

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Stephen Combs

Opinion No. 27-15WC

v.

By: Jane Woodruff, Esq.
Administrative Law Judge

Broe's Masonry

For: Anne M. Noonan
Commissioner

State File No. BB-00554

**RULING ON CLAIMANT'S REQUEST FOR AWARD OF COSTS AND ATTORNEY
FEES**

Background

By motion dated July 13, 2015 Claimant seeks an award of costs totaling \$8,097.88 and attorney fees totaling \$6,336.50. Defendant responded by counter-motion on July 24, 2015 opposing Claimant's request. It asserts that the circumstances do not justify an award.

By way of background, Claimant suffered a compensable work injury to his low back in June 2009. As treatment, he underwent disc excision and fusion surgery. Claimant's counsel became involved in the case in July 2011, when Defendant sought to discontinue his benefits, and has remained involved to the present time. Significant milestones included the following:

- In May 2013 the parties agreed to an end medical result determination with a 21.5 percent whole person permanent impairment;
- Previously, in June 2011 Claimant had been referred for vocational rehabilitation services. Due to his limited work capacity, Tammy Parker, his vocational rehabilitation counselor, focused on establishing a work capacity by way of encouraging his participation in volunteer work activities. Subsequently, Claimant missed more than fifty percent of his volunteer shifts. Ms. Parker considered this an indication that he would not be able to successfully maintain a paid position, a conclusion with which Defendant's assigned insurance adjuster agreed. Vocational rehabilitation services were terminated in June 2014;
- On July 3, 2014 Attorney Massicotte contacted Defendant's adjuster in an attempt to settle Claimant's case;
- On July 14, 2014 Attorney Massicotte filed a Notice and Application for Hearing (Form 6) and requested a direct referral to the formal hearing docket on the issue whether Claimant was permanently and totally disabled under the odd lot doctrine;

- On August 6, 2014 Attorney Massicotte contacted Attorney Ferguson requesting that Defendant agree to a direct referral to the formal hearing docket;
- On August 7, 2014 Attorney Ferguson filed an answer to Claimant's Notice and Application for Hearing. Citing the need for an independent medical evaluation, a functional capacity evaluation and a more vigorous approach to vocational rehabilitation, Attorney Ferguson denied the claim for permanent total disability and also opposed a direct referral to the formal hearing docket;
- Attorney Ferguson reiterated Defendant's opposition to a direct referral in late August and September 2014, in response to requests from the Department's workers' compensation specialist;
- On October 2, 2014 the parties participated in an informal conference, following which the Department's specialist referred the dispute to the formal hearing docket;
- On November 3, 2014 the parties participated in a pre-trial conference, at which time Claimant forwarded a functional capacity evaluation report by Louise Lynch. The claim was scheduled for hearing on April 21st and 22nd, 2015;
- On November 24, 2014 Attorney Massicotte forwarded Dr. White's independent medical evaluation report;
- In early March 2015 Defendant scheduled its own functional capacity evaluation;
- On April 2, 2015 Attorney Massicotte forwarded the report from its vocational rehabilitation expert, Greg LeRoy;
- On April 14, 2015 Attorney Ferguson informed Attorney Massicotte that Defendant was accepting Claimant's claim for permanent total disability. The Department subsequently approved the parties' executed Agreement for Permanent Partial or Permanent Total Disability Compensation (Form 22), thus resolving the disputed issue in Claimant's favor.
- On April 15, Attorney Massicotte informed Attorney Ferguson that Claimant had incurred costs approximating \$9,000.00 in pursuing his permanent total disability claim;
- On May 13, 2015 Defendant offered to settle the pending claim for costs and attorney fees for an amount less than \$9,000.00; and
- Claimant rejected this offer and filed the present request for costs and fees on July 16, 2015.

Discussion

Claimant's request for costs and fees follows resolution of the parties' dispute prior to formal hearing. The Commissioner has discretion to award costs and fees in such claims.

According to 21 V.S.A. §678(a), when a claimant prevails in a workers' compensation "proceeding," necessary litigation costs "shall be assessed" against the employer. The costs that Claimant seeks to recover here comprise photocopying charges totaling \$282.85 and the involvement of two experts – Mr. LeRoy, whose invoices total \$5,655.03, and Ms. Lynch, whose functional capacity evaluation totaled \$2,160.00.

Defendant did not raise any objections either to the photocopying charges or to Ms. Lynch's fees. However, it strenuously objects to the costs associated with Mr. LeRoy's evaluation. Noting that Claimant already had a qualified vocational rehabilitation expert in Ms. Parker, the counselor who actually worked with him for approximately three years, it reasons that he did not need to engage Mr. LeRoy's services and therefore that it should not be required to pay for this expense.

I disagree. It is not for Defendant to decide how Claimant should go about proving his case. To the contrary, Claimant's attorney is in the best position to assess what evidence she needs to adduce in order to prevail. Had his claim proceeded to formal hearing, any purported deficiencies in Mr. Leroy's evaluation would properly have been left to Defendant's cross-examination.

I conclude that Claimant has sufficiently established his entitlement to an award of costs totaling \$8,097.88.

As for Claimant's entitlement to an award of attorney fees, as amended in 2008 the statute, 21 V.S.A. §678(d), now 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.

Prior to the enactment of §678(d) in 2008, the Commissioner had relied on the general grant of authority contained in §678(a) to award costs and fees at both the formal and informal levels of workers' compensation dispute resolution proceedings.¹ Workers' Compensation Rule 10.1300 provided further guidance regarding the exercise of that authority in the context of informal proceedings, as follows:

Awards to prevailing claimants are discretionary. In most instances awards will only be considered in proceedings involving formal hearing resolution

¹ Section 678(a) requires an award of costs and, at the Commissioner's discretion attorney fees as well, when the claimant prevails in "proceedings under this chapter."

procedures. In limited instances an award may be made in a proceeding not requiring a formal hearing where the claimant is able to demonstrate that:

- 10.1310 the employer or insurance carrier is responsible for undue delay in adjusting the claim, or
- 10.1320 that the claim was denied without reasonable basis, or
- 10.1330 that the employer or insurance carrier engaged in misconduct or neglect, and
- 10.1340 that legal representation to resolve the issues was necessary, and
- 10.1350 the representation provided was reasonable, and
- 10.1360 that neither the claimant nor the claimant's attorney has been responsible for any unreasonable delay in resolving the issues.

Following the addition of §678(d), in 2010 Rule 10.1300 was amended as well, in two respects.² First, the last word in Rule 10.1330 was changed from “and” to “or” as follows:

Awards to prevailing claimants are discretionary. In most instances awards will only be considered in proceedings involving formal hearing resolution procedures. In limited instances an award may be made in a proceeding not requiring a formal hearing where the claimant is able to demonstrate that:

- 10.1310 the employer or insurance carrier is responsible for undue delay in adjusting the claim, or
- 10.1320 that the claim was denied without reasonable basis, or
- 10.1330 that the employer or insurance carrier engaged in misconduct or neglect, ~~and~~ or
- 10.1340 that legal representation to resolve the issues was necessary, and
- 10.1350 the representation provided was reasonable, and
- 10.1360 that neither the claimant nor the claimant's attorney has been responsible for any unreasonable delay in resolving the issues.

Second, Rule 10.1370 was added, as follows:

² Effective August 1, 2015 Rule 10.1300 was amended again, and has now been renumbered as Rules 20.1400 and 20.1500.

- 10.1370 Attorney fees may also be awarded in cases not involving formal hearing when the claimant is able to demonstrate that:
- 10.1371 a formal hearing has been requested; and
 - 10.1372 the case is resolved prior to formal hearing; and
 - 10.1373 the claimant retained an attorney in response to an actual or effective denial of a claim; and
 - 10.1374 thereafter, payments were made to the claimant as a result of the attorney's efforts.

Together, the amendments have effectively eliminated employer or insurance carrier delay, unreasonable denial or misconduct as a necessary prerequisite to an award of fees at the informal level. Instead, in appropriate circumstances an award can now be based solely on a finding that but for the attorney's efforts, the claimant would not have prevailed. *Herring v. State of Vermont Department of Liquor Control*, Opinion No. 06-15WC (March 24, 2015).³

Notably, in promulgating Rule 10.1370 the Commissioner left intact the general requirement, as stated in Rule 10.1300, that "in most instances" attorney fees will only be considered in formal hearing proceedings. Even with the changes, furthermore, both statute and rule continue to acknowledge that while the Commissioner retains the authority to award fees when a claim is resolved informally, she is by no means compelled to do so in every case.

Properly exercising the discretion granted by statute requires a balance between an injured worker's specific interest in receiving an award of fees against a public policy that continues to favor collaboration over conflict in workers' compensation matters. Thus, in addition to the criteria referenced in §678(d), in cases that are resolved short of a formal hearing the Commissioner also should 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. Workers' Compensation Rule 13.000; *see Herring, supra*.

I do not find in this case that Defendant failed to maintain appropriate standards of employer or adjuster conduct, or that either party caused excessive delay and/or engaged in unnecessarily adversarial conduct. In fact, both parties engaged in due diligence to prepare their cases for trial.

Nevertheless, I must acknowledge that the settlement agreement that ultimately issued in this case came about primarily as a result of the efforts of Claimant's attorney as she continued to advance her case to formal hearing. She provided two expert reports to Defendant that

³ In cases decided prior to *Herring*, the Commissioner erroneously relied on the requirements of Rule 13.000 as it existed prior to its amendment in 2010, *see Herring, id.* at n.2. As evidenced by the arguments for and against an award of fees here, both parties appear to have made the same mistake.

indicated that Claimant was permanently totally disabled under the odd lot doctrine. Defendant agreed to accept the claim only 12 days after receipt of Mr. LeRoy's report. As this is the principal touchstone under the current statute, an award of some portion of the fees Claimant has incurred is justified.

I turn now to the specific fees requested here. 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 August 7, 2014, the date when Defendant first denied Claimant's claim. Those fees represent three hours or \$435.00. This reduces the total fee request to \$5,901.50.

I conclude that Claimant has established her entitlement under 21 V.S.A. §§678(a) and (d) and Workers' Compensation Rules 10.1340-1360 and 10.1370 to costs totaling \$8,097.88 and attorney fees totaling \$5,901.50.

ORDER:

Claimant's request for an award of costs and attorney fees is hereby **GRANTED IN PART**. Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$8,097.88; and
2. Attorney fees totaling \$5,901.50.

DATED at Montpelier, Vermont this ____ day of _____, 2015.

Anne M. Noonan
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.