

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

James Pawley

Opinion No. 04-13WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Booska Movers/Zurich  
North American and Vanliner  
Insurance Co.

For: Anne M. Noonan  
Commissioner

State File Nos. CC-52769 and DD-576

**RULING ON CLAIMANT'S PETITION FOR AWARD OF COSTS AND ATTORNEY  
FEES**

Claimant seeks an award of costs and attorney fees incurred in reaching a pre-hearing settlement with Defendants regarding the compensability of his claim for workers' compensation benefits arising out of his August 2011 work-related injury.

The facts are not disputed. In September 2010, while engaged as a long-haul truck driver for Booska Movers, Claimant suffered a blood clot, or deep vein thrombosis (DVT), in his leg. Defendant Zurich North American ("Zurich") was the workers' compensation insurance carrier on the risk at the time; it accepted the injury as compensable and paid benefits accordingly.

In August 2011 Claimant suffered a second DVT, which developed into a pulmonary embolism, again while in the course of his driving activities for Booska Movers. Defendant Vanliner Insurance Co. ("Vanliner") was the workers' compensation insurance carrier on the risk at the time of this incident.

After having been notified of the second incident, in November 2011 Vanliner filed a Denial of Workers' Compensation Benefits (Form 2) on the grounds that Claimant had suffered a recurrence of his earlier injury, and that therefore Zurich remained liable. Following an informal conference, in December 2011 the Department's Workers' Compensation Specialist issued an interim order (1) that Vanliner assume responsibility for the claim; and (2) that the carriers proceed to arbitration on the aggravation/recurrence issue, pursuant to 21 V.S.A. §662(e). Consistent with the first part of the Specialist's order, Vanliner assumed responsibility for adjusting Claimant's August 2011 claim and began paying benefits accordingly.

In January 2012 Vanliner's medical expert, Dr. Pulde, conducted a records review and issued a report as to the cause of Claimant's August 2011 DVT. The essence of his opinion was that that injury would not have occurred but for (1) various inherited and acquired non-work-related risk factors; and (2) Claimant's prior DVT in September 2010, which put him at higher risk for a recurrent episode. According to Dr. Pulde, therefore, the second DVT was not causally related in any way to Claimant's work.

With Dr. Pulde's opinion as support, in January 2012 Zurich asserted that because the disputed issues now included not only aggravation/recurrence but also compensability, arbitration was no longer the appropriate forum for determining its responsibility for Claimant's August 2011 injury. Instead it requested that the Specialist forward the matter to the formal hearing docket for resolution of all issues. The Specialist complied.

In March 2012 Claimant retained attorney Christopher McVeigh to represent him in formal hearing proceedings before the Commissioner. Attorney McVeigh attended the telephone pretrial conference on Claimant's behalf, corresponded with both Zurich's and Vanliner's attorneys on various issues and participated in the depositions of three medical expert witnesses, including Dr. Pulde.

Dr. Pulde's deposition occurred on November 16, 2012. Shortly thereafter, on December 5, 2012 Attorney McVeigh notified the Department that the parties had agreed that the formal hearing, which had been scheduled for December 13, 2012, could be cancelled, presumably because Vanliner had withdrawn its dispute as to compensability. The aggravation/recurrence dispute between the carriers remains pending and will be arbitrated.

At all times relevant, and particularly during the time period encompassed by Attorney McVeigh's representation of Claimant, Vanliner has continued to pay benefits in accordance with the Specialist's December 2011 interim order.

### Discussion

Claimant seeks reimbursement for the costs and attorney fees he incurred in defending himself against Vanliner's claim that his August 2011 DVT was not work-related and therefore not compensable. Vanliner withdrew its denial on those grounds some months after the claim had been placed on the formal hearing docket, and only a week prior to the scheduled formal hearing.

The commissioner has discretion to award costs and fees in claims that are resolved short of formal hearing. As to attorney fees specifically, 21 V.S.A. §678(d) provides:

In cases for which a formal hearing is requested and the case is resolved prior to formal hearing, the commissioner may award reasonable attorney fees if the claimant retained an attorney in response to an actual or effective denial of a claim and thereafter payments were made to the claimant as a result of the attorney's efforts.

I acknowledge at the outset that if the circumstances of the current case justify an award of costs and attorney fees, these can fairly be assessed solely against Vanliner, not against Zurich. Zurich never disputed the compensability of Claimant's August 2011 DVT. Its defense was based solely on aggravation/recurrence grounds, and directed entirely against Vanliner. Regardless of which carrier prevails in that dispute, that Claimant was required to retain an attorney to protect his interests was a consequence of Vanliner's position alone, not Zurich's.

Vanliner argues that because it already was paying benefits under an interim order at the time Claimant retained counsel, technically it cannot be said that payments were made “as a result of” his attorney’s efforts, as the statute purports to require. Thus, it asserts, Claimant has failed to establish a statutory basis for an award of fees.

The circumstances of this case are somewhat unique. It is true that at the time Claimant’s attorney became involved, payments already were ongoing. However, this was occurring only as a result of the Specialist’s interim order, the purpose of which had been to allocate responsibility as between the two carriers, not as between Vanliner and Claimant.

Once Vanliner raised the compensability issue as a defense to further payments, Claimant faced a new, and very real, risk that the interim order would be overturned at formal hearing, and payments would cease altogether. Certainly he couldn’t rely on Zurich to defend against this possibility on his behalf. From Zurich’s perspective, whether liability for further payments remained with Vanliner (in the event the second incident was deemed an aggravation) or whether it was avoided altogether (in the event the second incident was deemed not causally related to work) was of no importance to it, so long as it avoided responsibility one way or the other.

Without an attorney, therefore, Claimant would have been left to defend his right to compensation against two very experienced parties and their counsel – one (Vanliner) with much to gain by prevailing on the compensability issue, and one (Zurich) with nothing to lose by acquiescing. That Claimant would have been severely disadvantaged had he not had his own counsel to represent his interests at that stage of the proceedings is self-evident.

I conclude that an award of attorney fees under these particular circumstances fulfills the intent of §678(d) and therefore is within my discretion.

My inquiry does not end there, however. As to both costs and attorney fees, Workers’ Compensation Rule 10.1300 provides further guidance as to when it is proper to exercise the discretion granted by statute in cases that are resolved short of formal hearing, as follows:

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 that:

- 10.1310 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 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.

There is no evidence here that Vanliner was responsible for undue delay, or that it engaged in misconduct or neglect. If a fee award is to be justified, therefore, it must be because Vanliner had no reasonable basis for denying the compensability of Claimant's claim.

Vanliner relied on Dr. Pulde's expert medical opinion to support its denial on compensability grounds. In his written report, Dr. Pulde stated unequivocally that there was no causal relationship between Claimant's employment as a long distance truck driver and his development of DVT, either in September 2010 or in August 2011. It was not until his deposition, some months later, that he apparently acknowledged a work-related connection notwithstanding Claimant's many non-work-related risk factors.

Were this the first time that Claimant had sought to establish the compensability of either incident, I likely would conclude that Dr. Pulde's report provided a reasonable basis for his employer to deny his claim for benefits. The fact is that Claimant's employer previously had accepted compensability, however. True, this occurred while another carrier was on the risk. But the statute equates employer with insurer, so both are thereby bound. 21 V.S.A. §601(3); Workers' Compensation Rule 2.1190.

Given this particular circumstance, I conclude that Vanliner had no reasonable basis for denying the compensability of Claimant's August 2011 DVT on the grounds that it was not related to his employment. The other requirements of Rule 10.1300 having been met, I therefore conclude that it is within my discretion to award Claimant those costs and attorney fees that are specifically referable to Vanliner's compensability dispute.

Claimant has submitted a request for reimbursement of \$242.84 in costs, and a total of \$5,031.50 in attorney fees (34.7 hours at \$145.00 per hour). I conclude that the requested costs are reasonable and these are hereby awarded.

Of the attorney fees invoiced, 26.4 hours appear to be for representation on the compensability issue that was resolved prior to hearing. The remaining 8.3 hours relate to Claimant's entitlement to temporary partial disability benefits, which is a separate, as yet unresolved, disputed issue. Deducting these from the fees requested leaves a total of \$3,828.00, which are hereby awarded.

**ORDER:**

Claimant's Petition for Costs and Attorney Fees is hereby **GRANTED**. Defendant Vanliner Insurance Co. is hereby **ORDERED** to pay:

1. Costs totaling \$242.84; and
2. Attorney fees totaling \$3,828.00.

**DATED** at Montpelier, Vermont this 5<sup>th</sup> day of February 2013.

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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.