Ronald Thomas v. Engelberth Construction (February 6, 2015)

STATE OF VERMONT
DEPARTMENT OF LABOR

Ronald Thomas

v.

Engelberth Construction

Opinion No. 02-15WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. U-09592

RULING ON CLAIMANT'S REQUEST FOR AWARD OF ATTORNEY FEES

Claimant seeks an award of attorney fees incurred in pursuing his claim for workers' compensation benefits at the informal dispute resolution level. The facts are as follows:

Claimant worked as a construction laborer/carpenter for Defendant. On September 3, 2003 he suffered a work-related left ankle injury. Defendant accepted his claim as compensable and paid workers' compensation benefits accordingly. These included coverage for associated medical expenses, an extended period of temporary total disability and vocational rehabilitation assistance. As to the latter, because Claimant's treating physician, Dr. Huber, had discouraged him from returning to construction work, vocational rehabilitation services focused instead on retraining him for work as a heavy equipment operator, a medium capacity job.

In March 2006 Dr. Huber determined that Claimant had reached an end medical result, with a seven-percent whole person permanent impairment referable to his September 2003 work injury. Defendant paid permanency benefits in accordance with this rating.

The record does not clearly indicate at what point Claimant returned to work. In any event, by July 16, 2009 he was again doing general construction work, for a new employer. On that date, at Defendant's request, he underwent an independent medical examination with Dr. Johansson. According to Dr. Johansson's report, Claimant was still having symptoms in his left foot and ankle, but wanted to continue working until the winter prior to considering possible fusion surgery. Noting that Claimant was now working essentially full time and full duty in a job that exceeded Dr. Huber's previously stated recommendations, Dr. Johansson concluded that his ongoing symptoms and need for renewed treatment represented "an aggravation of his pre-existing condition . . . that was accelerated due to his return to work in the construction field."

Shortly after Dr. Johansson's examination, on July 22, 2009 Claimant began working as a crane operator for CCS Constructors, Inc. On two occasions thereafter (October 20, 2009 and June 14, 2011), he reported to Dr. Huber that he was experiencing increased, though manageable, discomfort in his ankle with heavy work activities. Aside from bracing, Dr. Huber did not recommend any additional treatment at either visit.

On April 30, 2014 Claimant retained Attorney Illuzzi for the purposes of pursuing a possible claim for additional workers' compensation benefits on account of his worsening ankle and foot symptoms. On May 1, 2014 Attorney Illuzzi corresponded by letter with Defendant's workers' compensation insurance adjuster. The letter contained the following representations:

- That Claimant had asked Attorney Illuzzi "to assist him to determine if additional benefits are due" as a result of his September 3, 2003 work injury;

- That as time had passed, Claimant was experiencing "reduced range of motion in his left ankle and foot such that it is worse than what it was when he was evaluated by Dr. Huber" in March 2006;

- That Claimant was scheduled for an appointment with Dr. Huber on May 20, 2014; and

- That with the upcoming appointment in mind, Attorney Illuzzi had asked Dr. Huber to address the question "whether additional surgery is necessary to further stabilize that left ankle, and if not, whether he should be re-rated to determine his degree of permanent partial disability."

With the letter, Attorney Illuzzi enclosed a medical authorization that Claimant had executed "to allow you to obtain his medical records."

Attorney Illuzzi's itemized billing statement contains the following entry for June 20, 2014: "Review and index medical records received from carrier." I cannot discern from the evidence presented whether this entry refers to records that Defendant's adjuster had just recently obtained, or to records already on file dating back to the original claim.

Some three weeks later, on July 16, 2014 Attorney Illuzzi sent a letter to Defendant's adjuster in which he requested that Claimant's benefits be resumed as of July 9, 2014. Enclosed with the letter were Dr. Huber's medical records relating to evaluations on May 20th, June 18th, and July 9, 2014. The first two records briefly noted Claimant's medical history and current status, but did not address causal relationship. In the third record Dr. Huber stated, "I believe that [Claimant's] current problem is directly related to his worker's comp injury."

On July 25, 2014 Defendant filed a Form 2 Denial of Workers' Compensation Benefits. Specifically as to Claimant's claim for indemnity benefits, the denial stated, "Claimant reached a medical end result on 3/13/06 with 7% whole person PPD. All disability, permanency and voc rehab benefits have been paid. Per July 16, 2009 IME report,[1] the claimant's new employment aggravated his condition." As to the claim for medical benefits, it stated, "Treatment at Mansfield Orthopedics[2] on 5/20, 6/18 and 7/9/14 not related to the 9/3/03 injury due to intervening aggravations."

[1] This is a reference to Dr. Johansson's report, a copy of which was attached to the Form 2.
[2] Mansfield Orthopedics is the practice to which Dr. Huber belongs.

Attorney Illuzzi appealed Defendant's denial by way of a request for hearing filed on July 30, 2014. On August 11, 2014 the Department's assigned workers' compensation specialist conducted an informal conference, in which both Attorney Illuzzi and Defendant's counsel, Attorney Cain, participated. At Attorney Cain's request, the specialist agreed to put Claimant's current employer on notice of its potential liability should the medical evidence establish that Claimant had suffered an aggravation of his prior injury. The specialist further advised that she would allow the current employer 21 days to investigate Claimant's claim for additional benefits, following which she would make a determination as to liability.

On September 17, 2014 Claimant's current employer denied responsibility for any claimed workers' compensation benefits on the grounds that his current condition represented a recurrence of his earlier injury, and that therefore Defendant remained liable. Upon reviewing the medical evidence, on September 22, 2014 the Department's specialist issued an interim order of benefits against Defendant.[3] Additionally, she ordered both Defendant and the current employer to arbitration under 21 V.S.A. §662(c), so that liability for any benefits owed could be finally determined. The record does not reflect the current status of those proceedings.

Upon receipt of the interim order, Defendant seasonably commenced paying benefits in accordance with its terms.

On October 15, 2014 Attorney Illuzzi filed the pending request for an award of attorney fees totaling $4,686.40. On November 7, 2014 he filed an updated request, reflecting additional hours billed in responding to Defendant's Memorandum in Opposition. The fee request now totals $5,338.90.

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:

[3] The specialist's interim order was amended on September 23, 2014 to correct an error as to the start date for temporary total disability benefits; otherwise its terms were unchanged.

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 here asserts two grounds upon which to base an award of attorney fees under Rule 10.1300. He asserts, first of all, that Defendant's adjuster should have initiated its investigation immediately upon receipt of Attorney Illuzzi's May 1, 2014 letter, and that her failure to do so was unreasonable. Second, he argues that because Dr. Johansson's July 2009 independent medical examination was outdated, the adjuster should have known not to rely on it as the sole grounds for Defendant's denial. I disagree on both counts.

As to the first assertion, by its plain language Attorney Illuzzi's May 1, 2014 letter was not a claim for benefits. The letter stated that he had been retained "to assist [Claimant] to determine *if* additional benefits are due." (Emphasis added). In furtherance of that goal, Attorney Illuzzi represented that he already had put the question to Dr. Huber, with whom Claimant already had scheduled an appointment. Considered together, these statements establish first, that no claim for benefits had yet been filed and second, that no evidence in support of a claim had yet been identified. Under these circumstances, I conclude that no action on the part of Defendant's adjuster was yet required.

As to the second assertion, I conclude that it was not unreasonable, even five years later, for Defendant's adjuster to rely on Dr. Johansson's 2009 independent medical examination in support of her denial. Dr. Johansson's report stands for the proposition that Claimant's return to construction work severed the causal connection between his original injury and his current condition. Claimant having continued in that line of work in the years since, I cannot fault the adjuster for presuming that Dr. Johansson's opinion on this issue had not changed in the interim.

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 aggravation, and therefore ordered Defendant to assume responsibility for the claim pending formal resolution of the issue through arbitration. That she thus rejected the basis for Defendant'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. *Ploof v. Franklin County Sheriff's Department*, Opinion No. 13-14WC (August 8, 2014), citing *Yustin, supra*.

I conclude that neither of the grounds Claimant has asserted in support of his request for attorney fees is sufficient to establish that Defendant unreasonably denied his claim, or otherwise engaged in misconduct, neglect or undue delay. For that reason, I must reject his request for an award.[4]

ORDER:

Claimant's Petition for Costs and Attorney Fees is hereby **DENIED**.

DATED at Montpelier, Vermont this 6th day of February 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.

[4] I note with approval Defendant's objection to Claimant's itemized billing on the grounds that it fails to differentiate between paralegal and attorney hours spent. Assuming Attorney Illuzzi typically bills at a separate rate for the former, his billing statement should have reflected this.