May 9th, 2017

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LETTER DECISION AND ORDER

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Dear Counselors:

This letter addresses the following submissions by the parties:

January 27th, 2017	Claimant's Motion for Approval of Attorney's Fees
	Affidavit of David S. Barari
March 3rd, 2017	Employer/Insurer's Opposition to Motion for Attorney's Fees
	Affidavit of Comet H. Haraldson
March 17th, 2017	Claimant's Reply Brief in Support of Motion for Attorney's Fees
	Third Affidavit of David S. Barari

Issues presented:

Is Claimant entitled to an award of attorney's fees under SDCL 58-12-3?

Is Claimant entitled to an award of attorney's fees under SDCL 62-3-37?

Relevant Facts:

1. Claimant was previously injured while employed with Employer and filed a petition for worker's compensation benefits.

2. Claimant was awarded worker's compensation benefits by the Department of Labor and Regulation in the amount of $208,979.42 on September 25th, 2008.

3. In 2011, Employer learned from another employee that Claimant had completed the Volksmarch at the Crazy Horse Monument in the Black Hills. This employee took photos and surveilled Claimant.

4. On February 5th, 2013, Employer sent interrogatories to Claimant requesting further medical information about Claimant's current condition, to which Claimant did not answer.

5. On June 13th, 2013, Employer filed a petition alleging Claimant's condition had improved and that Claimant was no longer eligible for worker's compensation benefits. Employer also sought to be reimbursed for any benefits paid to Claimant in error.

6. Claimant hired attorney David Barari of Goodsell Quinn, LLP to represent her in this action.

7. Claimant had an MRI completed on July 26th, 2013.

8. Employer sought the opinion of Dr. Nolan Segal to perform an IME on Claimant. Dr. Segal's subsequent report was sent to Claimant's counsel January 30th, 2015.

9. Dr. Segal's professional opinion was that the damage to Claimant's L4-L5 and L5-S1 discs had lessened or resolved since the original injury.

10. Employer filed a motion to dismiss its petition for review of Claimant's eligibility for worker's compensation benefits. Said petition was granted by the Department January 17th, 2017.

11. Claimant now seeks attorneys' fees in the amount of $24,503.52, which includes sales tax.

Analysis:

1. Whether Claimant is entitled to attorney's fees under SDCL 58-12-3

SDCL 58-12-3 provides:

> In all actions or proceedings hereafter commenced against any employer who is self-insured, or insurance company… 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 and Regulation, 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… (emphasis added).

Since Employer had a statutory right to revisit the issue of ongoing benefits, the mere fact that Employer brought a petition to review Claimant's eligibility by itself is not sufficient for an award of attorney's fees. *Howie v. Pennington Cty.,* 1997 S.D. 45, ¶ 11, 563 N.W.2d 116, 119. "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." *Taylor v. Commercial Union Ins. Co.,* 614 F.2d 160, 165 (8th Cir. 1980)(Quoting *United States v. F. D. Rich Co.,* 439 F.2d 895, 905 (8th Cir. 1971)).

Employer sought review of Claimant's original award after it received evidence suggesting that Claimant's condition may had improved over time. Employer learned that Claimant had participated in the Volksmarch in the Black Hills. Claimant argues that the fact that she engaged in the Volksmarch at Crazy Horse Monument was insufficient evidence to warrant reinvestigation of her case. The Department disagrees. Given Claimant's original injury, it is entirely plausible for Employer to question whether someone in Claimant's condition would be able to engage in a hike of this nature. In his report, Dr. Segal also opined that Claimant's participation in the Volksmarch was inconsistent with someone who was suffering from the ailments claimed by Claimant. Additionally, this evidence was not the sole basis for Employer's petition.

Employer also obtained evidence that Claimant had engaged in a number of activities which would suggest that her condition had improved over time, including gardening and attending sporting events. Based on these observations, Employer then requested that Claimant be seen by Dr. Nolan Segal. Dr. Segal's deposition testimony was that, per a July 26th, 2013 MRI, his opinion was that Claimant's L4-L5 and L5-S1 discs had improved since her original award of benefits. When taken together, all of these facts support Employer's request for a determination of whether or not Claimant's injury had improved to a point in which she would no longer be eligible for worker's compensation benefits.

Claimant also cites *Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs.,* 2016 S.D. 70, 886 N.W.2d 322, to support its proposition. However, *Mordhorst* is not supportive of Claimant's request for attorney's fees under SDCL 58-12-3 for two reasons. First, the Court did not actually rule on the merits of Mordhorst's claim. Rather, the Court found the claimant had asserted facts sufficient to overcome a motion for dismissal:

> It is not necessary to determine whether Dr. Segal's report was lacking or whether Insurers' reliance thereon was actually unreasonable. Because the present case is an appeal from a Rule 12(b)(5) motion for dismissal, such issues are not properly before us. We decide only that Mordhorst asserted facts that if true, state a claim for bad-faith denial of a workers' compensation claim and that Insurers' reliance on Dr. Segal's report to deny benefits was not per se reasonable. Therefore, the circuit court erred by granting Insurers' motion to dismiss.

Id. at ¶ 14.

Second, in *Mordhorst*, employer had ceased making payments before the hearing. In this case, Employer continued to make payments even while it contested

Claimant's future eligibility for benefits. See *Howie,* at ¶ 14. (Employer was not unreasonable in seeking review of benefits while it continued to pay the full benefits to claimant during litigation.)

2. Whether Claimant is entitled to attorney's fees and costs under SDCL 62-7-36

Employer first argues that SDCL 62-7-36 does not authorize payment of attorney's fees in this case. SDCL 62-7-36 reads:

Except as otherwise provided, fees for legal services under this title shall be subject to approval of the department.

Attorneys' fees may not exceed the percentage of the amount of compensation benefits secured as a result of the attorney's involvement as follows:

(1) Twenty-five percent of the disputed amount arrived at by settlement of the parties;

(2) Thirty percent of the disputed amount awarded by the Department of Labor and Regulation after hearing or through appeal to circuit court;

(3) Thirty-five percent of the disputed amount awarded if an appeal is successful to the Supreme Court.

Attorneys' fees and costs may be paid in a lump sum on the present value of the settlement or adjudicated amount.

SDCL 62-7-36 provides a ceiling on what percentage may be paid out in various scenarios. However, nothing in SDCL 62-7-36 prevents the Department from approving attorney's fees so long as such fees are reasonable and do not exceed the statutorily mandated percentages.

Employer next argues that Claimant's attorneys are not entitled to fees because the attorneys did not secure any benefits in this case. While it is true that no new benefits were granted, the petition brought by Employer jeopardized Claimant's future

benefits. Claimant hired Mr. Barari's firm to assist her in defending her original benefit award from Employer's challenge. Mr. Barari's involvement in the case no doubt played some part in Employer's decision to abandon its challenge of Claimant's ongoing eligibility. As such, Mr. Barari secured continued compensation for Claimant in this case. Claimant's original award was for $208,979.42. Since Employer also requested reimbursement of benefits paid to Claimant in error, Claimant risked not only losing future benefits, but also the real possibility that she would have to repay those which she had already obtained. Therefore, Mr. Barari not only defended future benefits for Claimant, he also ensured Claimant would not have to repay those benefits which she had already received.

For the services which he provided Claimant in defense of her original award, Mr. Barari seeks $24,503.52 in fees and costs. This represents approximately twelve percent of Claimant's original award. When determining whether attorney's fees are reasonable, a court should consider various factors, including the time and skill required to perform the requisite legal service, the fee customarily charged in the locality for similar legal services, and the amount involved and the results obtained. *City of Sioux Falls v. Kelley,* 513 N.W.2d 97 (S.D. 1994). When analyzed under *Kelley*, Claimant has met several criteria for reasonableness. First, Claimant's attorney spent approximately 125 hours over the span of three and a half years on Claimant's case, including familiarizing himself with Claimant's case. When broken up over the time pendency of this case, Claimant's attorneys spent only a few hours per month on Claimant's case. Mr. Barari billed Claimant at a rate of $200 per hour for his time and $90 per hour for time spent on this case by to paralegals. This amount by itself is not unreasonable and

is likely within the range charged by other attorneys in the Rapid City area. Finally, the fees must be considered in light of the amount involved in litigation and the results obtained. Claimant risked losing over $200,000 in benefits which the Department had awarded her. Claimant may have also had to repay a large portion of that amount which she had already received. Given what was at stake for Claimant, an award of attorney's fees of twelve percent of the total amount is reasonable. SDCL 62-7-36 contemplates that an attorney will be paid as a percentage of the total amount of benefits awarded to a claimant. Since no new benefits were granted, any attorney's fees under SCL 62-7-36 must come from the original benefit award.

Order

Claimant's motion for attorney's fees under SDCL 58-12-3 is DENIED. Claimant's motion for attorney's fees under SDCL 62-7-36 is GRANTED. Claimant shall pay attorney's fees and costs of $24,503.32 from her original settlement amount. This letter shall constitute the Department's Order in this matter.

Sincerely,

/s/ Joe Thronson
Joe Thronson
Administrative Law Judge