Mongeur v. E. F. Wall & Associates (July 20, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR

Robert Mongeur	)	Opinion No. 37-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
E.F. Wall & Associates, Inc.	)	
	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. T-53708

RULING ON CLAIMANT'S REQUEST FOR FEES AND COSTS

ISSUE:

Is claimant entitled to attorney's fees and costs, even though the claim was accepted prior to a formal hearing?

BACKGROUND:

Defendant E.F. Wall & Associates employed claimant as a concrete worker and construction laborer. Claimant noticed left hand/extremity pain and swelling in May of 2003. He first sought medical care on May 26, 2003 and was initially diagnosed with "cellulitis." Defendant's carrier, Liberty Mutual (Liberty), denied workers' compensation in June of 2003. Claimant saw Dr. Christian Bean on June 27, 2003 and Dr. Bean could only "suspect" that the injury was work-related. Based on this information, the Department denied claimant's request for benefits and stated that claimant failed to meet his burden of proving compensability. On July 31, 2003, claimant saw Dr. Melissa Smith-Horn, an IME. Dr. Smith-Horn opined that claimant's conditions were not work-related. In November of 2003, Dr. Bean recommended carpal tunnel release surgery and ulnar nerve transportation at the elbow. Claimant went ahead with these surgeries in December of 2003.

Claimant retained counsel in March of 2004. In September of 2004, Liberty issued another position letter basing its denial of disability on Dr. Smith-Horn's opinion. In November of 2004, claimant submitted to defendant an IME report from Dr. Philip Davignon. Dr. Davignon opined that claimant's injuries were work-related from his work with defendant. A pre-trial conference was held on January 10, 2005. At this time, claimant amended his claim to add claims for the right extremity as well. Claimant stated that he had recently developed similar symptoms on the right side as he had on the left. Defendant did not object to this additional claim and agreed to have them both tried at the May 3, 2005 formal hearing. Claimant had a second IME report from Dr. Davignon, dated February 15, 2005, which was received by defendant on March 3, 2005. Dr. Davignon opined that the right extremity injury was also work-related. However, Dr. Davignon recommended further diagnostic testing to rule out nerve pathology and to obtain orthopedic consultation. On April 26, 2005, defendant accepted both extremity claims and waived its right to a formal hearing on the compensability of both the right and left extremity claims.

DISCUSSION:

At the discretion of the Commissioner, the prevailing party may be awarded attorney's fees and costs. 21 V.S.A. § 678(a); WC Rule 10.1000. The costs must be necessary and fees must be reasonable. The Commissioner has considerable discretion in awarding fees to prevailing claimants. *Hodgeman v. Jard Co.*, 157 Vt. 461 (1991); *Miller v. IBM*, 163 Vt. 396 (1995); and *Wilson v. Black and TIG Insurance Co.*, Opinion No. 54-03WC (2004). In most instances fees and costs will only be considered in proceedings involving formal hearings, except if the criteria listed in Workers' Compensation Rule 10.1300 is met:

10.1310	the employer or insurer carrier is responsible for undue delay in adjusting the claim, **or**
10.1320	that the claim was denied without reasonable basis; **or**
10.1330	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.

Sanz v. Collins, Opinion No. 25-05WC (2005).

At the time counsel was retained by claimant, defendant was denying compensability of all claims. Legal representation was clearly necessary to resolve the dispute. Legal representation was reasonable, as less then 25 hours were spent by claimant's attorney's firm in settling the case. Furthermore, there is no evidence of unreasonable delay in resolving the issues by the claimant or his attorney. Clearly, claimant satisfied 10.1340, 10.1350, **and** 10.1360.

However, claimant must still satisfy 10.1310, 10.1320, **or** 10.1330 to fit the exception provided for in 10.1300. Claimant does not explicitly state which Rule he relies on, but he makes a general statement that claims were well grounded and Liberty conceded costs after denying them for two years. This is a misleading statement, because claimant did not even submit an IME report on the left side until November of 2004, did not add the right side claim until January of 2005, and did not submit an IME report to Liberty's counsel on the right side until March of 2005. Prior to this the Department had denied claimant's workers' compensation claim based on Dr. Bean's diagnosis, and received a contradictory medical opinion from Dr. Smith-Horn. Clearly Dr. Bean's initial opinion and Dr. Smith-Horn's IME report provided a reasonable basis for denying claimant's claim. Therefore, Rule 10.1320 is not applicable.

Also, the evidence does not show Liberty engaged in any misconduct or neglect, as it kept the Department and claimant abreast through correspondence of the reasons for denying the claims. This evidence is sufficient to demonstrate that Rule 10.1330 is not applicable either.

Finally, Liberty was not responsible for any undue delay in resolving the claims. Liberty has the right to fully investigate claims. Dr. Davignon's second report stated that further tests were required to rule out nerve pathology. In March of 2005, Liberty still had the opinion of Dr. Smith-Horn and the incomplete conclusion of Dr. Davignon to provide a reasonable basis for denying the claims. The acceptance of the claims by Liberty on April 26, 2005 appears to be a credit to Liberty and does not demonstrate any undue delay. Therefore, Rule 10.1310 is not applicable either. Since 10.1310, 10.1320, **or** 10.1330 have not been satisfied, claimant fails to meet the exception to 13.1300. However, because of the discretionary power of the Commissioner provided through 21 V.S.A. § 678(a) and Rule 10, the Commissioner must undertake a more in-depth analysis.

Claimant argues that the timing of the acceptance of the claim is of great importance. The claim was accepted on April 26, 2005, just a little more than a week before the May 3, 2005 formal hearing date. The claimant argues that insurers, as a matter of public policy, should not be able to deny a claim until the last moment, forcing claimants to incur fees and costs to meet their burden, and then accept the claim on the eve of trial. The Commissioner has stated that the custom in this Department has been to discourage "the practice of settlement on the courthouse steps." *Aker v. ALHC and Savelberg Construction*, Opinion No. 53A-98WC (1998) (quoting *Wyman v. Rutland Plywood*, Opinion No. 61-96WC (1996)). The Commissioner has also noted that a last minute settlement by defense counsel should not be used to avoid the necessary expense of preparing the case. See *Wilson*, Opinion No. 54-03WC. It is not good policy to set a precedent, which allows insurers to settle claims immediately prior to a formal hearing, and relieves them of paying claimant's attorney fees and costs. Claimant is correct to note that this is an important policy question that the Commissioner must consider.

Defendant counters claimant's policy argument by stating that granting of attorney fees and costs after settlement would be an impediment to the settlement process. Defendant cites *Barnes v. Morgan*, Opinion No. 5-89WC (1991), to support his argument. In *Barnes*, defense accepted the claim prior to a formal hearing and the Commissioner denied claimant's request for attorney's fees. The Commissioner in *Barnes* stated that the general policy of not awarding fees until after a formal hearing removes the impediment of settling disputes, and decreases satellite litigation over attorney's fees. *Barnes, supra*. This too is an important policy consideration that the Commissioner must weigh, but it must be noted that since *Barnes*, Rule 10 was amended to provide for fees even when the parties did not proceed to formal hearing. See *Sanz, supra*; and *Wells v. Gringas and Liberty Mutual*, Opinion No. 24-00WC (2000).

The Commissioner takes note of the policy arguments made in *Aker* and in *Barnes*, but finds this case most similar to *Wells*. In *Wells*, the permanency rating of claimant's disability was at issue. Just prior to the formal hearing, defendant settled the case. Defendant argued that it settled to avoid paying claimant's attorney's costs and fees. The Commissioner looked to the specific facts of the case and tailored the allowance of fees to the facts. The Commissioner concluded that both the claimant's legal representation was reasonable and necessary, and that the defendant's position carried a reasonable basis.

A factual analysis and the consideration of ultimate fairness is the most appropriate approach in the current case. The Commissioner now applies the *Wells* analysis and will tailor the allowance of fees to the current facts. On March 3, 2005, the defendant received the report from Dr. Davignon's second IME regarding the compensability of the claimant's injuries. By that time, claimant had evidence from a medical professional that both his left and right extremity injuries were work related. From that time on, counsel worked meticulously with Liberty's counsel to negotiate the allowance of claims prior to a formal hearing. The Commissioner has often noted the importance of the claimant's attorney's efforts and skill in establishing the claimant's access to compensation. See *Wilson*, *supra*; *Brewer*, *supra*; and *Deforge v. The Wayside Restaurant*, Opinion No. 35-96WC (1996). This was a case where skilled negotiation led to a settlement agreement and claimant's access to compensation. However, as discussed above, Dr. Bean's initial opinion and Dr. Smith-Horn's IME report provided a reasonable basis for initially denying the claim. Therefore, for the period leading up to the March 3, 2005 receipt of Dr. Davignon's second IME (dated February 15, 2005), claimant's attorney fees will not be granted. On March 3, 2005, the claimant fulfilled his burden of proof showing that the injuries were work-related. In the interest of fairness to the claimant, the Commissioner awards reasonable attorney fees from March 3,2005 through May 10, 2005, and all of claimant's necessary costs. The total amount for this period is $1,925.00[1]

CONCLUSION:

In sum, claimant's request for fees and costs is granted in part. Defendant is ORDERED to pay requested reasonable attorney fees from March 3, 2005 to May 10, 2005, and all necessary costs, for a total of $1,925.00.

Dated at Montpelier, Vermont this 20th day of July 2005.

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Patricia A. McDonald
Commissioner

[1] Claimant's attorney's fees from February 15, 2005 through May 10, 2005 consist of: 6.7 hours of work by Attorney Robinson, at $90/hr; 1.4 hours by Ms. Clark, at $60/hour; and 4.2 hours by Ms. Pacholek, at $75/hr.