

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Keith Herring

Opinion No. 06-15WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

State of Vermont
Department of Liquor Control

For: Anne M. Noonan
Commissioner

State File No. CC-61758

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

Claimant seeks an award of costs and attorney fees incurred in successfully pursuing his claim for permanent partial disability benefits at the informal dispute resolution level.

By way of background, Claimant suffered a work-related injury on May 16, 2011 when he fell while unloading a truck. Defendant accepted responsibility for the resulting sacrum and coccyx contusions, lower back and neck strains and left knee sprain, and paid workers' compensation benefits accordingly.

In March 2013 Defendant denied responsibility for medical bills relating to treatment of Claimant's bilateral shoulder complaints on the grounds that they were not causally related to his 2011 work injury. In October 2013 Claimant retained Attorney Cusick to represent him. In mid-November Attorney Cusick requested that the Department issue an interim order for both medical and indemnity benefits relative to the claimed bilateral shoulder injuries. Given conflicting medical opinions as to causation, the Department's workers' compensation specialist declined to do so, and instead referred the matter to the formal hearing docket on an expedited basis. A formal hearing was scheduled for March 19, 2014 but was never held. Instead, on March 12, 2014 Claimant withdrew his hearing request without prejudice, claiming that he needed additional time to prepare his case.

Claimant renewed his hearing request on September 19, 2014, but as to an entirely different disputed issue. He was no longer seeking benefits referable to his bilateral shoulder complaints, but rather claimed entitlement to permanent partial disability benefits on account of his accepted cervical and lumbar spine injuries. Specifically, Claimant sought permanency benefits for a ten-percent whole person impairment, in accordance with Dr. Peterson's July 11, 2014 independent medical examination and permanent impairment rating. Citing the zero-percent permanent impairment ratings previously issued by Drs. Binter and Gennaro following their independent medical examinations (December 2012 and January 2014, respectively), Defendant argued that no permanency benefits were due.

After reviewing the various impairment ratings, the workers' compensation specialist determined that Dr. Peterson's opinion was the most credible. She therefore issued an interim order compelling Defendant to pay permanent partial disability benefits accordingly.

Having prevailed at the informal dispute resolution level, Claimant filed the pending request for an award of costs totaling \$170.30 and attorney and paralegal fees totaling \$3,440.50. Defendant objects to an award on the grounds that the requirements of Workers' Compensation Rule 10.1300 have not been met.

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.

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.¹ 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
- 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

¹ 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."

10.1360 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.²

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. Exercising that discretion should further 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.

With those goals in mind, for example, an award of attorney fees might not be appropriate in a case that would have been amenable to informal resolution but for the attorney's unnecessarily adversarial posturing. Similarly, where the claimant's attorney prolongs a dispute by failing to obtain and share critical information promptly and voluntarily, fees will likely be denied. There might be other instances as well where the attorney's conduct so undermines the informal dispute resolution process as to negate his or her entitlement to an award of fees. And last, there might be claims that are successfully resolved largely as a consequence of the workers' compensation specialist's efforts rather than the attorney's, in which case a fee award might not be justified.

In the claim before me now, I can find no basis for concluding that Defendant unduly delayed, unreasonably denied or otherwise mishandled its claims adjusting responsibilities so as to trigger an award of fees under Rules 10.1310-1330. However, I find sufficient grounds to justify an award under 21 V.S.A. §678(d) and Rules 10.1340-1360 and 10.1370. Faced with two zero-percent permanency ratings from Defendant's independent medical examiners, on his own initiative Claimant's attorney obtained a third rating, which the specialist ultimately accepted as most persuasive. But for his efforts, no permanency benefits would have been paid.

Defendant asserts that Claimant's attorney unreasonably delayed resolution of the claim, by voluntarily withdrawing his initial hearing request only days before the formal hearing was scheduled to occur. I do not consider this sufficient grounds to deny his request for an award of fees, however. True, Claimant's attorney initially focused his attention on securing benefits for his client's claimed shoulder injuries. Presumably, upon recognizing that he did not have sufficient evidence to succeed with this claim, the attorney withdrew it, and instead turned his attention to securing permanency benefits for the injuries Defendant already had accepted. The nine-month gap between Defendant's more recent impairment rating (January 2014) and Claimant's request for hearing on the permanency issue (September 2014) is not so substantial as to automatically infer that Defendant was prejudiced as a result, nor has Defendant alleged any facts tending to show that it was. Under the particular circumstances of this case, I consider the delay to be relatively inconsequential.

² To the extent that prior decisions were based, at least in part, on the pre-amendment version of Rule 10.1330 rather than the current one, the rationale stated in those cases must now be abandoned.

I conclude that Claimant has established his entitlement under 21 V.S.A. §§678(a) and (d) and Workers' Compensation Rules 10.1340-1360 and 10.1370 to costs totaling \$170.30 and attorney fees totaling \$2,964.00.³

ORDER:

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

1. Costs totaling \$170.30; and
2. Attorney fees totaling \$2,964.00.

DATED at Montpelier, Vermont this 24th day of March 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.

³ I have disallowed the paralegal and attorney fees incurred prior to June 5, 2014, as Claimant has failed to show the extent, if any, to which these were referable to his successful claim for permanency benefits as opposed to his initial claim (subsequently withdrawn) for benefits referable to his bilateral shoulder complaints.