

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Daniel Otto

State File No. YY-00183

v.

Price Mechanical, LLC,

Christopher Price, individually,

Pekin Insurance Company,

and

Dairy Farmers of America, Inc.

RULING ON CLAIMANT’S PETITION FOR ATTORNEYS’ FEES

Attorneys

Christopher McVeigh, Esq., for Claimant

Theodore C. Kramer, Esq., for Defendants Price Mechanical, LLC and Christopher Price

Erin J. Gilmore, Esq., for Pekin Insurance Company (coverage)

William J. Blake, Esq., for Pekin Insurance Company (merits, if coverage exists)

Wesley M. Lawrence, Esq., for Dairy Farmers of America, Inc.

Background

I have received Claimant’s Motion for Attorneys’ Fees submitted in connection with his successful efforts to procure an interim order at the informal resolution stage in this case, as well as the multiple responses and replies thereto.

This case arises out of an injury that Claimant sustained at work on October 16, 2023. On that date, he was working in the course and scope of his duties with Defendant Price Mechanical, LLC, an Iowa business, while on an assignment at Dairy Farmers of America, Inc.’s (“DFA’s”) facility in Saint Albans, Vermont, when a hot liquid sprayed out of a pipe and caused Claimant significant burns.

At that time, Price Mechanical and its principal, Christopher Price, allegedly believed that they had procured workers’ compensation insurance for Claimant’s assigned activities in Vermont through Pekin Insurance Company. However, upon presenting this claim to Pekin Insurance, they learned that they lacked coverage for injuries in Vermont. Additionally, Claimant is currently pursuing a third-party tort liability action against DFA. Meanwhile, Defendants Price Mechanical and Pekin Insurance Company have recently implied DFA, over Claimant’s objection, as a potential statutory employer based on Claimant’s recent deposition testimony concerning the scope of his activities and the direction he received from DFA personnel. The

status of DFA as a putative statutory employer is now pending at the informal level. Claimant has not sought attorneys' fees against DFA in this case.

After Claimant's injury, Defendant Price Mechanical, through an agreement with DFA, continued to pay Claimant's wages from October 16 through November 26, 2023, although he was unable to work during that time as a result of his injury. However, DFA eventually declined to accept further wage liability and stopped making payments. At that point, Price Mechanical stopped paying any benefits to Claimant. Pekin Insurance Company denied any liability, claiming that its insurance policy did not cover Claimant's injury. Thus, Claimant was not receiving any benefits even though it appears that there was never any dispute about whether his injury arose out of and in the course of his employment.

After he stopped receiving payments, Claimant, through Attorney McVeigh, filed a Notice and Application for Hearing (Form 6) for benefits related to this injury. The Department's Specialist II held two informal conferences in this matter and issued an interim order on February 16, 2024, directing Price Mechanical and Christopher Price individually to pay benefits pursuant to 21 V.S.A §§ 618 and 687. Price Mechanical continues to pay benefits as a result of Claimant's counsel's efforts. Notably, there is no order in place requiring Pekin Insurance or DFA to pay Claimant anything.

This matter was referred to the formal hearing docket on multiple issues, including whether Pekin Insurance should be estopped to deny insurance coverage even in the absence of contractual coverage, the existence and amount of certain offsets or credits for benefits voluntarily paid to Claimant, the correct calculation of certain indemnity benefits, and whether a discontinuance of temporary indemnity benefits was justified based on Claimant's having reached end medical result and/or declining an offer of employment from Defendant Price Mechanical for a position in Iowa.

Price Mechanical has filed a brief in opposition to an award of attorneys' fees, noting that it has continued paying indemnity benefits despite great financial difficulty. It also asserts that Claimant is fully recovered and has not sought treatment for multiple months and that Claimant has not been fully cooperative in efforts to procure a physician to perform an independent medical examination. It notes that the award of attorneys' fees is discretionary and asks that I exercise that discretion by denying such an award.

Pekin Insurance Company, for its part, is represented by two separate attorneys, one to contest insurance coverage and one to represent its interests if coverage is found to exist. Both of its attorneys filed materials in opposition to an award of fees against it, emphasizing that the Department has not ordered it to pay any benefits to Claimant.

In reply to Pekin Insurance Company's opposition to an award of fees, Claimant filed an additional brief contending that because the insurer had injected itself into this aspect of the litigation, I should issue any award of attorneys' fees severally against all Defendants, describing Pekin's filing "mettlesome" and "unnecessary." Claimant has also filed a reply to Price Mechanical's opposition, noting that none of its arguments in opposition to a fee award address the fact that it had no real basis to contest the interim order and arguing that it should not be Claimant's responsibility to schedule his own IME.

Legal Standards

The Commissioner has discretion to award prevailing claimants their reasonable attorneys' fees, and must award costs, in claims where the claimant prevails short of formal hearing pursuant to 21 V.S.A. § 678. *See Mallow v. Bullrock Solar, LLC*, Opinion No. 11-22WC (May 12, 2022).

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; and

(B) the Commissioner shall award necessary costs if the claimant incurred the costs in response to an actual or effective denial of a claim and payments were made to the claimant as a result of the costs incurred.

21 § 678(b)(3).

For fee awards at the informal level, the Department considers whether awarding fees will further the goals of (a) maintaining appropriate standards of employer and adjuster conduct; (b) discouraging excessive and unnecessary attorney involvement; and/or (c) encouraging the parties to make effective use of the informal dispute resolution process. *Id.*; *Herring v. State of Vermont Department of Liquor Control*, Opinion No. 06-15WC (March 24, 2015).

Discussion

In this case, the statutory requirements of Section 678 are met. Defendant Price Mechanical effectively denied this claim by not paying any benefits after DFA stopped making voluntary payments. Claimant retained or continued to retain Attorney McVeigh in response to Defendant Price Mechanical's effective denial. Attorney McVeigh requested a hearing and requested an interim order, and the Department granted that request. Claimant eventually received some benefits because of those efforts. *Cf.* 21 V.S.A. § 678(b)(3)(A).

That said, this case is not fully resolved. There remain several specific disputes pending at the formal hearing level, including the computation of certain benefits, whether those benefits may be discontinued, and the extent, if any, of Pekin Insurance Company's liability. Additionally, DFA's status as a potentially liable party is now pending at the informal resolution level. However, this claim's status as a compensable injury for which Price Mechanical is liable *is* resolved. As a result of Attorney McVeigh's successful efforts at the informal level, Claimant went from receiving *no* benefits to *some* benefits for an injury whose causal relationship to work was never genuinely in dispute. I conclude that Claimant has substantially prevailed sufficient to satisfy the statutory prerequisites for an award of fees.

The discretionary factors also favor an award of fees in this case. There is no dispute that the event giving rise to this claim occurred and that it occurred while Claimant was working in furtherance of Price Mechanical's business. Although there were discussions between Price Mechanical and Pekin Insurance Company concerning their respective obligations to make payments, and there was initially a voluntary payment agreement with DFA to make some payments that eventually ceased, none of that changed the fact that Claimant was entitled to receive benefits that he was not receiving. Any dispute among the potentially liable parties as to who should be paying what benefits should never have been Claimant's problem. Proper adjustment of this claim from the beginning would have been for Price Mechanical to make payments to Claimant of any undisputed benefits and seek repayment from other sources separately.

Although Price Mechanical is a business without insurance coverage in Vermont and thus there was no insurance adjuster involved, I find that an award of attorneys' fees nonetheless incentivizes proper adjustment of claims from their inception. The duty to adjust claims properly exists whether insurance coverage exists or not. Thus, I conclude that the first discretionary factor weighs in favor of awarding fees.

With respect to the second and third discretionary factors—attorney involvement and the effective use of the informal dispute resolution process—the breadth of the disputes involved in this case makes it likely that Claimant would have sought an attorney one way or the other and that an informal conference with a Department specialist was inevitable. Still, Claimant should not have needed an attorney and should not have needed an interim order to cause Defendant Price Mechanical to treat this claim as compensable and to pay benefits that were not seriously in dispute. Thus, an award of attorneys' fees will further the Department's goal of incentivizing the timely acceptance and payment of claims where there is no serious question as to general compensability. For these reasons, I find an award of attorneys' fees appropriate.

That said, I find no merit in Claimant's assertion that Pekin Insurance should be liable for his attorneys' fees just because it filed a brief opposing an award of fees. Defendants are entitled to defend their legally defensible positions. Claimant has not in any sense "prevailed" against Pekin Insurance Company. His attorney's efforts have not resulted in any payment from that insurer. Therefore, he cannot satisfy the basic statutory prerequisites for an award of fees against it. Price Mechanical and its owner Christopher Price, pursuant to 21 V.S.A. § 687(b), are the only parties against whom Claimant has prevailed at all. Therefore, they are the only parties against whom present liability for his attorneys' fees lies.

As to the amount of fees, the determination of "reasonable attorney's fees" lies "within the commissioner's discretion, and counsel has the burden of providing evidence to justify an award." *Hodgeman v. Jard Co.*, 157 Vt. 461, 466 (1991). Attorney 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, which provides a formula for determining the maximum hourly rates for attorney fees based on the Consumer Price Index, U.S. city average, not seasonally adjusted, or successor index, as calculated by the U.S. Department of Labor. *See id.*

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 include the extent to which 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 considering the difficulty of the issues raised and the skill and time expended. *Id.*, p. 2.

In this case, Claimant's attorney filed a fee invoice with his initial fee petition totaling 28 hours of attorney time between October 18, 2023 and March 12, 2024. For that entire period, the maximum attorney fee hourly rate allowable under the Department's published schedule was \$245.00 per hour. Claimant seeks recompense at that rate, which I find reasonable. Additionally, Claimant's attorney has invoiced 1.6 hours dedicated to responding to Pekin Insurance Company's filings, which I find unjustified given that Claimant's original fee petition did not purport to cover Pekin Insurance Company but only sought fees against Price Mechanical. As such, this additional amount is not recoverable.

I find that all the services reflected on Claimant's original itemized fee invoice are reasonable as to activity and the amount of time spent. However, because there remain multiple active disputes as to the computation of certain indemnity benefits and whether such benefits are subject to discontinuance, it would be wrong to say that Claimant has completely prevailed at this point in the litigation, even though I find that he has *substantially* prevailed by virtue of his success on the basic question of compensability. Because some open questions concerning the amount and duration of benefits remain unresolved, I find that awarding 80 percent of the allowable fees invoiced commensurate with the extent of Claimant's success at this point. If Claimant ultimately prevails on the merits of the disputes currently pending at the formal hearing level, he may renew his request for the remaining 20 percent of fees incurred prior to the date of his petition, in addition to whatever fees he may incur thereafter.

Therefore, Defendants Price Mechanical and Christopher Price are ordered, jointly and severally, to pay Claimant's attorneys' fees in the amount of \$5,488.00.¹

Dated this 22nd day of July 2024,

Stephen W. Brown
Administrative Law Judge

¹ $0.8 \times \$245.00 \text{ per hour} \times 28 \text{ hours} = \$5,488.00$.