STATE OF VERMONT
DEPARTMENT OF LABOR

Sarah Mariani

v.

Kindred Nursing Home

Opinion No. 34A-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. X-51262

RULING ON CLAIMANT'S MOTION FOR ATTORNEY FEES AND COSTS

This claim initially came before the Commissioner by way of Defendant's Motion to Determine Future Credit. In that motion, Defendant sought an order determining the amount of the workers' compensation "holiday" to which it was entitled on account of Claimant's third-party settlement, in accordance with 21 V.S.A. §§624(e) and (f). Essentially, Defendant advocated that the Commissioner establish its future credit as a fixed sum, with no further diminution for any increased share of Claimant's third-party recovery expenses if and when the credit was spent down.

To the extent that the fixed-sum order Defendant sought made no provision for paying its future share of her third-party recovery expenses, Claimant argued against it. Instead, Claimant asserted that every time Defendant tapped into the credit – by not having to pay a workers' compensation benefit that it otherwise would have owed – it would have to pay an additional share of the recovery expenses. This view generally comported with legal precedent both in Vermont and in other jurisdictions as well. *Barney v. Paper Corporation of America*, 1988 WL221243 (D.Vt.); *Griggs v. New Generation Communication*, Opinion No. 29-02WC (July 10, 2002); *Franges v. General Motors Corp.*, 274 N.W.2d 392 (Mich. 1979).

The Commissioner's ruling (a) acknowledged the amount of the credit as it currently stands, but (b) established the rate at which Defendant will have to reimburse Claimant for its additional share of her third-party recovery expenses as the credit is spent down. By doing so, in essence the Commissioner rejected Defendant's approach to the problem and accepted Claimant's analysis instead.

Having substantially prevailed in the proceedings before the Commissioner, Claimant now seeks an award of costs and attorney fees pursuant to 21 V.S.A. §678(a). Defendant objects on two grounds, discussed below.

Defendant first argues that because the issue raised by its motion was decided on the basis of the parties' legal briefs rather than following an evidentiary hearing, Claimant's fee request is governed by Workers' Compensation Rule 13.1300. That rule, which establishes the requirements for awarding fees "in a proceeding not requiring a formal hearing," typically is applied to review fee requests in disputes that are concluded at the informal dispute resolution level. *See, e.g., Zahirovic v. Super Thin Saws, Inc.*, Opinion No. 38-11WC (November 17, 2011). The rule's requirements, which are fairly stringent, reflect the Department's long-standing policy against awarding fees at that level except under extraordinary circumstances.

Admittedly here there was no "formal hearing" – no witnesses were sworn, no testimony was taken, no live evidence was introduced. Instead, the parties stipulated to the relevant facts and submitted the dispute for formal resolution by the commissioner on the basis of their legal arguments alone. It was, therefore, a "formal hearing resolution procedure" governed not by the specific requirements of Rule 10.1300 but by the more general mandate of §678(a). Defense counsel's argument to the contrary is wholly without merit.

Defendant next asserts that Claimant's request for an award of costs and fees should be denied because she did not in fact prevail. I disagree. The dispute that Defendant itself brought forward was grounded in its insistence that it had no future obligation to pay any additional third-party recovery expenses, and Claimant's insistence that it did. By her ruling, the Commissioner adopted Claimant's reasoning and rejected Defendant's. Claimant thus prevailed and is entitled to an award of costs and fees.

Claimant has requested an award of costs totaling $155.53 and attorney fees totaling $4,547.00. These amounts include not only the costs and fees incurred in opposing Defendant's original motion, but also those related to responding to Defendant's opposition to the instant motion for costs and fees. I find that the costs and fees that Claimant incurred up to and including her initial response to Defendant's opposition are reasonable and appropriate, and therefore these are allowed.

Claimant's sur-reply to Defendant's opposition stands on a different footing, however. This filing amounted to a reiteration of the same arguments she already had presented in her two previous memoranda. I find that the costs (totaling $58.90) and attorney fees (totaling $539.00) related to this filing were unnecessarily incurred and therefore are disallowed.

ORDER:

Based on the foregoing, Defendant is hereby **ORDERED** to pay Claimant's litigation costs, totaling $96.63, and attorney fees, totaling $4,008.00.

DATED at Montpelier, Vermont this 18th day of January 2012.

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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.