

Not Reported in F.Supp., 1993 WL 256755 (D.Kan.)
(Cite as: 1993 WL 256755 (D.Kan.))

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United States District Court, D. Kansas.

Sam J. WALTERS, D.C., Plaintiff,

v.

MONARCH LIFE INSURANCE CO., Defendant.

Civ. A. No. 91-2396-GTV.

July 1, 1993.

Thomas L. Thurston, Perry & Hamill, [Anthony F. Rupp](#), Shughart, Thomson & Kilroy, Overland Park, KS, [W James Foland](#), [Bradley J Baumgart](#), [David H Luce](#), Shughart, Thomson & Kilroy, P.C., Kansas City, MO, for plaintiff.

[Lee M. Smithyman](#), [Smithyman & Zakoura, Chtd.](#), Overland Park, KS, for defendant.

MEMORANDUM AND ORDER

VAN BEBBER, District Judge.

*1 This case is before the court on Plaintiff's Motion for Attorney's Fees (Doc. 297) pursuant to [K.S.A. 40-256](#). Plaintiff contends that because defendant's refusal to pay benefits under his disability insurance policy was without just cause, he is entitled to recover \$173,958.80 in attorneys fees. Defendant has responded (Doc. 305) and opposes plaintiff's motion for attorney's fees. A statement of consultation pursuant to D.Kan.Rule 220 has been provided to the court. For the reasons stated below, plaintiff's motion for attorney's fees is denied.

Under [K.S.A. 40-256](#), attorney's fees may be awarded a plaintiff recovers against an insurance company and it appears from the evidence that the insurance company refused without just cause or excuse to pay the full amount of a loss claimed. Plaintiff may recover a reasonable sum as attorney's fees, including proceedings upon appeal. *Id.* The rules applied by Kansas courts in determining whether to award attorney's fees under [K.S.A. 40-256](#) were stated in [Clark Equip. Co. v. Hartford Accident & Indem. Co.](#), [227 Kan. 489, 608 P.2d 903 \(1980\)](#):

Whether attorney fees are awardable under [K.S.A. 40-256](#) depends on the facts and circumstances of the

particular case. [Forrester v. State Farm Mutual Automobile Ins. Co.](#), [213 Kan. 442, 517 P.2d 173 \(1973\)](#); [Sturdy v. Allied Mutual Ins. Co.](#), [203 Kan. 783, 457 P.2d 34 \(1969\)](#). What constitutes refusal to pay 'without just cause or excuse' varies with each case. [Koch, Admin. v. Prudential Ins. Co.](#), [205 Kan. at 565](#), held the above phrase to mean 'frivolous and unfounded,' and that denial of liability must be patently without foundation. Attorney fees must be denied when there existed a good faith legal controversy as to liability. [Forrester](#), at 452. If there is a bona fide and reasonable factual ground for refusing to pay a claim, attorney fees are not awardable. [Koch](#), at 565. Denial of payment where not arbitrary, capricious, or in bad faith will not give rise to an award of attorney fees. [Van Hoozer v. Farmers Insurance Exchange](#), [219 Kan. 595, 615, 549 P.2d 1354 \(1976\)](#).

Where an insurer refuses to pay a disability claim without first conducting a good faith investigation, attorney's fees may later be awarded under [K.S.A. 40-256](#). See [Matthews v. Travelers Ins. Co.](#), [212 Kan. 292, 510 P.2d 1315 \(1973\)](#); [Brown v. Continental Cas. Co.](#), [209 Kan. 632, 498 P.2d 26 \(1972\)](#).

The award of attorney's fees in insurance cases is committed to the sound discretion of the trial court. [Scott v. State Farm Mut. Auto Ins. Co.](#), [18 K.A.2d 93, 99, 850 P.2d 262 \(1993\)](#). Judicial discretion is abused only when an action taken is arbitrary, fanciful, or unreasonable. *Id.* at 100 (citing [State v. Wagner](#), [248 Kan. 240, 242, 807 P.2d 139 \(1991\)](#)). [Section 40-256](#) does not provide for the recovery of attorney's fees whenever a verdict against an insurance company is rendered, but only when the court deems the company's refusal to pay a claim to be without just cause or excuse.

*2 In the present case, plaintiff argues that defendant acted without just cause or excuse in denying plaintiff's claim for benefits under his disability policy. Specifically, plaintiff contends that **Monarch** failed to conduct a good faith investigation into the claim, that it had no medical opinion stating plaintiff was not disabled when it terminated his benefits, that it did not investigate what plaintiff's substantial and material occupational duties were, that it did not obtain statements from all eye witnesses to plaintiff's accident, and that it gave plaintiff no chance to

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respond to any “evidence” which supported termination of his benefits. Plaintiff asserts that under Kansas law, defendant is therefore liable for plaintiff's reasonable attorney's fees.

On the other hand, defendant argues that it interviewed numerous people who had contact with plaintiff during the period when he claimed to be disabled, had plaintiff surveilled, and talked to several of plaintiff's treating physicians before terminating his benefits. Defendant also states that it obtained the opinion of Dr. James Holtwick, a chiropractor who worked with plaintiff, prior to terminating plaintiff's benefits.^{FN1} Defendant contends that it made a reasonable, good faith investigation before terminating plaintiff's benefits. Defendant argues that because it had just cause to terminate plaintiff's benefits, it should not be liable for his attorney's fees under [K.S.A. 40-256](#). Defendant also claims that plaintiff's failure to recover the full amount of benefits claimed precludes the recovery of attorney's fees in this case.

With regard to defendant's argument that plaintiff's failure to recover the full amount sought in this case precludes the award of attorney's fees under [K.S.A. 40-256](#), the court disagrees with defendant. Defendant has argued in its brief that the plain language of [section 40-256](#) indicates that a court should not consider a request for attorney's fees unless the insured has first obtained a verdict against the insurer for the full amount of the loss claimed. Here, defendant argues that because plaintiff only recovered one fourth of the loss claimed, attorney's fees should not be awarded.

Defendant has not cited-nor has the court found-any case in which a Kansas court has interpreted [K.S.A. 40-256](#) to mean that the full amount of benefits claimed must be recovered before attorney's fees may be awarded under the statute. The court does not read the phrase “full amount of the loss” as used in [section 40-256](#) to pertain to a plaintiff's recovery. Rather, that phrase only appears in the section in the context of an insurance company's refusal to *pay* the full amount of a loss. Defendant's argument on this ground is without merit.

The court finds, however, that under the relevant standards for awarding attorney's fees pursuant to

[K.S.A. 40-256](#), plaintiff has not shown that he is entitled to recover his attorney's fees. Whether attorney's fees are awardable under [K.S.A. 40-256](#) varies with each case, and refusal to pay “without just cause or excuse” also depends on the facts of a case. *Koch, Administratrix*, 205 Kan. at 565. Under the facts and circumstances of the case at hand, the court cannot say that defendant's refusal to pay plaintiff's disability claim was “patently without any reasonable foundation” or “frivolous and unfounded.” See *Clark Equip. Co.*, 227 Kan. at 494. “If there is a bona fide and reasonable factual ground for refusing to pay a claim, attorney fees are not awardable.” *Id.* (citing *Koch, Administratrix*, 205 Kan. at 565.

*3 Although the jury ultimately found in favor of the plaintiff on his breach of contract claim, the jury's award of less than the full amount of damages sought supports the view that this was a close case. Defendant did conduct extensive investigation before terminating plaintiff's benefits, and the court is not convinced that the investigation was undertaken in bad faith. The court concludes that defendant's denial or termination of plaintiff's disability benefits was not without just cause or excuse, but was instead prompted by a bona fide controversy of plaintiff's physical status. Plaintiff's motion for attorney's fees is denied.

IT IS, THEREFORE, BY THE COURT ORDERED that Plaintiff's Motion for Attorney's Fees (Doc. 297) is denied.

Copies of this order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

^{FN1} Defendant has submitted an affidavit by claims representative Ed Gallet stating that it did obtain a medical opinion of Dr. James Holtwick, D.C., indicating that **Walters** was not disabled, prior to its termination of **Walter's** benefits. Holtwick did not testify at trial and plaintiff objects to the court's consideration of Gallet's affidavit concerning any opinion of Holtwick. The court will not consider Gallet's affidavit for the truth of the matters asserted therein as to Holtwick's opinion, but will consider it as

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evidence that an investigation into plaintiff's
condition was undertaken prior to the
termination of benefits.

D.Kan.,1993.
Walters v. Monarch Life Ins. Co.
Not Reported in F.Supp., 1993 WL 256776 (D.Kan.)

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