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June 15, 2022

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Re: Ashley Pedoty v. State of Vermont
State File No. RR-59504

Dear Counselors:

I am in receipt of Claimant's fee petition filed April 4, 2022, seeking an attorney fee award of \$742.50 for her attorney's representation in a dispute about temporary partial disability benefits. I received Defendant's response on May 2, 2022. Thereafter, Claimant's counsel sent me a follow-up email on May 2, 2022, and Defendant's counsel responded on May 3, 2022. Claimant's fee request is now ready for determination.

Background

Claimant is an employee of the Vermont Superior Court, Windsor Unit. On February 9, 2022, she sustained injuries in an automobile accident while driving to the White River Junction courthouse.

Defendant initially denied the claim on March 1, 2022 because Claimant did not provide a signed medical authorization (Form 7). Defendant also noted that injuries sustained while commuting are generally not compensable, but acknowledged that the circumstances of Claimant's trip would likely be compensable if she were paid for her commute. Defendant indicated that it was in the process of confirming that she was paid in order to resolve this issue.

Claimant filed a hearing request (Form 6) on March 2, 2022. Later that same day, Defendant received confirmation that Claimant was paid for her February 9, 2022 commute, and it agreed to pay her benefits without prejudice pending receipt of the required Form 7. Defendant presumably received that form, as it accepted the claim as compensable on March 3, 2022. No informal conference was necessary, and Claimant is not seeking attorney fees related to the compensability of the claim.



Temporary Partial Disability Benefits

After the accident, Claimant returned to work on a part-time basis, giving rise to a claim for temporary partial disability (TPD) benefits. On February 21, 2022, she was seen by a physician assistant at the Ottauquechee Health Center. The provider wrote that Claimant should be excused from work-related duties that involve strenuous physical activity or prolonged screen time; she could return to those activities once she has been asymptomatic for one week, at which time a full-duty work release could be provided. The provider planned to reevaluate Claimant on a regular basis to track her progress, and she scheduled Claimant's next office visit for March 7, 2022. Defendant paid Claimant TPD benefits based on this provider's note through March 7, 2022.

The adjuster appropriately followed up with the provider on March 9, 2022 to ask about Claimant's progress. The provider told the adjuster that Claimant did not keep the March 7 appointment and that no further appointments had been scheduled. On March 16, 2022, Defendant filed a denial of TPD benefits (Form 2) for the 4-day period of March 8 through March 11, because the anticipated reevaluation set for March 7, 2022 did not take place and it was not in possession of a work capabilities form (Form 20).¹

On March 17, 2022, Claimant filed a hearing request (Form 6) concerning the denial of benefits for March 8 through 11. Defendant waived its right to 21-days' notice, and an informal conference was scheduled for March 25, 2022. The sole issue for the conference was whether Defendant's denial of TPD benefits for March 8 through 11 based on Claimant's purportedly not having an out-of-work medical note or work capabilities form covering that time period was reasonably supported.

At the informal conference, the specialist noted that, although Claimant did not attend the March 7, 2022 medical appointment at which her work status was to be reviewed, two medical records for visits *subsequent* to the Form 2 denial, dated March 16 and March 21, retroactively resolved the ambiguity caused by the February 21, 2022 out of work letter. Accordingly, the specialist issued an interim order in Claimant's favor for payment of TPD benefits for March 8 through 11. Defendant has complied with the order and paid benefits to Claimant. This fee petition followed on April 4, 2022.

Authority for Attorney Fee Awards

Awards of attorney fees to prevailing claimants are always discretionary. 21 V.S.A. § 678(a) provides that the Commissioner may award reasonable attorney fees when the claimant prevails. This attorney fee provision applies whether the claimant prevails at the formal or the informal level. See Workers' Compensation Rule 20.1100.

¹ Paychecks for Vermont state employees are issued every two weeks. The pay period at issue here was the one running from Sunday, February 27 through Saturday, March 12, 2022. Defendant paid benefits for this pay period through March 7 but denied benefits for Tuesday through Friday, March 8 through 11.

21 V.S.A. § 678(d) specifically addresses attorney fee awards for claims resolved prior to formal hearing. It 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.

In this case, Claimant's counsel continued to represent her after her claim for TPD benefits was denied. Further, Claimant requested a hearing on the TPD issue, and thereafter payments were made to her as a result of her attorney's efforts. Thus, I find that this fee request meets the statutory requirements set forth in § 678(d) allowing the Commissioner to consider a discretionary fee award under the statute.

Application of the Discretionary Criteria

The discretion to award fees at the informal dispute resolution level is intended to be exercised in limited circumstances and not as a general rule. *See* Workers' Compensation Rule 20.1500. Thus, in addition to the criteria referenced in 21 V.S.A. § 678(d), I must 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.*

In this case, I find that the discretionary considerations do not favor an attorney fee award. Defendant was entitled to deny the claim until it received a signed Form 7. Further, it agreed to pay the claim without prejudice until it received that form, and then promptly accepted the claim.

With regard to Claimant's TPD benefits, Defendant reached out to Claimant's medical provider for information about her status and engaged in communications with Claimant's attorney in an effort to determine her medical status and correctly calculate her benefits. Further, Defendant agreed to waive the 21-day notice period in order to bring the disputed TPD issue to a resolution sooner. I find no failure to maintain appropriate standards of employer or adjuster conduct, nor any excessive delay or unnecessarily adversarial conduct on the part of Defendant here. Further, a fee award is not necessary to encourage Defendant to make effective use of the informal process. On the contrary, Defendant made effective use of the process, leading to a resolution of the TPD issue only 9 days after the denial. As noted above, 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. Those circumstances are not present here. *See, e.g., Fairbanks v. Town of Bristol*, Opinion No. 09A-21WC (March 25, 2021) (attorney fee award not warranted under WC Rule 20.1500).

Based on the foregoing, I conclude that an award of attorney fees would not meet the considerations set forth in Workers' Compensation Rule 20.1500 governing the exercise of discretion

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to award fees in cases that are resolved prior to formal hearing. Accordingly, I decline to make such an award.

For these reasons, Claimant's petition for an award of attorney fees is **DENIED**.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Beth A. DeBernardi". The signature is fluid and cursive, with the first name "Beth" being more prominent and the last name "DeBernardi" written in a more compact, flowing style.

Beth A. DeBernardi
Administrative Law Judge