

STATE OF VERMONT
DEPARTMENT OF LABOR

Richard Houle

Opinion No. 18-16WC

v.

By: Beth DeBernardi
Administrative Law Judge

Valley Crane Services, Inc.

For: Anne M. Noonan
Commissioner

State File No. CC-52878

**RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT
CONCERNING ATTORNEY'S FEES AND COSTS**

APPEARANCES:

Joshua Simonds, Esq., for Claimant
Justin Sluka, Esq., for Defendant

ISSUE PRESENTED:

Claimant seeks an award of costs and attorney's fees incurred in reaching a pre-hearing settlement with Defendant regarding entitlement to permanent partial disability benefits.

EXHIBITS:

Claimant's Statement of Additional Undisputed Facts

Claimant's Exhibit A: Email between counsel and adjuster
Claimant's Exhibit B: Email between counsel and adjuster
Claimant's Exhibit C: Email between counsel and adjuster
Claimant's Exhibit D: Draft settlement documents and expense documentation

Defendant's Statement of Undisputed Facts

Defendant's Exhibit A: Agreement for Permanent Partial Disability Compensation (Form 22), approved on 6/20/14
Defendant's Exhibit B: Copy of check for permanent partial disability benefits payable to Claimant
Defendant's Exhibit C: Claimant's Notice and Application for Hearing (Form 6), with supporting affidavit

BACKGROUND:

Judicial notice is taken of the relevant forms contained in the Department's file, which establish the following background:

Claimant injured his right shoulder in a work-related accident on July 7, 2010. He underwent surgery on November 3, 2010 and returned to work on or about January 3, 2011.

Defendant accepted the claim and paid temporary total disability benefits commencing on November 6, 2010. Defendant also covered Claimant's surgery.

On June 19, 2013 counsel for Claimant entered his appearance with the Department.

On June 17, 2014 the parties submitted a fully executed Agreement for Permanent Partial Disability Compensation (Form 22) to the Department, in which they agreed to an award of permanent partial disability benefits based on a six percent whole person impairment in accordance with Dr. Wieneke's July 16, 2013 report. On June 20, 2014 the Department approved the agreement.

On February 9, 2015 Claimant filed a Notice and Application for Hearing (Form 6), together with an affidavit, seeking attorney's fees and expense reimbursement due in connection with a Form 22 approved on June 20, 2014. Specifically, Claimant sought attorney's fees totaling \$4,507.96, and reimbursement of \$650.00 for an independent medical exam and \$177.00 for copies of medical records.

On January 4, 2016 Defendant filed a motion for summary judgment in its favor on Claimant's request for attorney's fees and costs. On February 4, 2016 Claimant filed an opposition to Defendant's motion and a cross motion for summary judgment.

FINDINGS OF FACT:

The following facts are undisputed:

1. Between March and May 2014, Claimant's counsel negotiated with Defendant's claims adjusters concerning the payment of both permanent partial disability benefits and Claimant's attorney's fees and costs. One of those adjusters told Claimant's counsel that the representation he had provided appeared reasonable, but that he was required to file his fee request with the Department of Labor.
2. Following the above discussions, Claimant's counsel sent Defendant a proposed settlement agreement, which included payment for attorney's fees and costs. Defendant did not agree to pay attorney's fees or costs, but the parties reached an agreement on the payment of permanent partial disability benefits.

3. On June 17, 2014 Defendant signed the proposed agreement awarding permanent partial disability benefits to Claimant. The Department approved the fully executed agreement on June 20, 2014.
4. On February 5, 2015 Claimant filed a Notice and Application for Hearing, seeking attorney's fees and expense reimbursement due in connection with a Form 22 approved on June 20, 2014. Counsel's attached affidavit set forth the total amount of claimed attorney's fees, but failed to include an itemized statement of the hours spent and the work performed.

CONCLUSIONS OF LAW:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed, or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979).
2. The parties here each claim that they are entitled to judgment in their favor as a matter of law on the question of Claimant's entitlement to an award of attorney's fees and costs. Defendant asserts that Claimant's request was untimely and that it failed to include an itemization of the attorney's fees.
3. Claimant argues that the parties did not agree on the payment of attorney's fees and costs, and that therefore that issue is contested. If the Department rules in his favor on that disputed issue, he asserts, then he will have prevailed. On those grounds, he claims he is entitled to an award of attorney's fees and costs.
4. The Commissioner has discretion to order an award of attorney's fees and costs in specified circumstances, as set forth in 21 V.S.A. §678. Section 678(d) 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 (emphasis added).
5. This statutory provision provides for a discretionary award of attorney's fees, but only in cases where a formal hearing has been requested. Neither of the parties in this case requested a formal hearing on the extent of Claimant's permanent partial disability. For that reason, I conclude that an award of attorney's fees is not available.

6. The Workers' Compensation Rules¹ further address the issue of the availability of attorney's fees and costs when the parties resolve a case prior to formal hearing. The applicable rule provides as follows:

Rule 10.1300. Awards to prevailing claimants are discretionary. . . . Generally, awards are considered in proceedings involving formal hearing resolution procedures. An award may be made *in a proceeding not requiring formal hearing resolution procedures* where the claimant is able to demonstrate [the factors set forth in Rules 10.1310 ó 10.1360] (emphasis added).

7. I conclude that the instant claim is not eligible for an award of attorney's fees or costs because the case did not reach the level of a "proceeding not requiring formal resolution procedures," in other words, an informal proceeding. The parties reached a voluntary agreement, which the Department approved, but no formal or informal proceedings took place.

8. The Workers' Compensation Rules further provide as follows:

Rule 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 (emphasis added).

9. Although Rule 10.1370 purports to apply to "cases" rather than "proceedings," it too requires at a minimum that a formal hearing be "requested" in order for a fee request to be considered. I find that Claimant's claim is not eligible for an award of attorney's fees under this provision either, because no formal hearing had been requested.
10. Turning now to Defendant's arguments, it first asserts that Claimant's request for attorney's fees and costs should be denied because Claimant failed to file it within thirty days, as required by 21 V.S.A. § 678(e). Claimant waited seven months to notify the Department that he was seeking payment of attorney's fees and costs.

¹ Claimant's request for attorney's fees was filed on February 9, 2015. Accordingly, I have applied the Workers' Compensation Rules in effect on that date, rather than the rules adopted in August 2015.

11. Section 678(e) of the statute provides that an attorney representing a claimant shall submit a claim for attorney's fees and costs *within 30 days following a decision in which the claimant prevails* (emphasis added). If approving the parties' permanency agreement constituted a decision of the Department in a claimant's favor, then I agree that Claimant here would have been out of time for submitting his claim, as he missed the 30-day deadline. I do not equate an approved compensation agreement that the parties voluntarily negotiated with a decision in which the claimant prevails, however. For that reason, I conclude that the provisions of §678(e) do not apply. Thus, though a claimant's failure to submit a timely claim for attorney fees might be grounds for denial in another case, here it is of no consequence.
12. Defendant next asserts that Claimant's request for attorney's fees should be denied because he failed to submit an itemized statement setting forth the hours expended and the work done, as required by Workers' Compensation Rule 10.1001. Again, had there been a decision in which Claimant prevailed, then submitting the itemization would have been a prerequisite to consideration of an award for attorney's fees. As it is, however, Claimant's failure to submit an itemized accounting of his time and expenses is irrelevant, because the statutory basis for considering an award of attorney's fees and costs was never triggered.
13. In fact, Claimant concedes that the parties did not contest his entitlement to permanent partial disability benefits in accordance with Dr. Wieneke's six percent impairment rating and that there was no decision of the Commissioner on this issue that would entitle him to an award of attorney's fees and costs. Instead, he contends that it is the issue of his entitlement to attorney's fees and costs itself that is contested.
14. Defendant clearly contested Claimant's request for attorney's fees and costs when the parties negotiated. Claimant had no legal basis for claiming entitlement to attorney's fees and costs at that time, and Defendant had no obligation to pay them. The Department had not issued a decision in Claimant's favor, and he had neither requested a formal hearing nor engaged in any informal proceedings before the Department.
15. In short, Claimant was not entitled to an award of attorney's fees and costs in conjunction with his permanent partial disability benefits in the spring of 2014. The fact that he characterizes the denial of his request for attorney's fees and costs as a contested matter does not provide an independent basis for awarding them. Claimant has not prevailed in any matter before the Department that would trigger consideration of an award of attorney's fees and costs.
16. Finally, Claimant contends that he is entitled to an award of attorney's fees and costs based on Defendant's claims adjuster's May 21, 2014 statement admitting to the reasonableness of his representation. *See* Finding of Fact No. 1, *supra*.
17. At best, this statement reflects the adjuster's opinion that Claimant's counsel provided reasonable representation to his client. It is not an agreement to pay his fees. To the contrary, Defendant specifically advised in its June 17, 2014 correspondence that the carrier was unwilling to do so.

18. Whether a defendant is required to pay a claimant's attorney's fees is a separate issue from whether the fees themselves are reasonable. An attorney's fee must always be reasonable. However, the employer's obligation to pay a claimant's costs and attorney's fees is limited to specific circumstances set forth in the statute, 21 V.S.A. § 678(a), and in Workers' Compensation Rule 10.1300. This case does not meet the criteria for an award of attorney's fees or costs under either authority.

ORDER:

Based on the foregoing, Defendant's motion for summary judgment is hereby **GRANTED**. Claimant's cross motion for summary judgment is hereby **DENIED**.

DATED at Montpelier, Vermont, this 28th day of October 2016.

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.