

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Maris Wolff

Opinion No. 16-15WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Johnson State College

For: Anne M. Noonan  
Commissioner

State File No. EE-63534

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

By letter dated December 4, 2014 Claimant seeks an award of costs totaling \$273.24 and attorney fees totaling \$9,154.33. By letter dated December 16, 2014, Defendant asserts that the circumstances do not justify an award.

Claimant's request for fees follows resolution of the parties' dispute prior to formal hearing, by way of an interim order issued under 21 V.S.A. §662(b). The Commissioner has discretion to award costs and fees in such claims. As amended in 2008, the statute, 21 V.S.A. §678(d), now provides 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.

Prior to the enactment of §678(d) in 2008, the Commissioner had relied on the general grant of authority contained in §678(a) to award costs and fees at both the formal and informal levels of workers' compensation dispute resolution proceedings.<sup>1</sup> Workers' Compensation Rule 10.1300 provided further guidance regarding the exercise of that authority in the context of informal proceedings, 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

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<sup>1</sup> Section 678(a) requires an award of costs and, at the Commissioner's discretion attorney fees as well, when the claimant prevails in "proceedings under this chapter."

- 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.

Following the addition of §678(d), in 2010 Rule 10.1300 was amended as well, in two respects. First, the last word in Rule 10.1330 was changed from “and” to “or.” That rule now reads 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~~ 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.

Second, Rule 10.1370 was added, as follows:

- 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.

Together, the amendments have effectively eliminated employer or insurance carrier delay, unreasonable denial or misconduct as a necessary prerequisite to an award of fees at the informal level. Instead, in appropriate circumstances an award can now be based solely on a finding that but for the attorney's efforts, the claimant would not have prevailed. *Herring v. State of Vermont Department of Liquor Control*, Opinion No. 06-15WC (March 24, 2015).<sup>2</sup>

Notably, in promulgating Rule 10.1370 the Commissioner left intact the general requirement, as stated in Rule 10.1300, that "in most instances" attorney fees will only be considered in formal hearing proceedings. Even with the changes, furthermore, both statute and rule continue to 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.

Properly exercising the discretion granted by statute requires a balance between an injured worker's specific interest in receiving an award of fees against a public policy that continues to favor collaboration over conflict in workers' compensation matters. Thus, in addition to the criteria referenced in §678(d), in cases that are resolved short of a formal hearing the Commissioner also should consider whether awarding fees will further the goals of (a) maintaining appropriate standards of employer and adjuster conduct; (b) discouraging excessive delay or unnecessarily adversarial conduct; and/or (c) encouraging the parties to make effective use of the informal dispute resolution process. Workers' Compensation Rule 13.000; *see Herring, supra*.

I do not find in this case that Defendant failed to maintain appropriate standards of employer or adjuster conduct, or that either party caused excessive delay and/or engaged in unnecessarily adversarial conduct. I therefore specifically reject Claimant's assertion that Defendant unduly delayed resolution of her claim for certain medical benefits by insisting that her providers file a formal, written request for preauthorization. I am similarly unconvinced that Claimant's other allegations of insurer misconduct or neglect would have been sufficient under prior Rule 13.000 to justify an award of fees.

Nevertheless, I must acknowledge that the interim order that ultimately issued in this case came about primarily as a result of the efforts of Claimant's attorney. As this is the principal touchstone under the current statute, an award of some portion of the fees and costs Claimant has incurred is justified.

I turn now to the specific fees requested here. The statutory trigger for an award of fees at the informal level is that the attorney's involvement occurs "in response to an actual or effective

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<sup>2</sup> In cases decided prior to *Herring*, the Commissioner erroneously relied on the requirements of Rule 13.000 as it existed prior to its amendment in 2010, *see Herring, id.* at n.2. As evidenced by the arguments for and against an award of fees here, both parties appear to have made the same mistake.

denial of a claim.” I thus must exclude from consideration the fees incurred prior to September 9, 2013, the date when Defendant first denied Claimant’s claim. Those fees total \$348.00.

Upon close review of Claimant’s request, I further conclude that the amount billed for telephone conferences, email responses and other client status updates was excessive. I have therefore reduced the fees charged for these contacts by one-third. This reduces the total fee request to \$7,114.82.

I conclude that Claimant has established her entitlement under 21 V.S.A. §§678(a) and (d) and Workers’ Compensation Rules 10.1340-1360 and 10.1370 to costs totaling \$273.24 and attorney fees totaling \$7,114.82.

**ORDER:**

Claimant’s request for an award of costs and attorney fees is hereby **GRANTED IN PART**. Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$273.24; and
2. Attorney fees totaling \$7,114.82.

**DATED** at Montpelier, Vermont this 13<sup>th</sup> day of July 2015.

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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.