

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Lisa Greeno-Rickert

Opinion No. 06F-24WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Rutland Regional Medical Center

For: Michael A. Harrington
Commissioner

State File No. PP-55768

RULING ON CLAIMANT'S PETITION FOR ATTORNEY FEES

APPEARANCES:

Robert D. Mabey, Esq., for Claimant
Jennifer L. Meagher, Esq., for Defendant

Claimant's counsel has filed a petition for attorney fees following the resolution of several disputes between the parties.

BACKGROUND:

Based on documents in the Department's file and the background provided by the parties in their instant filings, I find the following facts for purposes of this ruling only:

Claimant sustained injuries on December 17, 2020 when she was kicked in the face by a patient in the course of her employment as an ICU nurse with Rutland Regional Medical Center ("Defendant"). Defendant accepted the injuries and began paying workers' compensation benefits accordingly.

Upon injury, Claimant was immediately seen at the Rutland Regional Medical Center Emergency Department, complaining of nausea, dizziness, headache and neck pain. She was diagnosed with blunt head trauma and a concussion. Despite conservative treatment, her symptoms persisted, leading to additional treatments including physical therapy, autonomic testing and Botox injections for migraines.

In April 2021, Claimant came under the care of Dr. Renga, a neurologist at Dartmouth Hitchcock Medical Center. In July 2001, she began treatment with a chiropractor, Dr. Woodbury.

In September 2021, Claimant underwent an independent medical examination with neurologist Dr. Gaughan at Defendant's request. Dr. Gaughan's diagnoses included post-traumatic migraine with vertigo, post-traumatic exercise intolerance, chronic insomnia, and post-traumatic stress disorder.

Thereafter, Claimant continued treatment with her chiropractor, Dr. Woodbury, and also underwent specialized vision treatment with a neurodevelopmental optometrist at Visual Victory Training.

On May 5, 2023, Defendant filed Form 27, seeking to discontinue various benefits, including chiropractic care. On June 1, 2023, the Department's specialist approved the discontinuance of chiropractic care effective May 28, 2023. By that date, she had already attended over 170 chiropractic sessions. Claimant then underwent additional chiropractic treatment with Dr. Woodbury, including visits in May, June and August 2023, even though Defendant was no longer paying for these visits. *Defendant's Exhibit B*.

In July 2023, the parties settled Claimant's permanent partial disability benefits, but left other benefits open. Thereafter, Claimant continued actively engaging in vocational rehabilitation services and undergoing treatment for migraines and vertigo.

Disputed Chiropractic Treatment

Claimant returned to Dr. Woodbury on October 23, 2023, reporting an increase in migraines and neck pain since she began using a computer for vocational rehabilitation. *See Specialist's November 9, 2023 Formal Docket Referral Memorandum*, at 1. Dr. Woodbury recommended a course of six to twelve chiropractic visits to treat this increase in her symptoms.

On October 24, 2023, Dr. Woodbury sent an invoice for the October 23 visit to Defendant, and Defendant filed a denial (Form 2) of that invoice on November 2. Defendant based its denial on the Department's previous approval of its discontinuance of chiropractic treatment effective May 28, 2023. Claimant objected, arguing that her symptoms had recently flared up due to her participation in vocational rehabilitation. The denial was upheld at the informal level on November 8, 2023, and the chiropractic dispute was referred to the formal hearing docket on November 9, 2023. *See Defendant's Exhibit C*.

Meanwhile, on October 30, 2023, Defendant sent Claimant a notice that her employment was terminated based on her inability to return to work for an indefinite period. The notice informed her that her health insurance would end on October 31, 2023. *See Attachments to Claimant's Fee Petition*.

With the chiropractic dispute now pending on the formal hearing docket, the Administrative Law Judge held a pretrial conference with the parties on December 20, 2023. At the conference, she set an expedited formal hearing on the reasonableness of Claimant's chiropractic treatment for March 6, 2024.

On January 15, 2024, Defendant's counsel sent a letter to the Department stating that it "will pay for Claimant's chiropractic visits for dates of service 10/23/23 and 11/2/23 and also an additional six visits for palliative care visits for alleged neck pain/migraines, expressly without prejudice." Defendant's counsel then emailed the Department on January 17, 2024, asking to cancel the March 6, 2024 hearing. The Administrative Law Judge asked Claimant's counsel whether he agreed to cancel the hearing. Claimant's counsel did not agree to cancel the hearing because Claimant might need additional chiropractic sessions beyond what Defendant had agreed to pay

without prejudice.¹ Defendant's counsel responded to Claimant's counsel's position on January 17, 2024 by asking for a status conference. She wrote:

By authorizing payment of the 10/23/2023 bill that was initially denied, the 11/2/2023 visit, two visits in January and "4" additional (a total of 8 of the "6-12" palliative visits [Claimant] was looking for in his Form 6 filing) has been authorized expressly without prejudice. If we are going to be expected to go to a formal hearing on that issue, then we should be able to rescind that payment without prejudice authorization.

The Administrative Law Judge held a status conference on January 23, 2024. Claimant was still not willing to give up additional chiropractic visits beyond the eight visits authorized without prejudice; therefore, she did not agree to cancel the hearing at that time. Defendant reiterated its position that it might rescind its payment without prejudice authorization, but ultimately decided not to do so. As Claimant's entitlement to additional chiropractic treatment beyond eight visits was not yet resolved, the Administrative Law Judge set a follow up status conference for March 6, 2024 and continued the hearing to May 29, 2024.

The parties attended the March 6, 2024 status conference. By that time, the likely scope of Claimant's course of chiropractic treatment was better established. Further, Defendant represented that, even if chiropractic treatment was found not to be reasonable in the future, it would not seek to recoup the cost of eight visits from Claimant. Claimant then agreed to cancel the hearing on the reasonableness of her chiropractic treatment, and the parties' chiropractic dispute was resolved.

Other Disputes

In addition to chiropractic care, the parties also had disputes in early 2024 concerning the reasonableness of Claimant's treatment at Visual Victory Training and whether Defendant could require her to attend another independent medical examination in February 2024. The Department's specialist resolved both disputes in Claimant's favor at the informal level, and Defendant did not appeal either issue.

The Parties' Filings Related to the Request for Attorney Fees

On February 20, 2024, Claimant's counsel requested an award of attorney fees for the time spent on the chiropractic dispute, the Visual Victory dispute, and the independent medical examination dispute. In its March 21, 2024 response, Defendant agreed to pay the attorney fees related to the Visual Victory dispute, the independent medical examination dispute, and Claimant's counsel's time spent preparing the fee petition; the only item Defendant opposed was the request for attorney fees related to the chiropractic dispute. Claimant's counsel filed a reply on April 4, 2024, addressing his representation in the chiropractic dispute.

¹ In fact, Dr. Woodbury had already recommended up to 12 visits. Further, Claimant's counsel also wanted to keep the hearing date because the parties had a pending informal level dispute concerning Claimant's treatment at Visual Victory. As it turned out, that dispute was resolved at the informal level and was never referred for hearing.

Accordingly, the only portion of the fee request that remains for adjudication is whether Claimant's counsel is entitled to an award of attorney fees for his work on the chiropractic treatment dispute, and if so, in what amount.

DISCUSSION:

Timeliness of the Fee Petition

An attorney representing a claimant must file any fee petition within 30 days following a decision in which the claimant "prevails." 21 V.S.A. § 678(e). Defendant here contends that Claimant's counsel's February 20, 2024 fee petition was untimely because it was not filed within 30 days of Defendant's statement that it would pay for eight chiropractic visits without prejudice on January 15, 2024.

In cases like this one, where the claimant prevails in the absence of a specific Departmental order, I must consider all the relevant facts to determine the date of prevailing. Here, although Defendant stated that it would pay for eight chiropractic visits on January 15, 2024, the parties' dispute was not resolved on January 15. Rather, Claimant chose to keep the pending hearing date, as she might need more than eight chiropractic visits. Further, Defendant informed the Department only two days after agreeing to pay without prejudice that, if Claimant would not cancel the hearing, then Defendant should be able to rescind its payment without prejudice authorization. The parties did not end their dispute about the reasonableness of chiropractic treatment until Defendant reaffirmed its authorization to pay without prejudice and Claimant consented to cancel the formal hearing on March 6, 2024.

Under these circumstances, it would have been premature to find that Claimant prevailed on January 15, 2024. Rather, I find that she prevailed on March 6, 2024 and that counsel's time for filing a fee petition did not begin to run until that date. *See Leffler v. The Oryza Group, LLC*, Opinion No. 12- 20WC (July 8, 2020), at 4 (dispute must be resolved before an award of fees may be made). Claimant's counsel therefore did not miss the 30-day filing deadline when he filed his fee petition on February 20, 2024. If anything, he filed it earlier than required, not after the deadline.²

Based on the foregoing, I conclude that Claimant's counsel's attorney fee petition was timely filed, as required by 21 V.S.A. § 678(e).

Extent of Claimant's Success

To be eligible for consideration of an attorney fee award, a claimant must have prevailed in either formal or informal proceedings. 21 V.S.A. § 678(b)(1) and (2). Further, a claimant does not forfeit an award of attorney fees under § 678(b) merely because he or she did not prevail on every issue. *Hodgeman v. Jard Co.*, 157 Vt. 461, 465 (1991). Rather, the Commissioner may consider the extent of the claimant's success in making an appropriate award. *Hathaway v. Engineers Construction, Inc.*, Opinion No. 03F-17WC (April 11, 2017) (apportioning fees when an injured worker partially prevails).

² To the extent that Claimant's counsel's fee petition was premature at the time of filing, I consider it as having been filed *nunc pro tunc* on March 6, 2024.

In this case, Claimant has substantially prevailed in the parties' dispute over the reasonableness of her chiropractic treatment. Dr. Woodbury recommended six to twelve treatment sessions, and Defendant will pay for eight. Had this dispute proceeded to formal hearing, Claimant might have been found entitled to chiropractic treatment without an eight-visit limit and without Defendant's having preserved certain rights by paying without prejudice. Nevertheless, she was successful in obtaining payment for the course of physical therapy that Dr. Woodbury recommended.

Accordingly, I find that Claimant is eligible for consideration of a fee award commensurate with her success. Comparing the extent of her success with the possibility that she might have established her entitlement to additional chiropractic treatments at a hearing, I conclude that, if she meets the other criteria for a fee award, such reward shall be reduced by five percent.

Statutory Factors Relevant to Prevailing Prior to Formal Hearing

Claimant here prevailed prior to formal hearing. Accordingly, to be eligible for consideration of a discretionary attorney fee award, she must meet the three statutory criteria set forth in 21 V.S.A. § 678(b)(3), as follows:

In cases for which a formal hearing is requested and the case is resolved prior to a formal hearing, (A) 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 payments were made to the claimant as a result of the attorney's efforts.

Claimant's attorney requested a formal hearing on the chiropractic dispute. She has thus met the first criterion.

Second, although Claimant retained an attorney prior to the chiropractic dispute, such timing does not disqualify her from a fee award. Under such circumstances, the Department's practice is to limit the fee award to attorney time expended on and after the date the specific dispute arose. *See Williams v. State of Vermont*, Opinion No. 03-19WC (February 25, 2019), citing *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.")

In this case, Claimant's attorney has limited his fee petition to time expended on and after November 2, 2023, the date on which Defendant disputed the chiropractic treatment. Accordingly, Claimant has met the second criterion.

Third, payment must have been made to Claimant as a result of her attorney's efforts. In this case, Defendant authorized payments for Claimant's chiropractic care. Given Defendant's initial denial on November 2, 2023, and its position that all chiropractic care had been properly discontinued on May 28, 2023, I conclude that these payments were made on Claimant's behalf as a result of her attorney's efforts. Thus, she has met the third statutory criterion as well.

Exercise of Discretion

Meeting the statutory criteria for eligibility for a fee award is not the end of the analysis, however; under 21 V.S.A. § 678(b)(2), awards of attorney fees are always discretionary.

Workers' Compensation Rule 20.1500 provides that, when considering a fee request, "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." Although the rule requires consideration of these goals, it does not require the Department to make a specific finding under all or any of them. *See Williams v. State of Vermont, supra*, at 4.

First, I credit Defendant with avoiding unnecessary delay. Defendant denied the requested chiropractic treatment on November 2, 2023; the specialist upheld the denial and referred the dispute to the formal docket on November 9, 2023. Thereafter, Defendant did not object to the Department's setting an expedited hearing date on March 6, 2024. Further, Defendant offered to pay for the treatment on a without prejudice basis on January 15, 2024. I find these actions to have been timely and responsive.

Nevertheless, I find that a discretionary award of attorney fees is appropriate here for several reasons. In denying the claim for additional chiropractic treatment, Defendant simply relied on its approved discontinuance of chiropractic treatment five months earlier. There is no evidence that it took into consideration Claimant's position that she suffered a flare up of her symptoms while engaging in vocational rehabilitation. Under 21 V.S.A. § 640a, Defendant had 30 days in which to investigate the compensability of the requested chiropractic treatment. It could have reached out to Dr. Woodbury for more information about the reason for Claimant's proposed treatment; it also could have ordered a medical records review. It could even have offered to pay for a certain number of visits on a without prejudice basis at that time.

None of these things happened. Instead, Defendant received Dr. Woodbury's October 23, 2023 invoice on October 24 and denied payment for the invoice on November 2. Had it wished to investigate the reasonableness of the treatment based on the allegation that Claimant suffered a flare of her symptoms while participating in vocational rehabilitation, it had until November 24, 2023 in which to do so. Defendant's failure to investigate suggests that an award of attorney fees is appropriate.

Further, Defendant contends that its denial of Claimant's recommended treatment did not interfere with her medical care because she continued to undergo additional chiropractic treatment on her own after the May 28, 2023 discontinuance. However, when Claimant received chiropractic treatment in the summer of 2023, she was Defendant's employee and had health insurance through her employment. In contrast, when she sought chiropractic treatment on October 23, 2023, Defendant terminated her employment the following week, leaving her without any health insurance to cover ongoing chiropractic treatment. Accordingly, Defendant's argument that its denial did not interfere with Claimant's medical care is unavailing.

Based on these circumstances, and my overall review of this claim, I conclude that an award of attorney fees is appropriate.

Award of Attorney Fees

Claimant's counsel initially sought a fee award for 5.3 attorney hours in connection with the dispute about chiropractic treatment. On April 4, 2024, he submitted an additional 2.5 attorney hours for replying to Defendant's partial opposition to the fee petition. Accordingly, the total itemized time under consideration is 7.8 hours. *See Human Rights Comm'n v. LaBrie, Inc.*, 164 Vt. 237, 252 (1995) (time spent preparing a fee petition is recoverable).

I have reviewed the time entries for the 7.8 hours submitted, and I find that all the time entries are reasonable and recoverable.

Under Workers' Compensation Rule 20.1340, attorney time expended on or after July 1, 2023 is subject to the maximum rate of \$245.00 per hour. Further, I have determined to reduce the fee award for the chiropractic dispute by 5 percent, commensurate with Claimant's success. *See Background*, at 5. Accordingly, I calculate the fee award as follows: 7.8 attorney hours multiplied by \$245.00 per hour = \$1,911.00, reduced by 5 percent = \$1,815.45.

ORDER:

Based on the foregoing, Defendant is hereby **ORDERED** to pay attorney fees of \$1,815.45.

DATED at Montpelier, Vermont this 16 day of May 2024.

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.