STATE OF VERMONT
DEPARTMENT OF LABOR

James Hoyt

v.

Chittenden South Supervisory Union

Opinion No. 09-14WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. EE-59582

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

Procedural Background:

Claimant seeks an award of costs and attorney fees incurred in pursuing his claim for workers' compensation benefits at the informal dispute resolution level. Acting as the Commissioner's designee, the Hearing Officer initially denied the petition by letter dated February 20, 2014. In doing so, the Hearing Officer relied in part on factual allegations contained in Defendant's email response to the petition. Subsequently it became apparent that because Defendant's attorney had inadvertently used an outdated email address, Claimant's attorney had not received a copy of Defendant's response. In order to give Claimant an opportunity to address the factual issues Defendant had raised, the Hearing Officer agreed to reopen the record and reconsider Claimant's motion in light of the additional evidence he proffered.

Factual Background:

Claimant has worked for Defendant as a bus driver and fleet mechanic for approximately 18 years. Allegedly, on December 10, 2012 he injured his left wrist while attempting to loosen a rusty bolt from a bus. At one point, he banged his wrist on the bus frame when the wrench he was using slipped. At another point, he hit his wrist with a hammer while trying to loosen the bolt with a chisel. Claimant was unsure which of these two events actually caused the injury.

As he was well accustomed to the bumps and bruises that typically accompany a mechanic's job duties, initially Claimant did not seek medical treatment. One week later, on December 17, 2012 he presented to the Fletcher Allen Health Care walk-in clinic, complaining that his wrist was swollen and painful if he flexed it. In early January, he was referred to Dr. Frenzen, an orthopedic surgeon, who ultimately diagnosed a tendon tear. Claimant underwent surgical repair on January 31, 2013.

Although he had advised his treatment providers that he had injured his wrist at work, all but one of Claimant's medical bills were submitted to, and paid by, his group health insurer. And although Claimant recalled telling his supervisor of his injury shortly after it occurred, no First Report of Injury was filed until February 8, 2013. Thereafter, Defendant's workers' compensation insurance adjuster corresponded with Claimant, requesting that he sign a medical authorization so that it could retrieve and review his medical records. Despite two requests, Claimant failed to sign and return the authorization. As a consequence, on February 19, 2013 Defendant submitted its Denial of Workers' Compensation Benefits (Form 2) to the Department, citing the lack of any medical documentation causally relating the injury to work as grounds. Notwithstanding the instructions printed at the bottom of the denial form, Claimant did not notify the Department that he wished to appeal this determination.

Defendant was able to procure Claimant's medical records in the ensuing weeks. All of the records reported the injury as having occurred at work on or about December 10, 2012. There was some variation as to the specific mechanism of injury, however. One provider reported that Claimant had "banged" the back of his hand when it slipped, while another reported that he had hurt it while "lifting something;" both of these versions conflicted with the description on the First Report of Injury, which stated that Claimant had hit the top of his hand with a hammer. It does not appear that Defendant took any steps to reconcile these discrepancies, such as, for example, by interviewing Claimant.

In May 2013 Claimant retained Attorney McVeigh to represent him. In July Defendant retained Attorney Callahan to defend its claim denial. On September 30, 2013 Attorney McVeigh corresponded with Attorney Callahan, requesting that Defendant accept the claim as compensable on the basis of the medical records that both parties now possessed. In that correspondence, Attorney McVeigh represented that Claimant was owed approximately two months of temporary disability compensation, unspecified medical benefits and as yet undetermined permanency compensation. Concurrently with that correspondence, Attorney McVeigh filed a Notice and Application for Hearing (Form 6) with the Department.

Over the course of the next month, the parties engaged in a flurry of email correspondence, both among themselves and with the Department's workers' compensation specialist. Attorney McVeigh asserted repeatedly that because Defendant had failed to produce any medical evidence to sustain its denial, an interim order to pay benefits was appropriate. Attorney Callahan argued repeatedly in response that because the existing records documented three different versions of how the injury had occurred, thus putting Claimant's credibility at issue, an interim order was not justified.

On October 30, 2013 Attorney Callahan advised both the Department's specialist and Attorney McVeigh that Defendant was amenable to settling the claim, as doing so likely would be more cost effective than continuing to litigate it. For reasons that are unclear, Attorney Callahan understood that Claimant had missed only four days of work as a result of his injury. This would have entitled him to only one day of temporary total disability compensation, which Defendant was willing to pay. In addition, as Claimant's medical bills already had been submitted to, and paid by, his group health insurer, Defendant offered to reimburse his co-payments and other out-of-pocket medical expenses. Last, Attorney Callahan represented that Defendant likely would pay whatever permanency was determined to be due.

With some prodding from the Department's specialist, Attorney McVeigh agreed to convey Defendant's settlement proposal to his client, but stated that he would not recommend that his client accept it. His counter-proposal was that Defendant "simply accept the claim with no conditions." Notably, however, despite repeated requests from Attorney Callahan to clarify the duration of his client's time out of work and the extent of his out-of-pocket medical expenses, Attorney McVeigh was not forthcoming with this information.

On December 6, 2013 Attorney Callahan took Claimant's deposition. In it, Claimant credibly explained away the discrepancies between his varying accounts of how the injury had occurred, whether as a consequence of banging his wrist against the bus frame or as a result of hitting it with a hammer. Claimant also related that he had missed "a couple of months" of work after his surgery. During that time, he received a biweekly payroll check from his employer.

Following a series of status inquiries from Attorney McVeigh in early December 2013, on December 17, 2013 the Department's specialist indicated that she had completed her decision regarding Claimant's request for an interim order and would be issuing it within the next few days. Prior to her doing so, on December 19, 2013 Attorney Callahan notified both her and Attorney McVeigh that Defendant was accepting the claim without prejudice.

On January 13, 2014 Attorney McVeigh filed the pending Petition for Award of Attorney Fees and Costs. In it, he seeks a total of $52.75 in costs and attorney fees for 20.4 hours billed, which at the approved hourly rate of $145.00 totals $2,958.00.

Discussion:

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

Workers' Compensation Rule 10.1300 provides 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:
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> 10.1310 the employer or insurance carrier is responsible for undue delay in adjusting the claim, or
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> 10.1320 that the claim was denied without reasonable basis, or
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> 10.1330 that the employer or insurance carrier engaged in misconduct or neglect, and
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> 10.1340 that legal representation to resolve the issues was necessary, and
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> 10.1350 the representation provided was reasonable, and
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> 10.1360 that neither the claimant nor the claimant's attorney has been responsible for any unreasonable delay in resolving the issues.

In a slightly different context, the Vermont Supreme Court recently has addressed a workers' compensation claimant's right to collect attorney fees when he or she prevails by settlement in an action brought under 21 V.S.A. §675(a). That section authorizes "any court of law having jurisdiction of the amount involved" to enforce a prior award of benefits by the commissioner, including one issued by way of an approved agreement between the parties, when an employer or insurance carrier has failed to comply. If the claimant prevails, "reasonable attorney fees and costs shall be allowed."

In *Bonanno v. Verizon*, 2014 VT 24, the Court adopted the so-called "catalyst theory" as "a possible route to attorneys' fees" under §675(a). *Id.* at ¶21. To prevail under that theory, "a party must demonstrate: (1) that the filing of the lawsuit was a 'necessary and important factor in achieving' the other party's change in conduct, and (2) a 'colorable or reasonable likelihood of success on the merits.'" *Id.* at ¶22, quoting *Kirchner v. Giebink*, 155 Vt. 351, 353 (1990); *see also, Merriam v. AIG Claims Services, Inc.*, 2008 VT 8. As the Court explained in *Kirchner,* to meet the first requirement a plaintiff need not have prevailed by direct judicial action, so long as its lawsuit, and its attorney's efforts, were the catalyst for the relief ultimately obtained. *Kirchner, supra* at 352, 354. To meet the second requirement, a plaintiff must show that its claims were not frivolous, unreasonable or groundless as a matter of law. *Id.* at 354.

That the Supreme Court endorsed the catalyst theory in *Bonanno* is instructive, but not necessarily determinative in the pending claim. Public policy strongly favors full and free access to the court system when an employer or insurance carrier flaunts a lawfully issued order or approved agreement to pay benefits, as occurred in that case. Were the rule otherwise, an aggrieved injured worker would suffer a financial penalty for enforcing his or her rights, not to mention an unconscionable delay in receiving benefits. This would directly contravene the stated purpose of Vermont's workers' compensation system – to provide prompt and timely compensation without necessitating complex and expensive court action. Workers' Compensation Rule 7.1000; *Morrisseau v. Legac*, 123 Vt. 70, 76 (1962).

The commissioner's authority under §678(a) to award attorney fees to a claimant who prevails at the informal dispute resolution level stands on a somewhat different footing. Disputes at this level are often resolved with guidance from the Department's workers' compensation specialists, who emphasize information sharing over adversarial posturing. Attorney fee awards at this level are the exception, not the rule. *See* Workers' Compensation Rule 10.1300; *Morrisseau v. Hannaford Brothers*, Opinion No. 21A-12WC (August 9, 2012). Thus, while the catalyst theory is reflected to some degree in the language of §678(a), the commissioner's discretion to apply it is tempered by the factors listed in Rule 10.1300. *Zahirovic v. Super Thin Saws, Inc.*, Opinion No. 38-11WC (November 18, 2011).

Considering those factors in light of what transpired in this claim, I conclude that Defendant's conduct justifies an award of fees. I acknowledge that its initial denial, which was based on its inability to gain prompt access to Claimant's medical records, was appropriate. It received the records within a reasonable time thereafter, however. At that point, it owed a duty to investigate in order to determine whether substantive grounds still existed to deny. Its failure to do so caused undue delay in adjusting the claim. It thus put itself at risk for an award of fees under Rule 10.1310.

The proper exercise of discretion under Rule 10.1300 requires that I examine the conduct of Claimant's attorney as well. His failure to provide clarifying information as to the specific benefits owed impeded Defendant's ability to evaluate its exposure, and thus unnecessarily delayed its acceptance of the claim. Under Rule 10.1360, I consider this a proper basis for reducing the amount of fees awarded. *See Bonanno, supra* at ¶25 (affirming that trial court properly exercised its discretion to reduce plaintiff's fee award in light of his attorney's unnecessary delay in providing discovery).

There is fault to be shared on both sides for the untidy manner in which this claim was resolved, therefore. I conclude that it is appropriate to award Claimant costs totaling $52.75. As for attorney fees, I conclude that it is appropriate to award only a portion of the $2,958.00 requested. Thus, with the exception of the fees incurred for attending Claimant's deposition, I have deducted the fees incurred after November 11, 2013, the date on which Defendant clearly requested the clarifying information referred to above. The remaining fees, totaling $1,682.00, are hereby awarded.

ORDER:

Claimant's Petition for Costs and Attorney Fees is hereby **GRANTED IN PART**. Defendant is hereby **ORDERED** to pay:

- Costs totaling $52.75; and

2. Attorney fees totaling $1,682.00.

DATED at Montpelier, Vermont this 13th day of May 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.