Arthur Taft v. Central Vermont Public Service Corp. (January 25, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

Arthur Taft

v.

Central Vermont Public Service Corp.

Opinion No. 03-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. L-23771

RULING ON CLAIMANT'S MOTION FOR ATTORNEY FEES

Claimant seeks attorney fees associated with establishing his entitlement to mileage reimbursement. Defendant asserts that under the circumstances of this claim, particularly the fact that the disputed issues were resolved prior to the scheduled formal hearing, there is no basis for awarding attorney fees.

The facts are not substantially disputed. Claimant suffered severe burns in a work-related accident that occurred in June 1998. At the time, Claimant lived in Springfield, Vermont but had been commuting to Rutland in order to train for a new position to which he had been assigned in Springfield. The injury occurred in Rutland.

As treatment for his injury, Claimant underwent regular physical and occupational therapy sessions at Dartmouth Hitchcock Medical Center (DHMC). These treatments are ongoing, and continue to this day.

For many years after the injury, Defendant reimbursed Claimant's mileage for trips to and from his DHMC therapy appointments, as required by Workers' Compensation Rule 12. In November 2006, however, it sought to discontinue mileage reimbursement on the grounds that the treatment Claimant was receiving was equally available at a facility closer to his home. In support of its discontinuance, Defendant offered a medical opinion to that effect from Dr. Wing. The Department rejected the discontinuance, whereupon mileage reimbursement continued as before.

In October 2008 Defendant sought again to discontinue Claimant's mileage reimbursement, on the same grounds and supported by essentially the same opinion from Dr. Wing. Again the Department rejected the discontinuance. Later, in December 2008 it also rejected Defendant's request for reconsideration.

Shortly after the Department rejected the second proposed discontinuance, in November 2008 Defendant's attorney proffered another, separate basis for recalculating Claimant's mileage reimbursement, this one having to do with Claimant's "regular commute distance" to and from work. According to Rule 12, a claimant's reimbursement for travel to and from medical appointments is only for mileage "beyond the distance normally traveled to the workplace." While for the many years previous Defendant had calculated this commute distance from Claimant's Springfield home to his Springfield permanent assignment, now Defendant's attorney notified Claimant's attorney that Defendant would begin calculating it from Claimant's home to his Rutland training assignment instead. The result was a far greater "regular commute distance," and therefore a much smaller mileage reimbursement.

Claimant objected to the revised calculation. In October 2009 his attorney filed a Notice and Application for Hearing on the issue. There followed a flurry of correspondence among the parties' attorneys and the workers' compensation specialist assigned to consider the matter at the informal dispute resolution level. In January 2010 the specialist ruled in Claimant's favor.

Defendant appealed the specialist's determination and requested that the matter be forwarded to the formal hearing docket. As contested issues it cited both the "treatment closer to home" question it had raised in the context of its 2006 and 2008 discontinuances and the more recent "regular commute distance" question.

Having been forwarded to the formal hearing docket, the claim was assigned to a hearing officer, who conducted a telephone pretrial conference on May 4, 2010 and scheduled a formal hearing for September 27, 2010.

In July 2010 Claimant's attorney began drafting a Motion for Summary Judgment in which he argued that as a matter of law neither of the grounds Defendant asserted as a basis for recalculating his mileage reimbursement was valid, and that in any event Defendant had waived its right to contest the issue. It does not appear that this motion was ever filed.

On July 7, 2010 Defendant's attorney notified the hearing officer that Defendant was withdrawing the issue of whether Claimant's DHMC treatment could be provided just as adequately at a facility closer to his home. With that action, the only issue remaining for formal hearing was the "regular commute distance" question. On July 28, 2010 Defendant's attorney withdrew its request for formal hearing on that question as well. Defendant having thereby acquiesced to Claimant's position on both of the disputed issues, the formal hearing was cancelled.

By the time Defendant withdrew its request for formal hearing, Claimant's attorney already had invested a total of 14.3 hours at the informal dispute resolution level and 20.5 hours once the matter was referred to the formal hearing docket. Since then, Claimant's attorney has expended an additional 9.25 hours on the current Motion for Attorney Fees. At the prevailing rates ($90.00 per hour for work performed prior to June 15, 2010, $145.00 per hour for work performed thereafter), the attorney fees total $5,408.25.

Discussion

Vermont's workers' compensation statute provides for an award of costs and/or attorney fees as follows:

> 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. Costs shall not be taxed or allowed either party except as provided in this section.

21 V.S.A. §678(a).

Notably, the statute does not differentiate between the informal dispute resolution process and the formal hearing process. Both constitute "proceedings under this chapter." In appropriate circumstances, therefore, the commissioner's discretion can extend to attorney fee awards at either level.

Workers' Compensation Rule 10.1300 provides additional guidance as to attorney fee awards. It states:

> Awards to prevailing claimants are discretionary. In most instances awards will only be considered in proceedings involving formal hearing resolution procedures. In limited instances an award may be made in a proceeding not requiring a formal hearing where the claimant is able to demonstrate:
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> | 10.1310 | that the employer or insurance carrier is responsible for undue delay in adjusting the claim, or |
> | 10.1320 | that the claim was denied without reasonable basis, or |
> | 10.1330 | that 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 | that 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. |

As a preliminary matter, Defendant asserts that the current version of Rule 10 is inapplicable to this claim, and that the version in effect as of the date of injury – June 1998 – must control instead. That version referenced only "awards of attorney fees to a prevailing claimant." It did not differentiate in any way between awards involving the formal hearing process and those made in the context of informal dispute resolution proceedings. Nor did it specify the evidence required in order to justify an award in the latter circumstance.

I agree that as with all benefits defined by the Workers' Compensation Act, a claimant's right to recover attorney fees is acquired at the time of the injury, not at the time the right is asserted. *Sanz v. Douglas Collins Construction*, 2006 VT 102, ¶10. I also agree that the obligation to pay such benefits is governed by the law in force at the time of the injury. *Id.* at ¶9; *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983). I disagree, however, that the current version of Rule 10 has created a new, substantive right to recover attorney fees short of a formal hearing where one did not exist before. That right derives from §678(a) and has not changed substantively since 1998. The amendments since then have merely clarified the factors to be considered in awarding attorney fees at different stages in the dispute resolution process. As such, they are procedural in nature and therefore applicable to pending claims. Workers' Compensation Rule 46.1000; *Estabrook v. New England Precision*, Opinion No. 10-00WC (May 16, 2000).

I turn then to the circumstances of the current claim in the context of Rule 10.1300 as currently written. Here, Defendant withdrew its appeal after the matter had been referred to the formal hearing docket and a pretrial conference held. A formal hearing already had been scheduled, and presumably in anticipation of that Claimant's attorney had begun preparing his case. Taken together, these circumstances constitute "proceedings involving formal hearing resolution procedures." Thus, the determination whether to award fees rests not on the "limited instances" covered by Rules 10.1310-10.1360 but rather on the more common instance in which fees are awarded to a prevailing claimant in the context of the formal hearing process.

As noted above, the statute grants the commissioner discretion to award reasonable attorney fees to a prevailing claimant. Among the factors to be considered in exercising that discretion are the extent to which the attorney's efforts were integral to the rights secured, the time, effort and skill required to prepare and present the case, and whether the fees requested are proportional to the effort expended. *Wilson v. Black*, Opinion No. 54-03WC (January 28, 2004); *Estate of Lyons v. American Flatbread*, Opinion No. 36A-03WC (November 3, 2003).

Considering these factors, I find that Claimant's attorney fee request is both reasonable and justified. His attorney's efforts were integral to preserving his right to mileage reimbursement, and the time, effort and skill required justified the hours expended. I also find that the hours were properly itemized and billed at the appropriate rates.

I conclude that Claimant is entitled to an award of the fees requested. In doing so, however, I am mindful of the particular circumstances of this claim. Here, Defendant's decision to withdraw its appeal was not prompted by any further discovery or ongoing settlement negotiations that took place after the formal hearing process began. Nor did it come about as a result of mandatory mediation. If present in a future claim, such alternative facts very well might justify a different result.

ORDER:

Based on the foregoing, Defendant is hereby **ORDERED** to pay Claimant's attorney fees totaling $5,408.25.

DATED at Montpelier, Vermont this 25th day of January 2011.

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Anne M. Noonan
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.