

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Kristina Leffler

Opinion No. 12-20WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

The Oryza Group, LLC

For: Michael A. Harrington
Commissioner

State File No. MM-56359

RULING ON CLAIMANT'S MOTION FOR ATTORNEY FEES

By motion filed April 8, 2020, Claimant seeks an award of attorney fees in connection with an interim order of benefits in her favor. Defendant has raised several objections to a fee award.

BACKGROUND:

Claimant has a history of left ankle injuries, including an injury that resulted from a 2014 fall and an alleged 2018 prior workplace injury.¹ Her present claim alleges that she rolled her left ankle on November 25, 2019 when she stepped into a divot caused by a recessed outlet located on her workplace floor. Claimant promptly reported the injury to her supervisor and sought medical treatment the next day.

Claimant had already hired an attorney for her 2018 claim. When she was injured in 2019, she spoke with the same attorney. On December 5, 2019, Claimant signed a proposed fee agreement for the new claim, but her attorney declined to add her signature until Defendant had an opportunity to accept or reject the new claim.

On December 10, 2019,² Defendant denied Claimant's new claim on the grounds that there was insufficient evidence relating her injury to her employment and that there were allegedly credibility issues with her previous claim. On December 12, 2019, Claimant's counsel signed the new fee agreement. Defendant filed a second claim denial on January 21, 2020.

Claimant's counsel began work on the new claim on December 26, 2019. She requested a hearing on January 27, 2020 and represented Claimant at an informal conference on February 20, 2020. Her work included reviewing Defendant's denials, reviewing medical evidence, preparing filings with the Department, and advocating for her client at the informal conference. On March 5, 2020, the Department's specialist found Defendant's denial of the 2019 left ankle claim not reasonably supported and issued an interim order for benefits.

Claimant filed a fee petition on April 8, 2020, seeking \$3,483.00 in attorney fees for work performed at the informal level. Defendant objected to a fee award on April 30, 2020, and Claimant filed a reply on May 7, 2020.

¹ Claimant's 2018 left ankle claim is currently pending on the formal docket. *See* State File No. LL-52961.

² The Department received Defendant's Denial of Benefits (Form 2) on December 16, 2019.

DISCUSSION:

Defendant objects to this fee petition on the grounds that it was not timely filed and that it does not meet the criteria for a fee award under 21 V.S.A. § 678(d) and Workers' Compensation Rule 20.1500.

Timeliness of the Fee Petition under 21 V.S.A. § 678(e)

The workers' compensation statute provides that any claim for attorney fees shall be submitted within 30 days following a decision in which the claimant prevails. 21 V.S.A. § 678(e). Defendant objects to Claimant's fee petition here on the grounds that she filed it more than 30 days after the interim order of benefits was issued.

The interim order was issued on March 5, 2020. Thirty days from that date was April 4, 2020. April 4, 2020 was a Saturday. Pursuant to V.R.Civ.P. 6(a)(1)(C), the deadline for filing the attorney fees petition was therefore Monday, April 6, 2020. Claimant filed her petition on April 8, 2020, two days late.

V.R.Civ.P. 6(b)(1) sets forth provisions for extending the time within which an act must be done. If a party requests an extension before the applicable time period expires, then the time may be extended for "good cause." V.R.Civ.P. 6(b)(1)(A). If the request is made after the time period expires, as was the case here, then the time may be extended only for "excusable neglect." V.R.Civ.P. 6(b)(1)(B).

In *In re Town of Killington*, 2003 VT 87, the Vermont Supreme Court adopted the federal four-factor test for evaluating excusable neglect under V.R.A.P. 4. The four factors are "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* at ¶ 16, citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). See also *Clark v. Baker*, 2016 VT 42, ¶¶ 18-23 (applying the *Pioneer* factors to excusable neglect under V.R.Civ.P. 6(b)(1)(B)). The Vermont Supreme Court noted that the focus of the inquiry should be on the third factor, namely the reason for the delay and whether that reason was within the reasonable control of the moving party. *Killington*, 2003 VT 87, ¶ 16; see also *In re Laberge Shooting Range*, 2018 VT 84, ¶ 14.

Although the Department has not previously applied the *Pioneer* factors to a late-filed attorney fee petition in a workers' compensation matter, it has considered whether to allow a late-filed petition. In *Zahirovic v. Super Thin Saws, Inc.*, Opinion No. 38-11 WC (November 17, 2011), the claimant's attorney filed a fee request four months after the claimant prevailed against one defendant and six months after he prevailed against the other. In denying the petition, the Commissioner wrote that the claimant had offered "no extenuating circumstances" that would justify the late filing and that she herself saw none. Accordingly, the lateness of the fee petition was grounds for denial.

Claimant's counsel here has explained that her late filing was due to the significant disruption caused by the growing COVID-19 pandemic in March 2020. Specifically, in response to the pandemic, her law firm shut down unexpectedly in the middle of the 30-day period for filing fee petitions. Claimant's counsel not only transitioned her own practice to a home worksite, but also, as a manager of her firm, helped to implement the transition of ten employees to work-from-home status. As a result, her preparation of the fee petition was interrupted, and the petition was filed two days late.

Applying the four *Killington* factors, I first find a minimal danger of prejudice to Defendant. Although the workers' compensation statutory scheme is designed to provide employers a liability that is limited and determinate,³ entertaining an attorney fee motion two days after the deadline does not significantly alter this balance. Second, the two-day delay did not have a significant impact on the overall proceedings. Third, the reason for the delay was the significant and unanticipated disruption of counsel's law practice caused by the COVID-19 pandemic, which was not within her control. Finally, Defendant does not allege that Claimant's counsel failed to act in good faith, nor is there any evidence of bad faith. Accordingly, although the bar for a finding excusable neglect is, and should be, high, I find that Claimant has met it here. I therefore accept her late-filed fee petition and consider it on the merits.

Authority for Attorney Fee Awards under 21 V.S.A. § 678(d)

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 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.

It is undisputed that Claimant requested a formal hearing⁴ and that payments were made to her as a result of her attorney's efforts.⁵ However, Defendant contends that the case has not yet "resolved" and that Claimant did not retain an attorney "in response to" a denial of her claim. For these reasons, it contends that her fee petition does not meet the fee award criteria.

³ See Workers' Compensation Rule 1.1100, citing *Morrisseau v. Legac*, 123 Vt. 70, 76 (1962).

⁴ See Claimant's Notice and Application for Hearing (Form 6) filed January 27, 2020.

⁵ See Interim Order of Benefits dated March 5, 2020.

Resolution of the Case

Although Defendant no longer contests the compensability of Claimant's 2019 ankle injury, it is still reviewing her medical bills and may decline to pay certain charges if it concludes that those charges pertain to her prior ankle condition, rather than to her 2019 injury. Defendant therefore contends that Claimant is not presently entitled to a fee award under 21 V.S.A. § 678(d) because her case has not yet "resolved."

Workers' compensation claims may give rise to a multitude of disputes concerning the specific benefits to which an injured worker is entitled. Here, the disputed issue on which Claimant requested a hearing was whether her claim arose out of and in the course of her employment. The fact that there is a potential dispute about whether a specific medical procedure was reasonable treatment for her work injury does not change the fact that she has prevailed in establishing that her injury arose out of and in the course of her employment. Accordingly, I find that Claimant's claim is "resolved" for purposes of the fee award statute.

Retention of an Attorney in Response to a Denial

Defendant also contends that Claimant is not eligible for a fee award because she retained an attorney for her 2019 claim *before* the claim was denied, rather than "in response to" a denial, as provided in 21 V.S.A. § 678(d). However, the Department's file shows that the claim was denied on December 10, 2019 and that Claimant's attorney signed the fee agreement on December 12, 2019. *See* Background *supra*, at 1. Thus, counsel was retained in response to a denial.

Even if Claimant's counsel had signed the fee agreement prior to December 10, 2019, that would not have disqualified her from an attorney fee award. In such circumstances, the Department limits the fee award to time spent by the attorney after the claim denial. *See, e.g., Williams v. State of Vermont*, Opinion No. 03-19WC (February 25, 2019); *Combs v. Broe's Masonry*, Opinion No. 27-15WC (November 20, 2015).

Discretionary Nature of Awards under 21 V.S.A. § 678(d) and Rule 20.1500

An award of attorney fees at the informal dispute resolution level is discretionary. 21 V.S.A. § 678(d). Further, the discretion to award fees at the informal level is intended to be exercised in limited circumstances. *Workers' Compensation Rule 20.1500*. Thus, in addition to the statutory criteria, I also consider whether awarding 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. *Id.*

Here, as set forth in the interim order, Claimant rolled her ankle in a floor divot on November 25, 2019. She promptly reported the injury to her supervisor and sought medical treatment the next day. An x-ray taken several weeks later identified a new left ankle fracture.⁶

Defendant contends that Claimant's 2018 left ankle claim presented credibility issues and that, therefore, her 2019 left ankle claim was also suspect. I decline to adopt this reasoning, especially as her 2018 claim is still pending. Defendant further challenges Claimant's credibility in this case because her employment contract was coming to an end when she sustained her 2019 injury and because her demeanor during the recorded interview was "defensive." However, Claimant's counsel has credibly explained that the end of the federal contract under which Claimant was working did not signal an end to her employment but merely an anticipated change of contractors. Further, having reviewed the recorded interview on which Defendant relies, I do not find that Claimant's defensive demeanor adversely reflects on her credibility. Accordingly, I conclude that Claimant's alleged credibility issues did not form a sound basis for the denial of her claim. Moreover, even after Claimant's December 2019 x-rays documented a new ankle fracture, Defendant did not reconsider its denial but rather issued another denial in January 2020.

Based on the foregoing, I conclude that a fee award under these circumstances would further the goals of maintaining appropriate standards of adjuster conduct and avoiding unnecessary delay. Therefore, an award of attorney fees is justified under both 21 V.S.A. § 678(d) and Workers' Compensation Rule 20.1500.

Claimant's Fee Request

Claimant has submitted itemized billings documenting 16.2 attorney hours incurred after July 1, 2019, to which the statutory rate of \$215.00 per hour applies. There are, however, two errors in her itemization.

First, an entry dated January 23, 2020 sets forth 2.1 hours for preparing and filing a "request for attorney fees." No fee petition was filed at that time; indeed, the interim order for benefits was not even issued until March 2020. Second, the entry dated April 8, 2020 sets forth 0.2 hours for finishing and sending "Form 6." Claimant's Form 6 was sent in January 2020, not in April. As both entries are unsupported by the record, I have removed them from Claimant's itemization.⁷ The total time removed from the itemization is 2.3 hours.

I find the remaining 13.9 hours of attorney time reflected on the itemized statement to be reasonable and recoverable. At the hourly rate of \$215.00 set forth by statute, the amount recoverable is \$2,988.50.

⁶ See December 19, 2019 medical record of orthopedic surgeon Mark Charlson, MD, documenting a new avulsion fracture in Claimant's left ankle.

⁷ It is possible that Claimant's January 23, 2020 time entry was for filing Form 6 and her April 8, 2020 time entry was for filing her fee petition. However, it is her responsibility to submit accurate records, and I decline to base a fee award on speculation as to what her records were intended to document.

ORDER:

Based on the foregoing, Defendant is hereby **ORDERED** to pay attorney fees totaling \$2,988.50.

DATED at Montpelier, Vermont, this 8th day of July 2020.

Michael A. Harrington
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.