Sanz v. Douglas Collins (February 11, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Antonio Sanz	)	Opinion No. 15-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Douglas Collins	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. L-14865

Pretrial conference held on December 13, 2004
Case submitted on the briefs
Record closed on January 25, 2005

APPEARANCES:

Emily J. Joselson, Esq., for the Claimant
Wesley M. Lawrence, Esq., for the Defendant

ISSUE:

Is claimant entitled to a lump sum award of permanent total disability benefits and an offset order from this Department?

FINDINGS OF FACT:

1. Claimant was seriously injured on January 30, 1998 in the course of his employment for Douglas Collins, a construction firm. While at the top of a ladder, he hit his head and fell about 15 feet to the ground.

2. Claimant's injuries include incomplete quadriplegia with central spinal cord syndrome. He is permanently, totally disabled.

3. On August 20, 2004, the carrier sent to claimant's counsel a Form 22, reflecting its agreement to permanent total disability. It has not, however, agreed to claimant's request for a lump sum payment of those benefits.

4. Claimant's current worker's compensation rate is $365.88 per week.

5. Claimant was awarded Social Security Disability benefits retroactive to the date of injury. Although those benefits total $589.60 per month, claimant receives $104.80 because they are offset by worker's compensation benefits received.

6. Because of claimant's weekly workers' compensation benefits, claimant receives $589.60 less than he otherwise would receive from Social Security.

7. At claimant's compensation rate, a lump sum award of 330 weeks of permanent total disability benefits would total $120,740.40.

8. Claimant was born on June 28, 1947 and has a life expectancy of 20 years (240 months; 1,040 weeks).

9. Claimant's fee agreement with his attorney provides that he pay one third any award over and above $83,791.08 in permanency benefits (offered by the carrier), plus litigation expenses.

10. Claimant requests that the following language be included in an order for a lump sum payment:

> Wherefore, it is ordered that the carrier pay to Claimant the remaining unpaid PTD in a lump sum. Furthermore, said benefits shall be considered as being paid to Claimant for a permanent impairment which will affect the Claimant for he rest of his life. Claimant's remaining life expectancy is 240 months. Therefore, although paid in a lump sum, less attorneys' fees and expenses, the employee's benefits shall be considered to be $251.18 per month for months beginning January 25, 2005.

11. Similar offset language has been part of settlements in other cases to allow for an increase in the amount of social security benefits received.

CONCLUSIONS OF LAW:

1. Workers' Compensation Rule 7.000 integrates the Vermont Rules of Civil Procedure and renders those rules applicable to all workers' compensation hearings, including V.R.C.P. 56, which provides for summary judgment. Either party is entitled to summary judgment when there is no dispute of material fact and that party is entitled to judgment as a matter of law. See *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt. 25, 28 (1999).

2. Because the date of claimant's injury was January 30, 1998, defendant argues that this dispute is governed by the statute and rules in effect at that time under the law of *Montgomery v. Brinver Corp*., 142 Vt. 461 (1983). Specifically, it argues that the commissioner has no authority to order a lump sum payment because the

3. On the other hand, claimant argues that § 652(b) applies to injuries predating the statute's amendment because the change involved a statute that is remedial in nature and because it is a "procedural change in the timing of payment, not a substantive change in the law." *Patch v. H.P. Cummings,* Op. No. 48A-02WC (2003) (citing *Ulm v. Ford Motor Co*., 170 Vt. 281, 287 (2000)).

4. On further reflection, it is clear that the quoted language from *Patch* was error. Prior to the amendment to § 652(b), lump sum payments were not permissible, afterwards they were. Such a change is indeed substantive. Therefore, the law in effect at the time of claimant's injury governs, barring an award of a lump sum.

ORDER:

Accordingly, the defense is entitled to judgment as a matter of law. This claim is for a lump sum is DENIED.

Dated at Montpelier, Vermont this 11th day of February 2005.

_____
Laura Kilmer Collins
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.

Sanz v. Douglas Collins (April 26, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Antonio Sanz	)	Opinion No. 25-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Douglas Collins	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. L-14865

RULING ON CLAIMANT'S REQUEST FOR FEES AND COSTS

Prior to any hearing in this case, the carrier agreed to pay the claimant permanent total disability (PTD) benefits, which the Commissioner declined to order paid in a lump sum. See Opinion No. 15-05WC (February 11, 2005). At issue in the motion now before the Department is whether claimant is entitled to attorney fees and costs.

The file indicates that claimant was injured in 1998 when he hit his head at a construction site and fell 10 to 15 feet. As a result he developed multiple problems, including incomplete quadriplegia, spasticity, neuropathic pain, neurogenic bladder, mild traumatic brain injury, and depression. By 2000 he was assessed with a permanent impairment rating of 76% whole person by his treating physician for his physical injuries. In 2003 the carrier's physician assessed medical end result with a 60% rating, an assessment that formed the carrier's basis to discontinue temporary total disability benefits. Also, based on that assessment, the carrier offered the claimant a Form 22 settlement for 243 weeks, based on the 60% rating.

Claimant then hired counsel who retained the services of an occupational therapist, vocational rehabilitation expert, and psychologist. The occupational therapist determined that claimant had no work capacity; the VR expert determined that claimant was not employable and the psychologist, Dr. Rodger Kessler, assessed a psychological impairment at 22%, over and above the previous ratings for physical impairment. These reports were sent to defense counsel in October 2003.

Defendant had a functional capacity evaluation (FCE) of the claimant performed on January 26, 2004. The evaluator, Ginni Reeves, reported that claimant walked with a cane, had spasticity in the lower extremities, poor balance because of spasticity and weakness. Her conclusion confirmed claimant's position that he had no residual work capacity. However, defendant refused to turn over its FCE report to claimant until ordered to do so by this department. It finally disclosed that report in July 2004.

With no response from the defendant by February 2004, claimant filed a Notice and Application for Hearing for permanent total disability benefits, which defendant continued to deny based on its 60% whole person rating. However, no agreement for PTD was filed until August 2004.

Section 678(a) of title 21 provides that a claimant is entitled to an award of necessary costs and reasonable attorney fees "when the claimant prevails." When one has prevailed after hearing, such a question is addressed in the hearing decision. However, a claimant "prevails" and may be awarded fees even without a formal hearing in limited instances and if the criteria listed in Workers' Compensation Rule 10.1300 are met:

10.1310	the employer or insurer carrier is responsible for undue delay in adjusting the claim, **or**
10.1320	that the claim was denied without reasonable basis, **or**
10.1330	the employer or insurance carrier engaged in misconduct **or** neglect, **and**
10.1340	that legal representation to resolve the issues was necessary, **and**,
10.1350	the representation provided was reasonable, **and**,
10.1360	that neither the claimant nor the claimant' s attorney has been responsible for any unreasonable delay in resolving the issues.

Once defendant had ample evidence that claimant was permanently and totally disabled in January 2004, a conclusion confirmed by its own FCE, its continuing denial of PTD was without reasonable basis (10.1320). Clearly claimant needed legal representation (10.1340), the representation provided was reasonable (10.1350) and neither the claimant nor his attorney has been responsible for any delay (10.1360). Therefore, the necessary criteria under Rule 10.1300 have been met, justifying an award of fees.

Defendant makes much of the fact that claimant was continuing to receive benefits during the time of the dispute, but those benefits were toward the 60% rating defendant obtained and would have ended after 243 weeks had defendant prevailed. Only because of the efforts of his attorney will claimant receive benefits due for PTD.

Next, is the question whether the award should be an hourly or contingency fee. Pursuant to 21 V.S.A. § 645, one who is permanently and totally disabled as a result of a work related injury is entitled to a minimum of 330 weeks of benefits. If the claimant has no reasonable prospect of finding regular employment after that time, benefits continue.

Because the actual amount due Mr. Sanz is uncertain at this time, making a contingency fee unrealistic, an hourly fee is the most appropriate award. The bill submitted reflects the required minimum billing unit of 0.10 hour. The complexity of the issues presented and resistance mounted despite strong evidence supports an award, but only for the time following the unreasonable denial, a necessary criterion under Rule 10.1300, which was in January 2004 when all parties had ample evidence that this claimant is permanently and totally disabled. Counsel's request acknowledges this. Therefore claimant is entitled to the fees for hours worked from January 26, 2004 through August 20, 2004**.**

Finally, claimant seeks reimbursement for necessary costs, including a charge for the permanency rating Dr. Kessler assessed for claimant's psychological impairment. A carrier is responsible for at least one permanency examination and impairment rating from the claimant's treating physician under the WC Rules. Further, "[a]t the commissioner's discretion, the employer may be ordered to pay for additional permanent impairment evaluations." Rule 11.2400

In this case, it was clear during rehabilitation that claimant suffered from depression from his work related injury, although that aspect of his health was not rated when the first permanent partial impairment rating was done. In fact, it is not clear that those treating the claimant were qualified to perform a rating for a psychological impairment. The rating performed by Dr. Kessler was a necessary part of the overall impairment for this claimant and, given the discretion granted by Rule 11.2400, is a cost recoverable from the carrier, less the administrative costs and no show fee.

In sum, defendant is ordered to pay the claimant fees and costs as detailed above.

Dated at Montpelier, Vermont this ____ day of April 2005.

_____
Laura Kilmer Collins
Commissioner

Sanz v. Douglas Collins (June 28, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR & INDUSTRY

Antonio Sanz	)	Opinion No. 15R-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Douglas Collins	)	
	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. L-14865

RULING ON ST. PAUL TRAVELERS' MOTION TO RECONSIDER AWARD OF FEES AND COSTS

BACKGROUND

Prior to any hearing in this case, the Carrier agreed to pay Claimant permanent total disability (PTD) benefits, which the Commissioner declined to order paid in a lump sum. See Opinion No. 15-05WC (February 11, 2005). On April 26, 2005, the Commissioner ordered Defendant to pay the Claimant fees and costs. See Opinion No. 25-05WC (April 26, 2005). Claimant was entitled to receive fees for hours worked from January 26, 2004 through April 20, 2004 and reimbursement for necessary costs. Id. Carrier now seeks reconsideration or clarification of the Commissioner's April 26, 2005 ruling.

ISSUES:

1. Does claimant's attorney's fee request comply with Department standards?
2. Is claimant's expert's invoice dated June 15, 2004 compensable in full?
3. Is claimant's medical bill from Dr. Kenosh s compensable in full?
4. Must defendant pay interest for attorney fees and expenses?

ANALYSIS:

1. Claimant's Attorney Fees

Defendant challenges the claimant's request for $5,472 in attorney fees. In the April decision, the Commissioner determined that an attorney fee award would be based on an hourly, not a contingency fee basis and that the hours the attorney worked between January 26, 2004 and August 20, 2004 were reasonable. That determination will not be changed now. The hours claimed are in the required tenth of an hour increments and are awarded now in the amount of $5,472 for 27.8 hours of attorney time and 39.6 hours of paralegal time.

2. Claimant's Expert's Invoice

At issue is an invoice dated June 15, 2004, from VOFORE Services. Defendant argues that it is not responsible for reimbursing Claimant for the full amount of the invoice because time conversing with Claimant's attorney and preparing for the deposition goes to the litigation strategy and not to expert opinion. Claimant counters that the Department's past decisions are n error and these were "necessary costs" pursuant to 21 V.S.A. § 678.

The cases that Defendant relies upon to support its position are *Emerson v. Transport Dynamics*, Opinion No. 40A-02WC (Dec. 6, 2001 & Sept. 27, 2002); and *Hatin v. Our Lady of Providence*, Opinion No. 21S-03WC (Oct. 22, 2002 & April 29, 2003). Both cases state that research by the expert is appropriately included in 21 V.S.A. § 678, but the time conversing with Claimant's attorney and preparing for deposition are not because that time goes to litigation strategy, not to the expert opinion. *Hatin* also notes that there is no provision in the Fee Schedule for the payment of preparation time. Pursuant to Rule 40.111(B), the party requesting the deposition assumes responsibility for payment of the witness fee and any related mileage. The Commissioner has not promulgated any express provision for the reimbursement of deposition preparation with the Claimant's attorney.

Claimant argues that the Department's past decisions were in error. Claimant states that pursuant to 21 V.S.A. § 678, the preparations for deposition are "necessary costs of proceedings." As Claimant notes, Defendant deposed Claimant's expert and subsequently required additional information from Claimant's expert. Meetings with Claimant's attorney occurred during the period following the deposition and before the requested information was provided to Defendant's counsel. Following the *Emerson* and *Hatin* rational, the review of medical records and preparation for the deposition would be compensable, but not the 0.40 hours spent meeting with Claimant's counsel, or the 0.20 hours emailing counsel. Taking this under to consideration, *Emerson* and *Hatin* should be reconsidered.

Attorneys, defense and claimants, are often required to confer with an expert witness before and after deposition. An expert is not always familiar with the legal procedure of a deposition and may require assistance from counsel. In this case, consultation with the expert becomes, "necessary costs of proceedings." 21 V.S.A. § 678. It is true that the Fee Schedule does not address deposition preparation specifically, but it does mandate an employer to cover a "witness fee." Brief consultation with the claimant's attorney, either prior to or after deposition, should be factored in as part of "witness fee." The Rules also provide that necessary costs to be considered under 21 V.S.A. §678(a) shall include, but *shall not be limited to,* deposition expenses, subpoena fees and expert witness fees. Rule 10.3000. The party requiring the deposition should be aware that a consultation is part of a "deposition expense." Finally, Rule 10.4000 provides the qualifier of reasonableness to limit the costs of consultation in preparation of a deposition. If preparation for a deposition is not reasonable then it can result in denial of reimbursement of the cost. For these reasons the Claimant's request for reimbursement of the full amount of the VOFORE Services is compensable in full.

3. Claimant's Medical Bill

At issue is a medical bill from Michael Kenosh, M.D. at Rutland Regional Medical Center for an examination of Claimant on June 9, 2004. Defendant argues that there is no evidence that this is related to or in furtherance of Claimant's PTD claim. Claimant's counsel maintains that the charges were reasonably necessary to Claimant's pursuit of his PTD claim and it was necessary for counsel to keep in close communication with Dr. Kenosh until the resolution of this matter. To support this claim, Claimant submitted one medical bill with little specification of services performed and only lists an amount due of $891.00.

The Commissioner lacks the ability to undertake any review of the appropriateness of the bill. Claimant's attorney had ample opportunity to provide documentation supporting the claim for reimbursement. Defendant's attorney requested more documentation regarding Dr. Kessler's bill on May 12, 2005, and he noted his concerns regarding the compensability of the expenses. The Claimant had 12 days before the Defendant filed its motion to reconsider. In those 12 days, Claimant failed to provide the requested documentation to support his claim. Therefore, pursuant to 21 V.S.A. § 678(a) the Claimant's request for reimbursement of Dr. Kenosh's fees is denied because the claim that those fees were necessary remains unsupported.

4. Interest

Claimant indicated that he seeks interest on the full amount demanded. The Commissioner has discretion to award interest from "the date the original award became a due and payable obligation." *Menard v. Vermont Castings*, Opinion No. 17-00WC (June 29, 2000) (quoting *Marsigli's Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 467 (1965)). Defendant was justified in seeking supporting documentation for the claimed fees, which are awarded even though there was no hearing. Interest, therefore, will begin to run 30 days after the date of this order, not before.

CONCLUSION:

In sum, Claimant's request for attorney fees is granted; payment for the expert's invoice is compensable in full and the medical bill from Dr. Kenosh is denied. Interest shall accrue in 30 days.

Dated at Montpelier, Vermont this 28th day of June 2005.

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Laura Kilmer Collins
Commissioner