

Kimberly Dudley v. South Burlington Supervisory Union (October 16, 2013)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Kimberly Dudley

Opinion No. 23-13WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

South Burlington Supervisory Union

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 and costs after successfully convincing the Department to issue an interim order for workers' compensation benefits during the informal dispute resolution process. In support of her petition, she 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.

Although not cited by Claimant, 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:

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).

Claimant here asserts that an award of costs and fees is justified not because Defendant was guilty of undue delay, misconduct or neglect, or even because it had no reasonable basis for denying her claim. To the contrary, she asserts that an award is justified simply because ultimately the Department issued an interim order in her favor. I disagree.

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.* The goal is to ensure that when a work-related injury is claimed, the employer takes the steps necessary to promptly investigate the factual and legal circumstances so that it can make an appropriately reasoned decision whether to accept compensability or not. The goal is not to penalize the employer unduly when it reaches a conclusion with which the claimant disagrees, even if the Department ultimately does so as well. *Yustin, supra*.

In this case, Defendant's initial denial was based on a promptly undertaken and reasonably considered review of the medical evidence available at the time. Later, Defendant scheduled an independent medical examination, the results of which further supported its position. Later still, in its own review of the evidence the Department found the opinion of Claimant's medical expert to be more credible, and on those grounds it rejected Defendant's denial as not reasonably supported. That it did so does not in any way render Defendant's actions objectionable *ab initio*, however. Claimant may have won the battle, but this does not mean that Defendant was wrong to have fought it.

The plain language of Workers' Compensation Rule 10.1300 requires that the discretion granted by the statute to award costs and attorney fees at the informal dispute resolution level be exercised only in instances where the employer has behaved unreasonably in crafting its defense against an injured worker's claim for workers' compensation benefits. This was not the case here. Defendant here conducted its business in a forthright and appropriate manner. Under these circumstances, an award of costs and attorney fees is not justified.

ORDER:

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

DATED at Montpelier, Vermont this 16th day of October 2013.

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.