

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Mark Wood

Opinion No.07-15WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

FairPoint Communications

For: Anne M. Noonan  
Commissioner

State File No. GG-50444

**RULING ON CLAIMANT’S REQUEST FOR AWARD OF ATTORNEY FEES**

Claimant seeks an award of attorney fees incurred in securing an interim order requiring Defendant to pay workers’ compensation benefits.

By way of background, Claimant injured his hand on June 10, 2014 while manipulating a wrench on a piece of machinery at work. He did not immediately report the injury. Ten days later, he notified his supervisor of the accident via email, and informed him that he likely would seek medical treatment if the swelling in his hand failed to resolve within the next week.

On July 9, 2014 Claimant presented to Leesa Taft, ARNP, his primary care provider, complaining of swelling and discomfort in his left hand. Upon registering for this appointment, he indicated for billing purposes that his injury was work-related. However, in her office note Ms. Taft mistakenly reported that the injury had occurred while Claimant was working with a wrench on a piece of farm machinery. Based on that report, on July 10, 2014 Defendant denied Claimant’s claim for workers’ compensation benefits for “lack of investigative evidence to determine causal relationship to employment.”

After Claimant brought her attention to the error, in September 2014 Ms. Taft corrected the July 9, 2014 office note to remove the reference to “farm” machinery. Claimant also secured a letter from Sherry Bellimer, the primary care practice manager, explaining how the error had occurred and confirming that Claimant had at all times represented that his injury had occurred at work. Notwithstanding this clarification, Defendant maintained its denial, again stating that “medical records do not prove treatment is for work-related injury.”

In January 2015 Claimant retained Attorney Powell to represent him. Following an informal conference, on February 26, 2015 the Department’s workers’ compensation specialist issued an interim order requiring Defendant to pay workers’ compensation benefits. In doing so, the specialist noted that while Defendant’s initial denial may have been reasonable, it had failed subsequently to produce any “investigative evidence” whatsoever, despite having had many months in which to do so.

Claimant's attorney filed the pending request for attorney fees on March 3, 2015. He seeks reimbursement for 7.4 attorney hours and 3.1 paralegal hours. At the applicable reimbursement rates,<sup>1</sup> his request totals \$1,305.50.

**Discussion:**

Under both statute and rule, the Commissioner has discretion to award costs and attorney fees in claims that are resolved at the informal dispute resolution level. As amended in 2008, the statute, 21 V.S.A. §678(d), now provides:

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, which was amended in 2010 to incorporate the provisions of §678(d), provides further guidance, 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, 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.
- 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

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<sup>1</sup> Attorney fee awards are based on a rate of \$145.00 per hour, in accordance with Workers' Compensation Rule 10.1210. Though not specified in the rule, the Commissioner typically has awarded paralegal fees at the rate of \$75.00 per hour, *see Jacobs v. Metz and Associates, Ltd.*, Opinion No. 02A-12WC (May 14, 2012).

- 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.

Notably, even as amended, both §678(d) and Rule 10.1300 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. As was the case prior to the amendments, an award of fees at the informal level remains the exception, not the rule. No such award should be made unless it furthers 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. *Herring v. State of Vermont Department of Liquor Control*, Opinion No. 06-15WC (March 24, 2015).

In this case, Defendant initially denied Claimant's claim for benefits because the medical record did not support his version of how the injury occurred, whether at work or outside of it. While justifiable at the time, when the inconsistency was later revealed to be an error on the treating provider's part, Defendant failed either to rescind its denial or to develop another plausible basis for it, thus triggering consideration under Workers' Compensation Rule 10.1320. Ultimately, Claimant retained Attorney Powell, whose efforts resulted in an interim order requiring Defendant to pay benefits.

I find that Claimant's fee request thus meets the requirements of both 21 V.S.A. §678(d) and Rule 10.1300. I also find that an award of fees in this case will further the goals stated above, particularly with respect to maintaining appropriate standards of adjuster conduct. For these reasons, I conclude that an award of fees is justified.

**ORDER:**

Based on the foregoing, Defendant is hereby **ORDERED** to pay attorney and paralegal fees totaling \$1,305.50.

**DATED** at Montpelier, Vermont this 10<sup>th</sup> day of April 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.