

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Stefan Kurant

Opinion No. 08-15WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Sugarbush Soaring Association, Inc.

For: Anne M. Noonan
Commissioner

State File No. M-8732

RULING ON CLAIMANT'S REQUEST FOR AWARD OF ATTORNEY FEES

Claimant seeks an award of attorney fees incurred in securing an interim order requiring Defendant to pay workers' compensation medical benefits.

Claimant suffered severe work-related injuries in 1998, for which he continues to receive medical care, including acupuncture treatments since approximately 2009. In April 2014 Defendant notified him via email that effective June 16, 2014 it would no longer pay for such treatments. Attached to the email was a March 2014 report from Dr. Lefkoe, Defendant's independent medical examiner, asserting that in his opinion ongoing acupuncture treatments were no longer medically necessary.

Aside from its email, Defendant provided no other notice, either to Claimant or to the Department, of its intention to discontinue medical benefits. This was a clear violation of Workers' Compensation Rule 18.2100, which requires an employer (or its workers' compensation carrier) to file a Notice of Intention to Discontinue Payments (Form 27) with both the injured worker and the Department prior to discontinuing payment of any medical benefit.

Through his attorney, Claimant appealed Defendant's discontinuance by letter to the Department on August 4, 2014. In urging the Department to reject the discontinuance, the attorney cited Defendant's failure to file a Form 27. The attorney also provided supporting evidence from Claimant's treating physician, who asserted that because the ongoing acupuncture treatments allow Claimant to maintain function and reduce his reliance on narcotic medications, they continue to be medically necessary.

Following an informal conference, on February 9, 2015 the Department's workers' compensation specialist issued an interim order requiring Defendant to resume payments for Claimant's acupuncture treatments retroactive to June 2014, on the grounds that it had failed to file the required Form 27 discontinuance prior to terminating benefits.

Having prevailed at the informal dispute resolution level, Claimant's attorney now seeks reimbursement totaling \$1,074.50, representing 7.3 attorney hours and 0.2 paralegal hours.

Discussion:

Under both statute and rule, the Commissioner has discretion to award costs and attorney fees in claims that are resolved at the informal dispute resolution level. As amended in 2008, the statute, 21 V.S.A. §678(d), now 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.

Workers' Compensation Rule 10.1300, which was amended in 2010 to incorporate the provisions of §678(d), provides further guidance, 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, or
- 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.
- 10.1370 Attorney fees may also be awarded in cases not involving formal hearing when the claimant is able to demonstrate that:
 - 10.1371 a formal hearing has been requested; and
 - 10.1372 the case is resolved prior to formal hearing; and

- 10.1373 the claimant retained an attorney in response to an actual or effective denial of a claim; and
- 10.1374 thereafter, payments were made to the claimant as a result of the attorney's efforts.

Notably, even as amended, both §678(d) and Rule 10.1300 acknowledge that while the Commissioner retains the authority to award fees when a claim is resolved informally, she is by no means compelled to do so in every case. As was the case prior to the amendments, an award of fees at the informal level remains the exception, not the rule. No such award should be made unless it furthers the goals of (a) maintaining appropriate standards of employer and adjuster conduct; (b) discouraging excessive and unnecessary attorney involvement; and (c) encouraging the parties to make effective use of the informal dispute resolution process. *Herring v. State of Vermont Department of Liquor Control*, Opinion No. 06-15WC (March 24, 2015).

Defendant's conduct in this case violates a well-established standard of adjuster conduct with respect to discontinuing workers' compensation benefits. As codified in both the statute, 21 V.S.A. §643a, and in Rule 18.2100, that standard requires written notification, with adequate supporting documentation, to both the injured worker and the Department prior to terminating benefits. The rule is strictly enforced, and with good reason. The discontinuance of any benefit – indemnity or medical – is likely to be a significant turning point for the parties to a workers' compensation claim. For the injured worker who believes it would be premature to discontinue benefits, notice provides an opportunity to amass countervailing evidence. For the Department, notice allows it to exercise its statutorily mandated review function, and to reject the employer's discontinuance if not adequately supported.

I find that Defendant's failure to comply with the requirements of Rule 18.2100 amounted to misconduct or neglect under Rule 10.1330. It thus became necessary for Claimant to retain an attorney, whose efforts resulted in an interim order requiring Defendant to continue benefit payments. Notably, because the benefits at issue involve ongoing medical coverage rather than a cash award, under the circumstances of this case Claimant has no other workers' compensation-related fund from which to pay his attorney for her work. If he is to be made whole, an award of attorney fees is necessary.

I conclude that an award of fees is justified.

ORDER:

Based on the foregoing, Defendant is hereby **ORDERED** to pay attorney and paralegal fees totaling \$1,074.50.

DATED at Montpelier, Vermont this 13th day of April 2015.

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.