STATE OF VERMONT
DEPARTMENT OF LABOR

Henry Sweetser

v.

O'Reilly Auto Enterprises, LLC

Opinion No. 21-22WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. PP-61737

RULING ON CLAIMANT'S MOTION TO APPROVE DIVISION OF SETTLEMENT RECOVERY PURSUANT TO 21 V.S.A. § 624

APPEARANCES:

Nicholas J. Sheldon, Esq., for Claimant
Erin J. Gilmore, Esq., for Defendant

Claimant filed the instant motion on August 2, 2022, while this case was pending at the informal level. Two days later, the specialist assigned to this case referred it to the formal hearing docket on the question of how, if at all, Defendant's lien against a third-party recovery should be apportioned.

On August 8, 2022, the Department's Formal Hearing Docket Clerk advised the parties' attorneys that the normal motion response timelines would apply to this case unless any party requested a different timeline. Neither party requested a different timeline. On September 19, 2022, the Administrative Law Judge emailed to the parties' attorneys and inquired in relevant part as follows:

> More than thirty days have passed since both the filing of Claimant's Motion and the related referral, and we have not received a response from Defendant. If Defendant has filed a response, please resubmit it along with evidence of the date of initial filing. If we have missed a submission, I apologize in advance. If Defendant needs additional time to respond, please work with Sonja Darling to schedule a status conference within the next week to discuss that request.

Defendant did not respond to that email, although Claimant's counsel confirmed that Defendant had not filed any response to the pending motion. Accordingly, Claimant's Motion is unopposed, and Defendant has admitted all its factual allegations by failing to respond.

Material Facts as Admitted by Defendant's Failure to Respond

On May 12, 2021, while in the course and scope of his employment with Defendant, Claimant was rear-ended by another motorist, Brian Thornton. As a result of that collision, Claimant suffered a lower back injury with lower extremity sequelae. He subsequently reached end medical result and has not sought or received medical treatment since

approximately May 2021. Defendant paid medical benefits and asserts a total lien of $1,858.52 for those benefits.

Mr. Thornton's liability insurer issued payment in the amount of $27,500.00 to compensate Claimant and his wife for all direct and derivative claims that arise out of this collision. However, Defendant has declined to compromise on its claimed lien for medical benefits. Claimant does not dispute the validity or amount of Defendant's lien but contends that Defendant has been stubborn and "greedy" in refusing to adjust the lien amount as required by the Workers' Compensation Act.

At all times relevant to this dispute, Claimant retained Attorney Nicholas J. Seldon on a contingency fee basis of one-third of any recovery. Under that fee agreement, Attorney Seldon's fee is one-third of $27,500.00, or $9,166.67. Claimant has also incurred costs of $48.50 by obtaining medical records.

Legal Analysis

Where a work-related injury occurs under circumstances creating a legal liability in some third party, Section 624 of the Workers' Compensation Act provides the framework for determining both parties' rights of recovery. The employee has a right to recover tort damages from the responsible third party. 21 V.S.A. § 624(a). "To prevent double recovery, however, from the proceeds of any such recovery the employee must repay the employer, or more typically its workers' compensation insurance carrier, for any workers' compensation benefits it has become obligated to pay on account of the injury's work-related nature." *Mariani v. Kindred Nursing Home*, Opinion No. 34-11WC (November 2, 2011). The portions of Section 624 specifically relevant to this case provide as follows:

> …Any recovery against the third party for damages resulting from personal injuries or death only, after deducting ***expenses of recovery***, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits….
>
> 21 V.S.A. § 624(e)(1); and
>
> Expenses of recovery shall be ***the reasonable expenditures, including attorney's fees***, incurred in effecting the recovery…. The expenses of recovery shall be apportioned by the court between the parties as their interests appear at the time of the recovery.
>
> 21 V.S.A. § 624(f).

In *Mariani*, *supra*, the Department followed the U.S. District Court of Vermont's application of those provisions as set forth in *Barney v. Paper Corporation of America*, No. CIV. A. 86-15, 1988 WL221243 (D.Vt.), which described the three-step statutory scheme mandated by 21 V.S.A. § 624(e):

- First, the expenses of recovery are deducted from the amount of recovery;

- Second, the employer is reimbursed for any benefits paid or payable to the date of recovery; and

- Third, the balance is paid to the employee, with the employer receiving credit (the so-called "holiday") towards any future workers' compensation benefits the employer otherwise would be obligated to pay.

Mariani, supra, Discussion, ¶ 5 (citing *Barney*, *supra*).

In allocating the expenses of recovery in accordance with Section 624(f), the District Court in *Barney*, and the Department in *Mariani*, applied a straight *pro rata* percentage, with each party bearing the same share of the third-party litigation expenses as its share of the third-party recovery represented in relation to the whole. For instance, in *Barney*, the workers' compensation claimant settled with a third party for $750,000.00, and the claimant's attorneys' fees under a contingency agreement were one-third of that figure, or $250,000.00. The claimant had also incurred $8,914.77 in additional costs, and the parties stipulated that the employer had paid $115,000.00 in workers' compensation benefits as of the time of settlement. The Court found that the employer's *pro rata* share of the expenses of recovery, which *Mariani* referred to as the "expense ratio,"[1] was fifteen percent, calculated as $115,000 in benefits paid divided by a $750,000 third party recovery.[2] Applying that ratio to the total expenses of recovery, $258,914.77 (the sum of attorneys' fees and costs), the Court held that the employer's share of the expenses of recovery was fifteen percent of $258.914.77, or $38,837.22. *Id.*; *accord Mariani* (applying *Barney*'s analysis to the computation of the appropriate ratio).[3]

I find the *Barney* court's approach, as adapted by *Mariani*, to be well-supported by the text of Section 624 and practical to apply. Following that approach, I find the following values:

1. The expenses of recovery in this case are $9,215.17, calculated as $9,166.67 in attorneys' fees plus $48.50 in costs;

2. The expense ratio is 6.758%, calculated as $1,858.52 in benefits paid divided by $27,500.00 recovered from Mr. Thornton's insurer;

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[1] *See* Opinion No. 34-11WC (November 2, 2011), Discussion ¶¶ 11-14.

[2] $115,000.00 ÷ $750,000.00 = 15.333%.

[3] The Court in *Barney* made the expense ratio subject to adjustment after the extent of the claimant's then-uncertain permanent impairment was resolved. However, the Department in *Mariani* held that the ratio should remain constant and fixed at the time of the third-party recovery to avoid a "moving target" that would result in having to apply a different ratio every time a new benefit became payable. *Id.*, Discussion, ¶ 12. It is not clear whether there are any future contingent benefits at issue in this case, but if they are, they shall be subject to the "fixed ratio" approach adopted in *Mariani*.

3. Defendant's share of the expenses of recovery is $622.76, calculated as 6.758% multiplied by $9,215.17;

4. The amount of Defendant's lien that it may recover is therefore reduced from $1,858.52 to **$1,235.76**.

The parties are **ORDERED** to allocate the third-party recovery accordingly.

DATED at Montpelier, Vermont this 27th day of October 2022.

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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.