

Mailed
State of Vermont

JUN 24 2019

Department of Labor
Workers' Compensation

STATE OF VERMONT
DEPARTMENT OF LABOR

THOMAS KIBBIE

Opinion No. 11-19WC

v.

By: Stephen W. Brown
Administrative Law Judge

KILLINGTON, LTD.

For: Lindsay H. Kurrle
Commissioner

State File No. Z-58225

**RULING ON CLAIMANT'S MOTION
FOR SANCTIONS AND ATTORNEYS' FEES**

I. Background

Claimant fell while working at Defendant's ski resort in 2008. As a result of that fall, he suffered multiple physical injuries and developed significant psychological conditions, including depression. He settled his claims for several physical injuries in 2010, but his settlement agreement left open his claim for medical treatment for his head, including depression. A 2014 hearing concerning the scope of that settlement resulted in a decision by the Department dated February 23, 2016 (Opinion No. 05-16WC), which ordered Defendant to pay, among other things, for Claimant's prescription for paroxetine, or Paxil.

A second hearing was held in 2018. The issues at that hearing were whether Defendant was still required to pay for Claimant's prescription for Paxil, whether it was also required to pay for Claimant's prescription for Cialis, and whether it was responsible for an outstanding balance on a dental bill adjusted pursuant to Workers' Compensation Rule 40.

In a decision dated March 1, 2019 (Opinion No. 04-19WC), the Department held that Defendant was still required to pay for Claimant's prescription for Paxil. Defendant provided no credible reason for continuing to deny payment for that previously-ordered benefit, produced no expert testimony supporting its continued denial, and produced no evidence of any relevant change in circumstances since the Department's February 23, 2016 Order. The Department also held, however, that Defendant was not responsible for Claimant's Cialis or the disputed dental balance.

II. Attorneys' Fees

Vermont law provides the Commissioner with discretion to award reasonable attorneys' fees to a prevailing claimant in a workers' compensation claim. 21 V.S.A. § 678(a); *Hodgeman v. Jard Co.*, 157 Vt. 461, 465-66 (1991). The determination of "reasonable attorney fees" lies "within the commissioner's discretion, and counsel has the burden of providing evidence to justify an award." *Hodgeman*, 157 Vt. at 466. Attorneys' fees may be based on either an hourly or contingency basis. When fees are requested on an hourly basis, the hourly rate may not exceed the amounts provided in Workers' Compensation Rule 20.1340.

As stated in an earlier opinion in this case, the Department “typically exercises the discretion granted by the statute to award only those attorney fees that are commensurate with the extent of the claimant’s success.” *Kibbie v. Killington, Ltd.*, Opinion No. 05A-16WC (May 24, 2016). Other factors deserve consideration as well, “such as whether the attorney’s efforts were integral to establishing the claimant’s right to compensation and whether the claim for fees is proportional to the attorney’s efforts in light of the difficulty of the issues raised and the skill and time expended.” *Id.*, p. 2.

A. Hourly Rate

Claimant seeks attorneys’ fees at the rate of \$200.00 per hour for work performed between December 22, 2017 and December 21, 2018. His request is within the allowable rate for attorney fee awards, *see* Workers’ Compensation Rule 20.1300, and I find that a fee award at the rate of \$200.00 per hour is reasonable and recoverable.

B. Degree of Claimant’s Success at the Formal Hearing

Claimant prevailed on his claim for Paxil, but not on his claims for Cialis or the outstanding dental bill. That said, the evidence relating to his claims for Paxil and Cialis overlapped significantly, particularly given that Claimant relied upon the same expert witness in support of his claims for both drugs. Additionally, the time expended at hearing on the dental bill was quite minor in comparison to the other issues, and Claimant does not seek an award of any time attributable only to the dental issue. While Claimant was only partly successful at the hearing, I find that most of the work that his counsel performed would have been necessary had he only pursued his claim for Paxil. However, some adjustments (detailed below) are necessary to make his award of attorneys’ fees commensurate with his degree of success. *Cf. Rodrigue v. Enterprises Precision, Inc.*, Opinion No. 16F-14WC (January 15, 2015) (reducing attorneys’ fee award to reflect extent of claimant’s success).

Claimant also submitted a post-hearing Motion for Directed Verdict relating to his claim for Paxil. That Motion also sought sanctions. Because the Department resolved the claim for Paxil in Claimant’s favor based on the evidence at the hearing, it did not separately grant the Motion for Directed Verdict, but it did hold that “Defendant has presented no reason for denying Claimant’s prescription for Paxil, particularly given that the Department previously ordered Defendant to pay for that medication. Within thirty days after the date of this order, Claimant may file a separate motion for interest and penalties for any specified instances of Defendant’s failure to timely pay for Paxil since February 23, 2016.” *Kibbie v. Killington, Ltd.*, Opinion No. 04-19WC (March 1, 2019). The Department also considered some of the arguments expressed in Claimant’s Motion for Directed Verdict when resolving the Paxil issue in Claimant’s favor and in allowing Claimant to request interest and penalties. As such, I find that Claimant was partially successful with respect to that Motion.

C. Specific Entries and Adjustments

Claimant initially requested a total of \$6,680.00 in attorneys’ fees based on 33.4 hours of attorney time. He later conceded that two of his entries, dated February 23, 2018 (0.2 hours) and February 26, 2018 (0.8 hours) respectively, related only to his unsuccessful claim for the

disputed dental bill. Accordingly, he reduced his claim by \$200.00 to \$6,480.00. His fee request is supported by itemized time entries which provide adequate detail as to the nature of the tasks performed. I also find that the amount of time spent on each task was objectively reasonable. However, to render the award of attorneys' fees commensurate with his degree of success, his allowed fees are adjusted as follows:

First, Claimant seeks an award of \$820.00 representing 4.1 hours of work associated with the deposition of Defendant's expert witness, Mark Friedman, M.D. Since Dr. Friedman only testified as to Claimant's claim for Cialis, I find that this work does not relate to a claim on which Claimant prevailed. Therefore, this time is disallowed.

Second, Claimant seeks an award of \$1,100.00 representing 5.5 hours of attorney time spent traveling for and attending the formal hearing in this case. Since Claimant did not obtain all the relief he sought at this hearing, awarding all of this time would not be commensurate with his degree of success. However, given the overlap in evidence concerning Paxil and Cialis and the minimal hearing time dedicated to the disputed dental bill, I find that reducing Claimant's attorneys' fees for these tasks by twenty-five percent, or \$275.00, is appropriate.

Third, Claimant seeks an award of \$720.00, representing 3.6 hours of attorney time associated with his Motion for Directed Verdict. Although the Department did not grant that Motion, I find that it was instrumental in Claimant obtaining some of the relief he received. Additionally, although the arguments in that Motion could have been incorporated into Claimant's Proposed Findings of Fact and Conclusions of Law, doing so likely would have increased the time spent drafting that filing. I thus find that reducing Claimant's attorneys' fees for tasks associated with that Motion by fifty percent, or \$360.00, is appropriate.

The remainder of Claimant's attorneys' time entries appear facially reasonable in amount but cover time relating to both Cialis and Paxil. As with the hearing, it is difficult to extricate the time spent on both of these issues into segments of time that would be necessary to pursue only the Paxil claim. Accordingly, the remainder of Claimant's attorneys' fees are reduced by ten percent to reflect the fact that most, but not all, of the work performed would have been necessary to prevail on the Paxil claim.

Accordingly, Claimant's request for attorneys' fees is **GRANTED**, subject to the following adjustments:

\$6,480.00	Claimant's requested attorneys' fees
- \$820.00	Time associated with Defendant's expert on Cialis
- \$275.00	25% of time traveling for and attending hearing
- <u>\$360.00</u>	50% of time associated with Motion for Directed Verdict
\$5,025.00	

Ninety percent of that figure is \$4,522.50. I award Claimant attorneys' fees in that amount.

III. Interest

Vermont law provides for interest on unpaid compensable medical bills computed at the rate of twelve percent annually. 21 V.S.A. § 640a(e). Where the unpaid medical bills are denied and Defendant timely serves a notice of denial based on insufficient information, interest runs from the first calendar day following 30 days after Defendant's receipt of information sufficient to determine liability for payment. 21 V.S.A. § 640a(e)(2). Where medical bills are not denied, or timely notice of denial is not served, interest begins accruing 30 days after the date the medical bill is received. 21 V.S.A. § 640a(e)(1).

Here, Claimant has identified twenty-seven unpaid invoices for Paxil, dated between November 16, 2016 and March 11, 2019. While the dates of these invoices are clear, the date of Defendant's receipt of each invoice is less clear. Defendant filed at least four Form 2 denials during that time period alleging a lack of causal connection between Claimant's workplace injury and his need for Paxil. *See, e.g.*, Form 2 Denials dated February 28, 2018; November 5, 2018; December 10, 2018; and December 20, 2018, all signed by adjuster Kelley Phelps. However, there is no evidence as to the specific dates of Defendant's receipt of any other Paxil-related invoices.

The invoices described in Defendant's Form 2 denials were based on allegedly insufficient information as to causation. Thus, interest associated with the bills covered by such denials is governed by 21 V.S.A. § 640a(e)(2). However, the reasons for Defendant's contention concerning the lack of causation remain entirely unclear given the Department's February 23, 2016 Order mandating payment for Paxil. Defendant's possession of that Order should have removed any doubt as to the causal connection. As such, interest on those invoices runs from the date of Defendant's receipt thereof.

With respect to any invoices for Paxil that Defendant received after February 23, 2016 but for which Defendant did not file a Form 2, interest shall also accrue beginning 30 days after the date it received the invoice, pursuant to 21 V.S.A. § 640a(e)(1).

Thus, for all invoices for Paxil that Defendant received after February 23, 2016, Claimant is entitled to interest on these obligations from the first calendar day following 30 days after receipt of each such invoice. If the Parties cannot determine the relevant dates of receipt, they may contact the Department and request a conference on that issue.

IV. Penalty Under Workers' Compensation Rule 45

Claimant seeks a penalty under Workers' Compensation Rule 45.6610, arguing that Defendant has violated the Department's February 23, 2016 Order. That Order provided as follows with respect to Paxil (paroxetine):

Based on Dr. Miller's credible testimony, and with no countervailing expert testimony to negate it, I conclude that the medications Dr. Miller prescribed, specifically oxycodone for pain, zolpidem tartrate for sleep disturbance and ***paroxetine for depression, are all causally related at least in part to his cognitive or other head injury*** rather than exclusively to his cervical condition. Under the

specific terms of the parties' approved settlement agreement, *these medications are all still covered and Defendant is obligated to pay for them, therefore.*

Opinion No. 05-16 (February 23, 2016), Conclusion of Law No. 24 (emphasis added).

Despite that clear directive, Defendant continued to deny liability for Paxil, claiming a lack of causal connection to Claimant's 2008 workplace injury. It did so despite Defendant's acceptance of Claimant's depression as a covered condition and despite its failure to produce evidence of any change in circumstance that might explain why the February 23, 2016 Order would not continue to require payment for Paxil.

A. Rule 45's Provisions Governing Penalties for Violation of the Department's Final Orders

Workers' Compensation Rule 45 provides the procedure for the Department's assessment of administrative penalties. *See generally* Workers' Compensation Rules 45.1000 through 45.4700. Specifically, the Department may, after notice and an opportunity for a hearing, "assess an administrative penalty against any person who violates ... any order issued by the Commissioner or the Workers' Compensation Division." Workers' Compensation Rule 45.1000. The Director of the Workers' Compensation and Safety Division has the discretion to issue the relevant citation that commences the penalty proceeding. *See* Workers' Compensation Rule 45.3100.

With respect to violations of the Department's final orders, Workers' Compensation Rule 45.6610 provides as follows:

Any person, including an employer or Workers' Compensation insurance carrier who fails to comply with an interim or final order of the Commissioner shall be assessed a penalty of \$500.00. An additional penalty of \$100.00 per day shall be assessed for each day the person fails to comply after the date set for compliance. The total penalty shall not exceed \$5,000.00. The Commissioner may reduce the penalty if the person demonstrates that noncompliance was the result of excusable neglect.

B. Referral to the Director, Order to Show Cause, and Order to Identify Any Additional Adjusters

Following Rule 45's procedures, Claimant's evidence of Defendant's non-compliance with the February 23, 2016 final order of the Commissioner, together with Defendant's response to the same, has been referred to the Director of the Workers' Compensation and Safety Division to determine what administrative action, if any, is appropriate.

Defendant, as well as its insurance adjuster Kelley Phelps, shall within thirty days after the date of this Order, **SHOW CAUSE** to the Director why they should not be subject to a penalty under Rule 45.6610.

Further, within thirty days after the date of this Order, Defendant shall also **IDENTIFY** to the Director any and all other adjusters assigned to this claim who received any invoice or payment request for Paxil between February 23, 2016 and the present that was not timely paid.

All information provided to the Director shall be addressed as follows:

Vermont Department of Labor
J. Stephen Monahan, Esq.
Director, Workers' Compensation and Safety Division
5 Green Mountain Drive
P.O. Box 488
Montpelier, VT 05601-0488

V. Additional Penalties or Sanctions

Claimant asserts that the financial penalties contemplated under Rule 45 are insufficient to deter a large corporation such as Defendant; it thus seeks additional sanctions under V.R.C.P. 11. Without determining whether the Department has any authority to impose punitive measures beyond those contemplated in Rule 45, I find that that rule reflects the Department's reasoned judgment as to the processes and remedies for the enforcement of its own orders. As such, I see no need to go beyond that Rule's provisions. To the extent Claimant seeks any penalty beyond those contemplated by Rule 45, his request is **DENIED**.

ORDER:

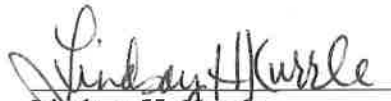
Based on the foregoing, Claimant's Motion is **GRANTED IN PART**, as follows:

Defendant is **ORDERED** to pay to Claimant \$4,522.50 in attorneys' fees pursuant to 21 V.S.A. § 678, as well as interest on Claimant's prescriptions for Paxil computed as provided in 21 V.S.A. § 640a(e). Referral has been made to the Director of the Workers' Compensation and Safety Division to determine what additional enforcement measures, if any, are appropriate under Rule 45.

Defendant, as well as its insurance adjuster Kelley Phelps, shall within thirty days show cause to the Director why a penalty should not be imposed against them in the amounts allowed by that rule for violation of the February 23, 2016 Order. Within that same time period, Defendant shall also identify to the Director any and all other adjusters assigned to this claim between February 23, 2016 and the present who received any invoice or payment request for Claimant's prescribed Paxil that was not timely paid.

Claimant's Motion is otherwise **DENIED**.

DATED at Montpelier, Vermont this 21 day of June 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.

