

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Scott Williams

Opinion No. 03-19WC

v.

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

State of Vermont

For: Lindsay H. Kurrle
Commissioner

State File No. KK-63539

RULING ON CLAIMANT'S REQUEST FOR ATTORNEY FEES

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.

Claimant worked for Defendant as a state attorney. On August 7, 2015, he was undergoing physical therapy at a private gym in Barre when he heard gunfire. He left the gym and hurried to the scene of the shooting, where he encountered the shooter and the victim, both of whom he knew. He rendered assistance to the victim, who did not survive, and remained on the scene until the authorities arrived. The next day he accompanied the authorities on their investigation of three related fatal shootings at a different site near his own home.

Claimant alleges that he experienced an aggravation of his preexisting post-traumatic stress disorder as a result of the shooting incident. On March 22, 2018, he hired attorney Patricia Turley to pursue a workers' compensation claim on his behalf.

Ms. Turley filed a claim notice with the employer on March 23, 2018. However, the recipient of the notice assumed that Ms. Turley had filed the notice with the Department of Labor and believed that the copy she received was just a courtesy copy. She therefore did not transmit the notice to Defendant's Office of Risk Management, its adjuster or its legal counsel. As a result, Defendant did not act on the claim until Ms. Turley followed up on April 30, 2018.

Defendant's counsel, attorney Robin Cooley, sent out a claim denial on May 8, 2018. *Defendant's Exhibit 3*. On May 10, 2018, Claimant requested a hearing. On June 26, 2018, Defendant reaffirmed its denial.

Defendant's investigation after April 30, 2018 was prompt and diligent. As Claimant had post-traumatic stress disorder pre-dating the incident, Ms. Cooley obtained pre- and post-incident medical records, spoke with fact witnesses, and conducted a background investigation. On July 17, 2018, she contacted the office of neuropsychiatrist Albert Drukteinis, MD, to arrange an independent psychiatric evaluation for the first available date. Ms. Cooley did not seek to schedule the exam sooner because she wanted to be sure that the

relevant records would be available for the doctor's review. Dr. Drukteinis's office scheduled the examination for September 27, 2018.¹

Defendant pursued multiple defenses to the claim, as set forth in Ms. Cooley's May 8, 2018 denial letter. *Defendant's Exhibit 3*. Those defenses included late notice of the alleged injury under 21 V.S.A. § 656(a); a contention that the injury did not arise out of and in the course of employment as required by 21 V.S.A. § 618; a contention that Claimant suffered from pre-existing, ongoing post-traumatic stress that accounted for his symptoms; and a contention that he could not meet the burden of proof for a work-related stress claim.²

On July 16, 2018, Ms. Turley filed a brief with the Department's Specialist, setting forth her response to each of Defendant's legal defenses. On July 18, 2018, the parties participated in an informal conference. Although the Specialist did not issue an interim order, her post-conference memo indicated that she agreed with Claimant's positions on the disputed late notice defense and the applicable burden of proof. As to whether the injury arose out of and in the course of employment, the Specialist wrote that she was "leaning toward" issuing an interim order based on Ms. Turley's persuasive explanation that the professional relationship between the three individuals at the shooting (Claimant, the shooter and the victim³) established the required employment connection. The Specialist wrote: "After considering the parties' respective arguments, I respectfully recommend that [Defendant] may wish to reconsider its position on denial." *Claimant's December 27, 2018 letter, Exhibit 1*.

The Specialist also recommended that Defendant pay temporary disability benefits without prejudice pending Dr. Drukteinis's independent psychiatric examination. The Specialist wrote that she would await defense counsel's update on that issue, after which she would "issue an interim level decision (if appropriate)." *Id.* On July 18, 2018, Defendant began paying temporary disability benefits without prejudice.

On October 4, 2018, Defendant underwent the independent psychiatric examination and, on October 17, 2018, Dr. Drukteinis issued his report. In his opinion, the August 2015 incident aggravated Claimant's preexisting post-traumatic stress disorder. *Dr. Drukteinis' report, attached to Defendant's December 28, 2018 letter*. On October 25, 2018, Defendant withdrew its denial of the claim and began paying benefits. *Defendant's Exhibit 4*.

On November 21, 2018, Claimant filed his request for an award of attorney fees and costs. On December 5, 2018, Defendant filed an opposition. On December 12, 2018, Claimant amended his request, as set forth below. On December 21, 2018, Defendant filed a sur-reply to Claimant's amended request. On December 27, 2018, Claimant filed a letter responding to

¹ Dr. Drukteinis later rescheduled the examination for October 4, 2018.

² The incident occurred in August 2015, but Claimant alleged that he did not make the connection between the incident and his increased symptoms until November 2017. The statute setting forth the burden of proof for psychological claims was amended as of July 1, 2017. Therefore, there was an issue concerning which version of the statute would apply.

³ The shooting victim was a state social worker. As state's attorney, Claimant worked with her to remove at-risk children from their homes. The shooter had just lost her children to state custody and blamed the social worker for that outcome.

Defendant's sur-reply, and on December 28, 2018, Defendant filed its third reply and a copy of Dr. Drukteinis's report.

Discussion:

The Commissioner has discretion to award attorney 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's 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.

Application of the Statutory Requirements to Claimant's Fee Request

Claimant requested a formal hearing on May 10, 2018. The disputed issues relevant to his fee request are whether he retained an attorney in response to the denial of his claim and whether his attorney's efforts resulted in payments to him.

Defendant first contends that Claimant is not eligible for an attorney fee award because he retained an attorney before his claim was denied, rather than in response to a denial. Although true, this does not disqualify him from an award of attorney fees. In such circumstances, the Department limits the fee award to time spent by the attorney after the claim denial. *See, e.g., Combs v. Broe's Masonry*, Opinion No. 27-15WC (November 20, 2015) ("The statutory trigger for an award of fees at the informal level is that the attorney's involvement occurs in response to an actual or effective denial of a claim. I thus must exclude from consideration the fees incurred prior to . . . the date when Defendant first denied Claimant's claim.")

Claimant here amended his fee petition to exclude attorney time expended prior to the date of claim denial. Had he not done so, I would have disallowed the time entries prior to that date. Either way, the entire fee request is not disallowed simply because Claimant hired an attorney prior to the claim denial.

Defendant next contends that Claimant is not entitled to a fee award because payments were not made to him as a result of his attorney's efforts. Defendant maintains that it was conducting a prompt and diligent investigation, at the conclusion of which it would have accepted the claim even without attorney Turley's efforts.

Having reviewed the file and the submissions of both parties, I agree that Defendant conducted a prompt and diligent investigation after the initial delay that ran from March 23, 2018 through April 30, 2018. Nevertheless, I find that payments were made to Claimant as a result of his attorney's efforts, and not merely in the due course of Defendant's investigation. In particular, Defendant asserted and vigorously pursued multiple legal defenses to the claim. The Specialist's post-conference memo to the parties reflects that she was persuaded by Claimant's counsel's positions on the issues of late notice and the applicable burden of proof.

As to whether the claim arose out of and in the course of employment, her memo reflects that Ms. Turley persuasively advocated for finding a causal connection between the incident and Claimant's employment. The Specialist's memo documents that Ms. Turley's theory of a "triangle" of work connections between her client, the shooter and the victim clarified in the Specialist's mind that the injury arose out of and in the course of employment. The Specialist therefore indicated in her memo that Defendant should reconsider its denial and suggested it pay temporary disability benefits without prejudice pending the doctor's examination.

Based on this claim history, I conclude that Ms. Turley's advocacy resulted in payments being made to Claimant. Although Dr. Drukteinis's report made a causal connection between the shooting incident and Claimant's worsening mental condition, it was counsel's advocacy that made the *legal* connection between the shooting incident and Claimant's employment required by 21 V.S.A. § 618. Without that connection, Claimant would not have been entitled to any benefits.

Having found that Claimant meets the statutory criteria for a discretionary fee award, I turn to the Workers' Compensation Rules for guidance on the exercise of that discretion.

Discretionary Considerations

Workers' Compensation Rule 20.1400 provides that "[a]ttorney fee awards to prevailing injured workers are discretionary, and generally shall be considered only in cases resolved at the formal hearing level." Workers' Compensation Rule 20.1500 then provides guidance for the exercise of that discretion:

The discretion to award attorney fees in cases that are resolved prior to formal hearing is intended to be exercised in limited circumstances and not as a general rule. When considering a fee request under Rule 20.1400, the Commissioner shall also consider whether an award of fees will further the goals of (a) maintaining appropriate standards of employer and adjuster conduct; (b) discouraging excessive delay or unnecessarily adversarial conduct; and/or (c) encouraging the parties to make effective use of the informal dispute resolution process.

Under Rule 20.1500, I must consider these three goals, but the rule does not require me to make a specific finding under all, or any, of them. In this case, I have focused on the goal of discouraging excessive delay or unnecessarily adversarial conduct.

The workers' compensation system is designed to be accessible for persons without legal representation, and many workers successfully represent themselves at the informal level. However, this was not a claim that an unrepresented claimant could easily handle himself. Claimant here was receiving physical therapy at a private facility when he heard gunshots, hurried to the scene, and rendered assistance. Whether those actions were related to his job duties as a state's attorney was a contested matter. He also had a preexisting post-traumatic stress disorder condition that could have potentially accounted for his symptoms. Further, the incident occurred two and a half years prior to the filing of this claim. Even defense counsel referred to the claim as "very unusual and complicated." *Defendant's Sur-reply*, at 6.

Although the commissioner may deny an award of attorney fees when a claimant's counsel is unnecessarily adversarial, that was not the case here. Here Claimant's counsel provided necessary assistance in an unusual and complex claim, without which he was unlikely to succeed. Further, a fee award here would help to maintain appropriate standards of employer conduct, to the extent that the employer inadvertently caused delay at the outset of the claim.

Considering the requirements of 21 V.S.A. § 678(d) and the goals set forth in Workers' Compensation Rule 20.1500, I conclude that Claimant's attorney's efforts in the face of Defendant's pursuit of multiple legal defenses justifies an award of fees here.

Review of Claimant's Attorney's Invoice

Claimant's initial petition sought a fee award based on 66.7 hours of combined attorney and paralegal time. *Claimant's Exhibit 2*. His amended petition eliminated 4.6 hours of attorney time incurred prior to the May 8, 2018 claim denial and added 6.3 attorney hours for replying to Defendant's opposition to the fee request. See *Claimant's Reply to Employer's Memorandum in Opposition to Claimant's Request for Award of Attorney's Fees and Costs*, at 7. Costs set forth in the original petition included medical records, postage and photocopying totaling \$160.88. The amended petition reduced that amount to \$135.06, removing the costs incurred prior to May 8, 2018. *Id.*

The amended petition thus includes attorney time from May 8, 2018 (the date of denial) through June 30, 2018 of 16 hours. I find 15.3 hours of this time reasonable.⁴ The amended petition then includes attorney time from July 1, 2018 through October 25, 2018 (the date of acceptance)⁵ of 29.8 hours. I find all of this time reasonable. Finally, it includes 6.4 hours of paralegal time, all of which I find reasonable.

Claimant has also requested attorney fees for the time spent preparing the attorney fee petition. His initial petition included 7.7 hours of attorney time for this task, and the amended petition added another 6.3 hours⁶ for the reply to Defendant's opposition. Time reasonably spent in preparing a fee petition is recoverable. *Human Rights Commission v. LaBrie*, 164 Vt. 237, 252 (1995). However, I find that 7.7 hours to prepare the initial fee petition was excessive, and I reduce that amount to 1.5 hours. Further, I find that 6.3 hours to respond to Defendant's opposition was excessive, and I reduce that amount to 2.0 hours. Accordingly, I have added an additional 3.5 hours of attorney time to the 29.8 hours incurred after July 1, 2018, as set forth above, for a total of 33.3 attorney hours for this time period.

The hourly rate for a fee award is the one in effect when the work was performed. *Jalbert v. Springfield School District*, Opinion No. 04-17WC (February 16, 2017). Workers' Compensation Rules 20.1310 and 20.1340 set the maximum amount recoverable for attorney

⁴ I removed two entries totaling 0.7 hours as duplicative.

⁵ I have disallowed attorney time spent after the October 25, 2018 claim acceptance date, except in connection with the fee petition.

⁶ These hours were not itemized, as required by Workers' Compensation Rule 20.1200.

time spent prior to July 1, 2018 at \$205.00 per hour. Time spent after that date is subject to a maximum rate of \$210.00 per hour. Paralegal time is recoverable at \$75.00 per hour. *Id.*

Based on the foregoing, I calculate attorney fees as follows: 15.3 hours of attorney time at \$205.00 per hour, for a total of \$3,136.50, and 33.3 hours of attorney time at \$210.00 per hour, for a total of \$6,993.00. I calculate 6.4 hours of paralegal time at \$75.00 per hour, for a total of \$480. I therefore conclude that it is appropriate to award Claimant \$10,609.50 in fees. I conclude that it is also appropriate to award costs of \$135.06.

Reasonableness of the Total Fee

The fee agreement between Claimant and his counsel provides in part as follows:

[Y]ou have chosen to be represented on a contingent fee basis with the following percentages of gross recovery to be paid to our firm:

30% of temporary benefits, if contested; and
30% of all other benefits awarded or received in settlement.

In addition to the fees charged above, under certain circumstances we may seek and retain an award of attorneys' fees by the Commissioner of the Department of Labor pursuant to 21 V.S.A. § 678(a). In that event, we will seek the maximum hourly charges or maximum contingent rate allowed under Workers' Compensation Rule 10, whichever is greater.

Claimant's Exhibit 1.

Under the fee agreement, therefore, Claimant's attorney may receive up to 30 percent of the gross recovery and a fee award for her time based on an hourly rate.

An attorney's fee must always be reasonable. *Vermont Rule of Professional Conduct 1.5(a)*. A fee agreement that provides for a contingent fee plus an hourly fee award presents a risk that the total fee might not be reasonable, depending on the circumstances of the particular case. Some authorities have found that a fee agreement permitting the lawyer to receive both the contractual fee from the client plus a fee award, without crediting the award against the contract fee, is presumptively unreasonable. *See Restatement (Third) of the Law Governing Lawyers* § 38 cmt. f (2000). *See also* Ellen J. Bennett et al., *The Annotated Model Rules of Professional Conduct*, Rule 1.5, Contingent-Fee Cases and Fee Awards (7th ed. 2011). Further, an attorney may collect a contingent fee on temporary disability benefits only to the extent that those benefits are past due. *VBA Comm. on Professional Responsibility, Formal Opinion 91-17 (1991)*.

It is often true, as in this case, that the total amount of benefits due to the injured worker is not known at the time a fee award is made. It is therefore incumbent on attorneys in this situation to be mindful going forward that the total fee ultimately collected must be reasonable under V.R.P.C. 1.5(a) and commensurate with the work performed.

Order:

Claimant's amended petition for costs and attorney fees is hereby **GRANTED IN PART**. Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$135.06; and
2. Attorney fees totaling \$10,609.50.

DATED at Montpelier, Vermont this 25th day of February 2019.

Lindsay H. Kurrle
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.