE: Bill and Report	.10
6-30-00	PC to Chleborad RE: Medical Bill and report	.10
8-21-00	PC to Chleborad RE: Medical report and bill from Dr. Weber	.10
6-21-01	TC to Chleborad RE: issues – getting this resolved	.20
7-23-01	TC Sandy @ BH Collection RE: Status of medicals	.10
7-26-01	R/R Medical Bills and Reports from Dr. Weber dated 7-9-01;	.10
	7-11-01 and 7-12-01	.10
	PC Chleborad RE: Medical Bill and report from Dr. Weber	
8-27-01	PC Chleborad RE: Medical Bills and Reports from Dr. Weber dated, 3-21-01, 3-19-01, 8-14-01, 7-19-1, 8-16-01	.10
	PC Chleborad RE: Medical Bills and Reports from Dr. Weber	.10
8-30-01	PC Chleborad RE: Medical Bills Payments	.10
10-2-01	TC Sandy @ BH Collection RE" She got a letter from Ken Nowell concerning O/S medical bills – she will send us a printout of what is O/S, for review and to compare open balances	.20
	PC Chleborad RE: Setting date to get together RE: Medical Bills- contact us to set a time to do review	.10
10-3-01	R/R Account Info from Sandy @ BH Collections	.10
	PC Chleborad RE: Account Summaries from BH Collections	.20
10-4-01	R/R Correspondence from Chleborad RE: Response to our response 10-2-01	.10
10-9-01	TC Chleborad RE: O/S Medical Bills – he's getting a list from Insurer – we will compare when we receive it	.10
11-9-01	TC Sandy @ BH Collections RE: Bills @ Collection are all paid	.10
		4.10
	Total	

Attorney's fees are hereby awarded for 4.10 hours at $125.00 per hour for a total of $512.50.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Ainsworth shall have ten (10) days from the date of receipt of the State's proposed Findings of Fact and Conclusions to submit objections thereto or to submit her own proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 12th day of February, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge