

Trahan v. Franklin Cty. Home Health (Oct. 30, 1996)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Amy Trahan) File #: C-25116
) By: Barbara H. Alsop
v.) Hearing Officer
) For: Mary S. Hooper
Franklin County Home Health) Commissioner
)
) Opinion #: 11-96WC

*Stipulations of fact filed on or before December 15, 1995.
Record closed on December 28, 1995.*

APPEARANCES

*William T. Counos, II, Esq., for the claimant
Keith J. Kasper, Esq., and Eric A. Johnson, Esq., for the defendant*

ISSUE

Whether the employer/insurer is responsible for any portion of the claimant's costs and expenses in an unsuccessful third party action.

STIPULATIONS

- 1. Claimant suffered a work-related injury arising out of and in the course of her employment with Defendant on May 18, 1990.*
- 2. Claimant was an employee within the meaning of the Vermont Workers' Compensation Act (hereinafter "Act") at the time of the injury.*
- 3. Defendant was an employer within the meaning of the Act at the time of the injury.*
- 4. Liberty Mutual Insurance Company was the Defendant's workers' compensation insurance carrier within the meaning of the Act at the time of the injury.*
- 5. Liberty Mutual paid to Claimant a total of \$25,597.57 in indemnity payments and \$7,709.79 in medical reimbursements.*
- 6. Liberty Mutual's position from the outset of the third party action*

until the start of trial was to receive full payment for its lien less deductions mandated by 21 V.S.A. §624.

7. In April of 1993, Claimant, without consultation with Liberty Mutual, rejected a settlement offer of \$25,000.00 by the allegedly responsible third party. At that time Claimant was aware that Liberty Mutual wanted full satisfaction of its lien. At no time prior to the trial did the third party ever increase its offer.

8. Suit was filed in Franklin Superior Court against the allegedly responsible third party on May 5, 1993, by Claimant with the knowledge of Liberty Mutual.

9. On July 29, 1994, Liberty Mutual was informed that the matter was set for jury draw on October 10, 1994.

10. The last telephone contact between Claimant's attorney and Liberty Mutual occurred on September 19, 1994, wherein Liberty Mutual reiterated its position that full satisfaction of its lien was expected. Subsequent attempts by Claimant's attorney to contact Liberty Mutual's adjuster via telephone before October 12, 1994, were unsuccessful.

11. The last contact prior to trial between Claimant's attorney and Liberty Mutual was on October 12, 1994, wherein Liberty Mutual by letter once again reiterated its position of full payment of its lien.

12. The matter was tried before a jury beginning on October 12, 1994, with a verdict in favor of the third party defendant.

13. On November 29, 1994, Claimant's attorney contacted Liberty Mutual and demanded payment of all of Claimant's costs associated with the third party claim in the amount of \$5,081.20.

14. At no time did Liberty Mutual expressly agree to share in the costs of litigation with Claimant.

FINDING OF FACT

I accept the stipulations as written and I take notice of all forms filed in this matter. Both parties have, in their memoranda, included either a "background" section or a "facts" section. I will only accept those facts specifically stipulated to or otherwise established in the official record of

the Department.

DISCUSSION AND CONCLUSIONS OF LAW

1. *The stipulated facts are accepted as true for purposes of this decision.*
2. *The applicable statutes in this dispute are 21 V.S.A. §§606 and 624(f). §606 states: "Questions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of the commissioner, shall be determined, except as otherwise provided, by the commissioner." §624(f), referring to cases involving third party actions, states: "Expenses of recovery shall be the reasonable expenditures, excluding attorney fees, incurred in effecting the recovery. Attorney fees, unless otherwise agreed upon, shall be divided among the attorneys for the plaintiff as directed by the court. The expenses of recovery above mentioned shall be apportioned by the court between the parties as their interests appear at the time of the recovery." The defendant argues that §624(f) controls the procedure for allocating expenses, and that therefore jurisdiction lies with the trial court and not the department.*
3. *§624 was enacted to preserve an injured worker's common law action against third party wrongdoers, subject only to the employer's subrogation for compensation paid the injured worker. Dubie v. Cass-Warner Corp., 125 Vt. 476, 218 A.2d 694 (1966). The Commissioner's role in third party actions is limited; the Commissioner is to be provided notice before an action is filed. Notice allows the Commissioner to take the third party action, and any settlement or resolution of that action, into account when fulfilling her obligations under the workers' compensation act, particularly the obligation to approve settlements pursuant to §622. Any other issues arising in a civil action brought pursuant to §624 are solely the province of the Superior Court.*
4. *The clear legislative purpose of §624(f) is to give the trial court authority to decide what expenses of recovery are reasonable and how they ought best be apportioned among the attorneys for the plaintiff. Although §624(f) does not expressly address apportionment of plaintiff's expenses where there is no recovery, presumably the "American rule" that each party must bear its own legal expenses in litigation, absent statutory provisions to the contrary, would be applied. See, Fleury v. Kessel/Duff Construction Co., 149 Vt. 360, 361, 543 A.2d 703 (1988); Albright v. Fish, 138 Vt. 585, 590-91, 422 A.2d 250, 254 (1980). Since this issue is inherently one decided*

by the superior courts, and since the trial court is in the best position to determine what expenses are reasonable and how they best ought to be apportioned, this department will not intrude on the authority of the court.

5. Even if the Commissioner were to find that this department did have jurisdiction to decide how to apportion expenses following an unsuccessful third party action, there is no possibility that an unsuccessful plaintiff would prevail based on the facts stipulated here. Plaintiff rejected an offer of settlement without even consulting with the employer/insurer from whom she now seeks to recover expenses. Her failure to allow the employer/insurer to make an informed decision with regard to any proffered settlement bars her request for recovery of expenses.

ORDER

THEREFORE, based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that Amy Trahan's request for reimbursement of expenses in an unsuccessful third party action to which Liberty Mutual was not a party be and hereby is DENIED.

DATED at Montpelier, Vermont, this _30th_ day of October, 1996.

*Mary S. Hooper
Commissioner*