IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 48A-2

WCC No. 9309-6893

**MONTANA SCHOOLS GROUP
WORKERS COMPENSATION RISK
RETENTION PROGRAM**

Petitioner

vs.

**DEPARTMENT OF LABOR AND INDUSTRY
EMPLOYMENT RELATIONS DIVISION**

Respondent.

ORDER DENYING MOTION TO RECONSIDER
ORDER DENYING ATTORNEY FEES

Summary: Self-insurance association of school districts renews request for attorney fees and costs following appeal, arguing that it seeks fees on a private attorney general theory, which it argues cannot be considered until after the Court has ruled on the substantive issues.

Held: Court remains without jurisdiction to award fees. Cases cited by appellant distinguished.

Topics:

> **Attorney Fees: Timeliness of Request.** Renewed request for attorney fees and costs based on private attorney general theory denied where appellant first made the request more than three months following judgment.

Montana Schools Group (MSG) has requested attorney fees. The request was made for the first time after entry and certification of judgment. On September 27, 1995, I determined that the request was untimely and that I was without jurisdiction to consider it. (Order Denying Attorney Fees.) MSG now asks the Court to reconsider its ruling, arguing that the type of attorney fees it seeks -- private attorney general theory -- cannot

be considered until after the Court has ruled on the substantive issues. MSG cites several cases, none of which are persuasive.

In *Weber v. State of Montana,* 253 Mont. 148, 151, 831 P.2d 1359, 1361 (1992), the Supreme Court stated that the motion for attorney fees was filed after trial. But that was in a case of a jury trial. Attorney fees and costs are frequently fixed by the Court even in cases tried by juries. Moreover, there is nothing in the *Weber* opinion to indicate that the plaintiff had failed to request attorney fees and costs in his prayers for relief, or that final judgment had been entered by the court prior to his motion for attorney fees.

In *Dearborn Drainage Area v. Montana Stockgrowers Association, Inc.,* 240 Mont. 39, 831 P.2d 1359 (1989), the Supreme Court's decision indicates that attorney fees were requested after remittitur from a prior decision of the Supreme Court which had affirmed a water rights determination of the Water Court. The Water Court awarded attorney fees after remand but the Supreme Court reversed. Its decision was based on the merits of the attorney fee claim; the timeliness of the attorney fee claim was not considered and apparently was not raised as an issue in the case. Moreover, the decision does not inform us whether a prayer for attorney fees had been included in the pleadings. Thus, *Dearborn* hardly stands as affirmative precedent for MSG's position.

In *Armstrong v. Montana Dept. of Justice,* 250 Mont. 468, 820 P.2d 1273 (1991), the attorney fee request was made after the plaintiff successfully appealed an adverse decision to the Supreme Court. The fact that the plaintiff requested the district court to consider attorney fees following his successful appeal is not surprising since he initially lost at the district court level and attorney fees were unavailable to him at that time. As in the other cases cited by MSG, the Supreme Court did not indicate whether attorney fees had been prayed for in the pleadings and the timeliness of the motion for attorney fees was not addressed.

Moreover, and not mentioned by MSG in its briefs, the Supreme Court has specifically considered the time in which a request for attorney fees must be filed. In the recent case of *In re Marriage of Hill,* 265 Mont. 52, 874 P.2d 705 (1994), the Court considered an attorney fee request made many months after the initial filing of the case. The Court held that the request was untimely:

> A review of the record reveals that Terry did not request attorney fees as a form of relief in her original petition for modification. The issue of attorney fees was not mentioned until a brief in support of the petition was filed seven months later. We conclude that an argument raised for the first time in a supporting brief does not equate with raising an issue in the pleadings and serving notice to the court and opposing parties of the relief requested. When the issue of attorney fees is omitted from the pleadings, and no evidence is presented on that issue at trial, the issue is outside the

> purview of the District Court. *Naftco Leasing v. Finalco* (1992), 254 Mont. 89, 835 P.2d 728. Accordingly, the court did not err when it did not address this issue, and this Court will not consider a claim raised for the first time after the trial, against which the opposing party had no opportunity to defend.

265 Mont. at 60, 874 P.2d at 709-710. Based on the language of the opinion, it appears that the attorney fee request was made after trial but prior to the district court's entry of judgment. The decision refutes MSG's position in this case that it did not have to raise the issue prior to this Court's entry of judgment.

The Supreme Court has also held that where the trial court enters judgment without mentioning attorney fees, a party seeking attorney fees must comply with the requirements applicable to motions to amend the judgment. *Haugen v. Nelson,* 240 Mont. 28, 31, 782 P.2d 901, 902 (1989). In district court actions, motions to amend a judgment are governed by Rule 59(g), Mont.R.Civ.P., which requires that such motions be filed within ten days after notice of entry of judgment. In *Haugen* both parties requested attorney fees in their pleadings. The Court entered judgment without awarding either party attorney fees. Notice of entry of judgment was then served. Nearly six weeks after that notice, the Nelsons filed a motion for attorney fees. The motion was rejected by the district court as untimely and the Supreme Court affirmed, holding that the motion was one to amend the judgment and that the Nelsons had only ten days in which to file the motion. The Court rejected the Nelsons' contention that the original judgment was merely interlocutory:

> Rule 54(a), M.R.Civ.P. defines *judgment* as "the final determination of the rights of the parties in an action or proceeding and as used in these rules includes a decree and any order from which an appeal lies ..."
>
> In its order dated June 1, 1989, the District Court dismissed Haugen's complaint and the Nelsons counterclaim. The District Court did not award attorney fees to either party. The Nelsons argue that the District Court's order of June 1, 1989 is interlocutory because it does not expressly award or deny attorney fees. We find no merit with this assertion. Under Rule 54(a), M.R.CIV.P., the court's order was a final determination of the rights of the parties, and thus a [240 Mont. 31] judgment. Even the Nelsons themselves deemed the District Court's order a final judgment by virtue of the fact that their attorney filed notice of entry of judgment on June 14, 1988 with the District Court. **The word "judgment" is blazed across the caption of the instrument filed by the Nelsons.** [Emphasis added.]

240 Mont. at 30-31, 782 P.2d at 902.

A situation similar to that in *Haugen* exists in the present case. The Court's June 16, 1995 Order on Appeal ended with a section entitled "JUDGMENT". The judgment

contained several paragraphs, including a final paragraph which stated, "5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348." On June 21, 1995, MSG gave Notice of Entry of Judgment.

While, unlike district court actions, a notice of entry of judgment has not been deemed necessary in Workers' Compensation Court actions, see ARM 24.5.348(1), notice of entry judgment was in fact given in this case. Thus, whether we date the running of the time for filing a motion to amend the judgment from the time of the Court's original judgment or the notice of entry of judgment, and whether we apply the 10-day period specified in Rule 59(g) or this Court's longer 20- day period prescribed by Rule 24.5.344 for motions to amend, makes no difference in this case. Any way you calculate the time, MSG's motion was untimely.

Although this Court has adopted a rule permitting actual calculation of attorney fees after final judgment, ARM 24.5.343, that provision only applies in cases where the Court determines *in its judgment* that the claimant is entitled to attorney fees. Indeed, there is an express requirement in Rule 24.5.343(1), that the Court "will indicate in its findings of fact and conclusions of law the basis for the award of reasonable costs and attorney fees." The rule applies only to awards of attorney fees to claimant. The rules are silent concerning any award of attorney fees to others, however, nowhere do the rules even hint that a party is entitled to seek attorney fees for the first time after entry of judgment.

MSG argues that only after judgment could it have known that it prevailed and whether the grounds on which it prevailed fit into a private attorney general theory of fees. The argument is disingenuous. Complaints and petitions ordinarily set out the various remedies to which the party **may** be entitled. If an award of attorney fees can be justified under any of the theories advanced in a complaint, petition or notice of appeal, then it can and should be requested. Moreover, the argument does not excuse MSG from complying with the deadlines fixed for filing a motion to amend the judgment.

Finally, MSG asserts that Rule 54(c), Mont.R.Civ.P., required the Court to award attorney fees even though not specifically requested to do so. That rule provides in relevant part: "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." This Court has not fully embraced the Rules of Civil Procedure, and it has no counterpart to Rule 54(c). Even if it adopts the rule, the rule does not require the Court to sua sponte explore every possible form of relief that could possibly be invoked in a case. The attorneys have a responsibility to identify and request the appropriate relief, and nothing prevented MSG and its attorney from requesting attorney fees in their original notice of appeal and their briefs. Moreover, if it was an error of the Court to fail to grant the relief in its original judgment, MSG's remedy was to file a timely motion to amend the judgment.

This Court was, and still is, without jurisdiction to consider MSG's motion for attorney fees. The motion **is denied**.

Dated in Helena, Montana, this 4th day of October, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Allan B. Chronister
Mr. Daniel B. McGregor
Ms. Christine L. Noland
Mr. Brian McCullough - Zip Mail
Submitted Date: October 2, 1995