

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

Charles Paini	)	State File No. L-09007
	)	
	)	By: Amy Reichard
v.	)	Staff Attorney
	)	
	)	For: Steve Janson
Twin City Subaru and	)	Commissioner
CIGNA	)	
	)	Opinion No: 17-99WC

Submitted on Stipulated Facts and Legal Briefs.  
Record closed on March 16, 1999

**APPEARANCES:**

Scott Skinner, Esquire for Claimant  
John W. Valente, Esquire for Defendants

**ISSUE:**

Whether claimant is entitled to an award of costs, attorney fees and interest.

**EXHIBITS:**

Joint Exhibit 1:	Medical Records
Joint Exhibit 2:	Medical Bills
Claimant's Exhibit 1:	Correspondence of Kenneth Borie, D.O. (2/3/99)
Claimant's Exhibit 2:	Written statement of George Milne
Claimant's Exhibit 3:	Shoe worn by claimant at the time of the incident
Claimant's Exhibit 4:	Affidavit as to Attorney Fees and Costs
Defendants' Exhibit I:	Correspondence, with enclosure, from Linda Volpe, Claims Adjuster (12/1/97)
Defendants' Exhibit II:	Collection of correspondence addressing settlement negotiations between the parties

**STIPULATIONS:**

1. At all relevant times, Twin City Subaru (Mulkin Corp Subaru) was an employer within the meaning of the Workers' Compensation Act.
2. At all relevant times, and specifically in September, October, November and December, 1997, Charles Paini was an employee of Twin City Subaru.
3. At all relevant times, CIGNA was the workers' compensation insurance carrier for Twin City Subaru.

4. The parties hereby stipulate and agree that the defendants shall pay all medical bills which are causally related to the left foot injury as soon as reasonably possible. The parties agree that the only such bills that are known to exist are those attached as Joint Exhibit No. 2.
5. The parties hereby stipulate and agree that the defendants will pay temporary total disability benefits due for a period of three weeks and three days in the amount of \$2,004.17 as soon as reasonably possible.
6. The only benefits claimed that are not being paid are attorney's fees and expenses and interest.
7. In October 1997 the claimant was employed by Twin City Subaru as an automobile salesperson working on commission.
8. The claimant's contention is as follows: On or about October 4, 1997, claimant was completing the sale of a vehicle. Because the person who normally washes cars was not on duty, claimant took the car to the back of the dealership building to wash the car. At the time, the area in question had a number of boards, pallets and other debris lying on the ground. As he got out of the vehicle and stepped around the car door, claimant felt something prick his left foot on the far left side of the pad of his foot. Claimant was in a great hurry and paid no attention to what he had stepped on. He did mention to a co-employee that same day that he had punctured his foot on something and an affidavit to that effect is contained in the Department's file.
9. The medical records indicate that on October 15, 1997, the claimant went to the emergency department at Gifford Memorial Hospital in Randolph, Vermont, complaining of a red area on his foot and that it was painful to bear weight. He also stated that "I stepped on something at work about 2 weeks ago." He was given some medication, but when his symptoms did not improve, he returned the next day and was admitted to the hospital. He remained at Gifford Hospital from October 16 through October 20, 1997 with a diagnosis of cellulitis of his left foot and leg.
10. The medical records indicate that on October 20, 1997 he was transferred to Dartmouth Hitchcock Medical Center where he was hospitalized for "progressive soft tissue infection from puncture wound," until his discharge on October 27, 1997.
11. The parties agree to the admission of Joint Exhibit 1 which consists of the claimant's medical records.
12. The following medical expenses, in the total amount of \$17,563.92, have been incurred as a result of the puncture wound<sup>1</sup>:

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<sup>1</sup> On February 16, 1999, claimant's counsel notified the Department of a minor correction to the

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medical expenses incurred in this case. Specifically, by the agreement of the parties, one further bill from Gifford Memorial Hospital, in the amount of \$302.25, was to be included in the Joint Stipulation and Joint Exhibit 2. The addition of this bill resulted in an amended overall total of \$17,563.92 and the Gifford Memorial Hospital figure was increased to \$5,729.38.

a.	Gifford Memorial Hospital	\$5,729.38
b.	Dartmouth Hitchcock Medical Center	9,496.54
c.	Lahey Hitchcock Clinic	2,317.00
d.	Green Mountain Radiology	21.00

13. The parties agree to the admission of Joint Exhibit 2 which consists of the claimant's medical bills.
14. The parties hereby stipulate and agree that the Commissioner may decide the issue of attorney's fees (including expenses) and interest in this case upon this Stipulation, the attached exhibits, and the briefs of the parties which shall be submitted on or before February 17, 1999.

**FINDINGS OF FACT:**

1. Notice is taken of all forms filed with the Department in this matter. The exhibits are admitted into evidence.
2. After the claimant sustained his work injury on October 4, 1997, he failed to immediately report the incident to his employer. In fact, the Form 1, Employee's Claim and Employer's First Report of Injury was completed on October 28, 1997 and subsequently filed with the Department on October 31, 1997.
3. However, on the day of the incident, claimant did comment contemporaneously on his injury to a fellow co-worker. Moreover, in an effort to explain his delayed reporting, claimant asserts that he was not aware of the severity of his injury until ten days later when he developed an acute infection.
4. Claimant's explanation is consistent with Kenneth Borie, D.O.'s medical opinion. Specifically, in his report, Dr. Borie stated that the period of time which elapsed between claimant's initial injury and the time he first sought medical attention was not unusual for the incubation of bacteria that are inoculated into soft tissue by an object that causes a puncture. Although this medical opinion rationalizes claimant's delayed reporting, it cannot properly be considered as evidence in the resolution of the immediate issue because this report was not made available to defendants until after the Joint Stipulation was entered into between the parties.
5. As such, in a November 1997 correspondence, since there was a delay in reporting his injury to the employer, the workers' compensation carrier requested an extension of time to investigate the compensability of the claim.
6. Subsequently, on December 1, 1997, the Department received a formal denial of the claim from defendants. The defendants contested their liability for workers' compensation, arguing that the subject shoe had a hard rubber sole and, therefore, it was their contention that if the incident occurred as explained by claimant, the object would have been embedded in the shoe. Since an examination of the shoe failed to reveal any such object, the claim was denied. The only documentation submitted by defendants in support of this denial was claimant's sworn statement.

7. Acting in response to this denial, claimant retained counsel in this matter and a formal appearance was entered on December 16, 1997. Following this, on January 7, 1998, defense counsel also entered his appearance on behalf of the defendant employer and defendant carrier.
8. After official appearances were entered in this matter, several settlement discussions occurred. However, these discussions were to no avail. As such, on May 4, 1998, claimant filed a Form 6, Notice and Application for Hearing, requesting TTD, medical and hospital benefits, and attorney's fees.
9. Although the parties continued to discuss settlement possibilities through the summer of 1998, their efforts were not met with success. Therefore, at the request of claimant, this matter was forwarded to the formal hearing docket.
10. In December 1997 a pre-trial conference was held to discuss the status of the case. As a result of this conference, the formal Hearing was scheduled for February 3, 1999.
11. Following the pre-trial conference up until the date of the Joint Stipulation, the parties persisted in their settlement attempts. During these negotiations, the parties debated the utilization of various Department forms for the official settlement agreement. In addition, the parties also deliberated on the payment of claimant's medical expenses, the claimant seeking clarification of the defendants' intent to pay all incurred bills in full.
12. Finally, on February 1, 1999, the parties agreed upon the Joint Stipulation, which required defendants to pay claimant's 3 ½ weeks of TTD, as well as all medical expenses associated with treatment of claimant's puncture wound. The remaining contested issue of attorney's fees (including expenses) and interest in this case would be decided by the Department, following a review of the parties respective written proposals.
13. Since the Joint Stipulation was entered into between the parties, claimant's counsel has continued to expend time and effort in attempting to collect payment of claimant's TTD and medical expenses. In a March 4, 1999 correspondence to the Department, since claimant had yet to receive any payments, claimant's counsel requested that an Interim Order be issued, directing defendants to pay within one week. This request was based upon the defendants failure to pay claimant's TTD and medical bills "as soon as reasonably possible," as mandated by the Joint Stipulation.
14. On March 5, 1999, defense counsel replied to this correspondence. He maintained that an Interim Order was improper because only 16 days had elapsed since defendants received the final medical billing on the case.
15. On March 16, 1999, claimant's counsel again notified the Department that the Joint Stipulation had not been completely honored. Although the TTD payments were finally forwarded on March 10th, the claimant was still without compensation for his medical expenses. Since the final medical billing was actually made available to defendants on February 1, 1999, with the exception of a one technical correction on February 16, 1999, the claimant reasoned that thirty days had accrued without payment from defendants.

16. In response, defense counsel explained that the medical bills were forwarded for an audit to an off premises review company and they had not yet been returned to the carrier. However, following their return, defense counsel stated that the bills would then be paid.

### **CONCLUSIONS OF LAW:**

1. At issue in the present matter is the propriety of awarding claimant attorney fees, expenses, and interest. Both parties have filed proposed submissions in support of their respective positions.
  2. Relying upon numerous arguments, claimant asserts that such an award is entirely appropriate. Initially, claimant contends that an award for attorney fees, expenses, and interest is proper because defendants unreasonably denied claimant's clearly compensable injury. Furthermore, since the Joint Stipulation was not officially filed until February 1, 1999, claimant maintains that significant legal preparation for the February 3, 1999 Hearing was required and, therefore, the award is completely fitting. Finally, relying upon defendants delay in payment following the Joint Stipulation, claimant attempts to prove the necessity for the award.
  3. Conversely, defendants aver that an award for attorney fees, expenses, and interest is absolutely inappropriate. Defendants' contention is based upon the last best offer premise. Specifically, defendants assert that, a month prior to the Joint Stipulation, they had already offered to pay claimant's TTD and medical bills, those benefits to which claimant was entitled under statute. Therefore, defendants maintain that claimant's counsel unnecessarily continued in his representation of his client. Moreover, in an effort to refute claimant's argument that the TTD and medical bills were not paid "as soon as reasonably possible," defendants explained that a significant amount of time was necessary to process claimant's payments.
  4. Since an award granting costs, attorney fees, and interest within the workers' compensation is mandated by statute, an analysis of the relevant language is appropriate.
  5. 21 V.S.A. §678(a), which discusses awards for costs and attorney fees, provides:

Necessary costs of proceedings under this chapter shall be assessed by the commissioner against the employer or its workers compensation carrier when the claimant prevails. The commissioner may allow the claimant to recover reasonable attorney fees when the claimant prevails.
  6. 21 V.S.A. §664 addresses the issue of awarding interest in workers' compensation cases. If an employee prevails at a hearing, the commissioner's award shall include interest at the statutory rate on the total amount of unpaid compensation and it shall be computed from the date on which the employer's obligation to pay compensation began.
- A. COSTS:
7. As evidenced by the language contained within 21 V.S.A. §678(a), an award for reasonable costs is mandatory, as a matter of law, if the claimant prevails in a workers'

compensation proceeding. *Pederzani v. The Putney School*, Opinion No. 57-98WC (Oct. 6, 1998); *Fredriksen v. Georgia-Pacific Corp.*, Opinion No. 28-97WC (Oct. 17, 1997). In this matter, after examining the pertinent facts, it is apparent that the claimant has indeed prevailed in this claim. Consistent with the Joint Stipulation, claimant will recover his 3 ½ weeks of TTD, as well as all medical expenses incurred as a result of his puncture wound. Therefore, an award for necessary costs, in the amount of \$42.12 based upon the claimant's Affidavit as to Attorney Fees and Costs, is proper.

B. ATTORNEY FEES:

8. After interpreting the language within 21 V.S.A. §678(a), it is evident that an award of attorney fees is a matter of the Commissioner's discretion. *Aker v. ALIIC*, Opinion No. 53A-98WC (Nov. 5, 1998); *Pederzani, supra*; *Fredriksen, supra*.
9. When exercising this discretion, the Commissioner should attempt to effectuate the main purpose of section 678, which is to discourage unreasonable delay and unnecessary expense in the resolution of workers' compensation claims. *Morrisseau v. Legac*, 123 Vt. 70 (1962); *see also Eighmey v. Grand Union*, Opinion No. 21-95WC (April 26, 1995); *Grassette v. Beecher Falls Division of Ethan Allen, Inc.*, Opinion No. 68-95WC (Oct. 12, 1995); *Rhodes v. Whitney Blake Co. Of Vt.*, Opinion No. 93-95WC (March 12, 1996).
10. In addition, when determining whether to award attorney fees, it is important to recall that one of the purposes of the Workers' Compensation Act is to provide injured workers with expeditious and certain payments for economic losses without proof of fault. *St. Paul Fire & Marine Insurance Co v. Surdam*, 156 Vt. 585 (1991). Furthermore, consistent with this purpose, the Department has established a goal for speedy and inexpensive resolution of workers' compensation claims. *See Carter v. Portland Glass*, Opinion No. 8RS-98WC (April 3, 1998 and Feb. 6, 1998); *Fredriksen v. Georgia-Pacific Corp.*, Opinion No. 28S-97WC (Dec. 4, 1997).
11. Therefore, based upon these principles, attorney fees should be awarded in workers' compensation proceedings when an employer or carrier causes undue and unreasonable delay, which necessitates the legal representation of a claimant.
12. After a thorough review of this case, it is manifestly evident that the defendants acted in complete contravention with the purpose of the Workers' Compensation Act, as well as the Department's goal and, therefore, an award for attorney fees is appropriate.
13. Initially, it is important to note that defendants' denial of the claim was unsubstantiated, as required by Workers' Compensation Rule 3(e), which provides that all denials shall be accompanied by copies of all relevant documentation relied upon to support the denial. The only item attached to the denial in this case was the claimant's signed statement. Defendants failed to submit any evidence to bolster their theory that an object should have been embedded in the shoe. Having failed to provide the requisite support, the reasonableness of the denial is called into question, especially in light of the fact that the shoe clearly has a hole in the front, left portion of the sole.

14. In addition, defendants undue delay in paying claimant's TTD and medical expenses following the parties' Joint Stipulation also supports the necessity of claimant's counsel's involvement and, therefore, an award for attorney fees is further justified.
15. Specifically, after the Joint Stipulation was entered into between the parties, the defendants failed to provide claimant with his agreed upon compensation "as soon as reasonably possible." At the time of the Joint Stipulation, February 1, 1999, defendants were aware of the amount of TTD owed claimant. In addition, as of February 1, 1999, the defendants also possessed claimant's medical records, with the exception of a minor technical correction which was forwarded on February 16, 1999. However, claimant was not paid his TTD benefits until March 10, 1999. Furthermore, as late as March 16, 1999, defendants had yet to pay claimant's medical bills.
16. The workers' compensation rule pertaining to the medical fee schedule explicitly provides that an employer/carrier shall pay claimant's health care provider's charges within thirty days of receipt of the bills and supporting documentation. *Workers' Compensation Rule 40*. Moreover, in an interpretative memorandum elucidating this provision, the Director of Workers' Compensation reiterated that medical expense payments are to be made by the employer/insurer within 30 days from receipt of the bills and corroborating records. *Workers' Compensation Interpretive Memorandum - Clarification of Payment of Medical Providers*, (Nov. 20, 1996).
17. In the present matter, the medical bills and supporting documentation were available to defendants as of the date of the Joint Stipulation, February 1, 1999, with the exception of a minor addition which was raised on February 16, 1999. As of March 16, 1999, claimant's medical expenses had yet to be paid. In addition, claimant's TTD was not paid until March 10, 1999, despite defendants knowing the total amount owed claimant as early as February 1, 1999.
18. Since the claimant was not paid his compensation "as soon as reasonably possible," as agreed to within the Joint Stipulation, it is evident that defendants failed to act in a prompt, efficient and swift manner. This behavior clearly necessitated the time and effort of claimant's counsel to secure these payments and, therefore, an award for attorney fees is proper.
19. Workers' Compensation Rule 10(a) provides that an award of reasonable attorney fees to a prevailing claimant may not exceed (a) \$35.00 per hour or (2) 20% of the amount awarded, or \$3,000, whichever is less. Considering the need for claimant's legal representation as a result of the defendants' unreasonable denial and undue delay, an award of \$3,000 in attorney fees is entirely appropriate.

C. INTEREST:

20. In addressing the issue of an interest award in this case, both parties reference the relevant statutory provision, 21 V.S.A. §664. As evidenced by the language of that statute, an injured employee is entitled to interest on his award if he prevails at a *hearing*. When construing a statute in an effort to effectuate the intent of the legislature, a

presumption exists for the application of the plain meaning of the language within the statute. *Badger v. Town of Ferrisburgh*, Supreme Court Opinion No. 96-411 (May 8, 1998); *Bisson v. Ward*, 160 Vt. 343 (1993). The plain meaning of section 664 only permits an award of interest when a claimant prevails at a hearing. Consequently, in this case, since the claimant did not prevail as a result of a *hearing*, he is not statutorily entitled to an interest award.

21. However, pursuant to principles of common law, claimant is entitled to an award of interest from the date of the Joint Stipulation, February 1, 1999, until payment of all benefits. Specifically, in *Marsigli's Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 161 (1962), the Vermont Supreme Court concluded that the Commissioner possesses the authority to order the payment of interest on awards for any lapse of time subsequent to the date of the award. Consequently, since the defendants in the present case unreasonably and unduly delayed payment of claimant's benefits following the Joint Stipulation, an award of interest, at the statutory rate of 12%, is absolutely proper.

**ORDER:**

Therefore, based upon the foregoing Stipulations, Findings of Fact and Conclusions of Law, defendants are ordered to:

1. Pay claimant \$42.12 for the costs associated with this proceeding;
2. Pay claimant attorney fees in the amount of \$3,000; and
3. Pay claimant interest on his total benefits at the rate of 12% from February 1, 1999 until the date of payment.

DATED in Montpelier, Vermont, this 2nd day of April, 1999.

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Steve Janson  
Commissioner

