Tina Ploof v. Franklin County Sheriff's Department and Trident/Massamont (August 8, 2014)

STATE OF VERMONT
DEPARTMENT OF LABOR

Tina Ploof	Opinion No. 13-14WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Franklin County Sheriff's Department and Trident/Massamont	For: Anne M. Noonan Commissioner
	State File No. EE-58445

RULING ON CLAIMANT'S PETITION FOR ATTORNEY FEES AND COSTS

Claimant seeks an award of attorney fees totaling $11,599.09 and costs totaling $500.51 after successfully convincing the Department to issue an interim order for workers' compensation benefits during the informal dispute resolution process.

The underlying facts in this case are somewhat complicated. Claimant suffered a low back injury as a result of a work-related motor vehicle accident in 2004. In 2005 she underwent surgical fusion at the L5-S1 level. As the workers' compensation insurance carrier on the risk at the time, Defendant Trident/Massamont ("Trident") paid benefits accordingly. In 2006 she reached a settlement with the third party who was at fault for her accident. After deducting its share of the expenses of recovery, 21 V.S.A. §624(f), Trident was credited with a workers' compensation "holiday" totaling $135,538.45, in accordance with 21 V.S.A. §624(e).

Claimant resumed treatment for low back pain in January 2013. In April 2013 she underwent a second fusion surgery, this time at the L4-5 level. Her treating surgeon, Dr. Barnum, diagnosed adjacent segment disease, which he attributed to her original work injury in 2004 and subsequent L5-S1 fusion. Claimant suffered complications from the second fusion surgery, necessitating two additional surgeries thereafter as well as ongoing temporary total disability.

In July 2013 Claimant's then-counsel, Attorney Lynn, corresponded with Trident's attorney regarding her recently submitted claim for workers' compensation benefits causally related to her renewed treatment and disability. Notwithstanding Dr. Barnum's causation opinion, Attorney Lynn asserted that Claimant's condition was causally related not to her original 2004 injury, but rather to her work activities in late 2012 and thereafter. This constituted a new injury, he claimed. The legal consequence of this characterization, according to Attorney Lynn, was that Trident would not be entitled to claim any §624(e) "holiday" referable to Claimant's 2006 third party settlement.

In October 2013 Attorney Lynn's partner, Attorney Blackman, filed a Notice of Injury and Claim for Compensation (Form 5) on Claimant's behalf with the Department. Trident denied responsibility on the grounds that Claimant had suffered a new injury or aggravation, for which

her employer's current insurance carrier was responsible. Attorney Blackman responded by filing a Notice and Application for Hearing (Form 6) in November 2013.

Also in November 2013, at Trident's request Claimant underwent an independent medical examination with Dr. Backus. Dr. Backus agreed with Dr. Barnum's assessment that Claimant suffered from adjacent segment disease at the L4-5 level as a consequence of the L5-S1 fusion surgery she had undergone in 2005. However, his ultimate conclusion, which he stated to a reasonable degree of medical certainty, was that her work activities in late 2012 and early 2013 had further worsened the deterioration at that level, and thus amounted to an aggravation.

In December 2013 Attorney Blackman requested that Trident's attorney put the employer's current carrier on notice of its potential liability for Claimant's claim. Trident's attorney conveyed this message to the Department, which promptly notified the current carrier, Acadia. Acadia responded in January 2014, denying responsibility on the grounds that there had been no aggravation or new injury, and that Trident remained responsible for whatever benefits were owed.

In early February 2014 Attorney Blackman was granted leave to withdraw as Claimant's counsel on conflict of interest grounds, and Claimant's current counsel, Attorney McVeigh, entered his appearance in her place. Following an informal conference, in late February 2014 the Department's workers' compensation specialist concluded that Claimant had suffered a recurrence rather than an aggravation, for which Trident remained on the risk. Based on medical bills Claimant's current counsel had submitted, the specialist further determined that the workers' compensation "holiday" attributable to Claimant's 2006 third party settlement had been exhausted. The specialist therefore issued an interim order against Trident for retroactive and ongoing temporary total disability and medical benefits. Trident's motion to stay was denied, and it commenced payment as ordered thereafter. The claim is now pending on the formal hearing docket, where the disputed issues include both aggravation/recurrence and the proper calculation of any applicable workers' compensation "holiday."

In support of her petition for attorney fees and costs, Claimant cites to 21 V.S.A. §678(d), which states as follows:

> 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.

In exercising the discretion granted by §678(d) to award fees at the informal dispute resolution level the commissioner typically has relied on Workers' Compensation Rule 10.1300 for further guidance:[1]

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[1] The parties dispute whether §678(d), which was added to the statute in 2008, some years after Claimant's original injury, is even applicable to this claim. The Commissioner has held that the new section amounts to a procedural amendment rather than a substantive one, and therefore that it can be applied retroactively. *Yustin, supra* at p. 6 (interpreting the Supreme Court's reference to §678(d) in *Yustin v. State of Vermont*, 2011 VT 20 at ¶14 and n.2). In either event, both before and after the amendment, the statute has vested the Commissioner with discretion whether

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.

Compare Pawley v. Booska Movers, Opinion No. 04-13WC (February 5, 2013) (petition for pre-hearing costs and attorney fees granted)*, with Yustin v. State of Vermont, Department of Public Safety*, Opinion No. 08-12WC (March 20, 2012) (petition denied); *Zahirovic v. Super Thin Saws, Inc.*, Opinion No. 38-11WC (November 18, 2011) (same).

The discretion granted by §678(d) to award fees in cases that are resolved prior to formal hearing is broad. *Zahirovic, supra.* Rule 10.1300 directs that this discretion is to be exercised only in limited circumstances, and only when specific requirements are met. *Id.* One such requirement, embodied in Rules 10.1310 through 10.1330, is that the employer or insurance carrier be shown to have behaved unreasonably in crafting its defense against a claim for benefits. *Dudley v. South Burlington Supervisory Union,* Opinion No. 23-13WC (October 16, 2013).

Claimant's current counsel here asserts that because Trident failed either to advance disability benefits and/or to calculate the extent of its workers' compensation "holiday," it "unconscionably delayed" adjusting her claim. Counsel further asserts that at least until November 2013, when Dr. Backus issued his causation opinion, Trident had no reasonable basis for denying the claim, as Dr. Barnum already had attributed her renewed symptoms to her original injury. Claimant argues that these omissions are sufficient to justify an award of fees under Rule 10.1300.

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to award fees at the informal level, and the factors listed in Rule 10.1300, which dictate how that discretion is to be exercised, have remained unchanged as well. *See, e.g., Reed v. Leblanc*, Opinion No. 08-05WC (January 19, 2005).

I disagree with both assertions. The fact is, from July 2013, when Attorneys Lynn and Blackman first notified Trident of Claimant's claim for additional benefits, until late January 2014, when they withdrew their representation, the factual and legal posture they assumed on her behalf was that her renewed disability and need for treatment were not related to her original 2004 injury, but rather indicated a new injury, one to which the "holiday" did not apply. As Trident's coverage had long since expired, there would have been no basis for it to advance benefits, nor any reason for it to attempt to calculate the extent of its remaining credit.[2] There also would have been no reason for Trident to seek its own expert medical opinion on causation. Claimant's assertion that she had suffered a new injury, at a time when it was no longer on the risk, provided ample basis in itself for denying the claim.

I acknowledge that upon her review, the Department's workers' compensation specialist concluded that the record as a whole favored a finding of recurrence rather than new injury, and therefore ordered Trident to assume responsibility for the claim pending formal resolution of the issue. That she thus rejected the basis for Trident's denial does not automatically render it so unreasonable as to justify an award of attorney fees, however. I do not necessarily equate the requisite finding for issuing an interim order under 21 V.S.A. §662(b) – that the employer's denial lacks "reasonable support" based on the record as a whole, *see* 21 V.S.A. §601(24) – with the finding required for an award of attorney fees under Rule 10.1320 – that at the time it denied the claim the employer had no "reasonable basis" for doing so. *Yustin, supra* at p. 7.

I conclude that neither of the grounds Claimant has asserted in support of her petition for attorney fees is sufficient to establish that Trident unreasonably denied her claim, or otherwise engaged in misconduct, neglect or undue delay. For that reason, I must reject her petition for an award of attorney fees and costs.

[2] Claimant's counsel apparently assumes that the burden rested on Trident to calculate the extent of any remaining "holiday," and therefore that it acted unreasonably by failing to do so promptly. However, it is Claimant who presumably would have had the best access to the information required to do so, including medical treatment charges and/or lost wages incurred in the years since her third party settlement. That being the case, it may be more appropriate in such cases to assign the injured worker with responsibility for monitoring the extent to which he or she has spent down a credit, not the carrier.

ORDER:

Based on the foregoing, Claimant's Petition for Award of Attorney Fees and Costs is hereby **DENIED**.

DATED at Montpelier, Vermont this ____ day of August 2014.

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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.