Dzevad Zahirovic v. Super Thin Saws Inc (November 17, 2011)

STATE OF VERMONT
DEPARTMENT OF LABOR

Dzevad Zahirovic	Opinion No. 38-11WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Super Thin Saws, Inc.	For: Anne M. Noonan Commissioner
	State File Nos. S-6844 and CC-56257

RULING ON DEFENDANTS' MOTIONS TO DISMISS CLAIMANT'S PETITION FOR ATTORNEY FEES AND COSTS

Background

Claimant has worked for Defendant Super Thin Saws, Inc. ("Super Thin Saws") for many years. His job requires him to work with machine coolants, oils and motor fluids on a daily basis. As a result of this exposure, in October 2001 Claimant was diagnosed with contact dermatitis, for which he filed a claim for workers' compensation benefits. The workers' compensation insurance carrier on the risk at that time was the predecessor in interest to Defendant One Beacon Insurance Co. ("One Beacon"). It accepted Claimant's claim as compensable and paid workers' compensation medical benefits accordingly.

Claimant again sought workers' compensation medical benefits for contact dermatitis nearly ten years later, in April 2010. One Beacon seasonably denied the claim on various grounds. Most notably, it alleged that Claimant's current condition represented an aggravation for which Super Thin Saws' current workers' compensation insurance carrier, Defendant The Hartford Insurance Co. ("The Hartford"), was liable. Aside from asserting that Claimant had not treated for his condition in the intervening ten years since his 2001 claim, One Beacon offered no evidence in support of this contention.

Through his attorney, on July 27, 2010 Claimant filed a Notice and Application for Hearing in which he disputed One Beacon's aggravation claim. Because the medical records available at the time recounted a ten-year history of the condition and referenced a 2001 date of injury, upon review the Department determined that One Beacon was liable. By interim order dated November 18, 2010 it directed One Beacon to pay workers' compensation benefits accordingly.

Medical records produced subsequent to the Department's interim order clarified that in fact Claimant had neither sought treatment nor lost time from work on account of his condition for a period of years prior to April 2010. Accordingly, on December 7, 2010 the Department notified The Hartford of its potential liability for Claimant's current claim. The Department's Workers' Compensation Specialist granted The Hartford a brief extension to investigate the claim, and also scheduled an informal conference for January 3, 2011. Although it had filed a denial on that same day, during the informal conference The Hartford accepted responsibility for the claim and agreed voluntarily to pay benefits. One Beacon was thereby relieved of any responsibility for Claimant's April 2010 injury.

On May 6, 2011 Claimant's attorney filed the pending Petition for Attorney Fees and Costs. Defendants One Beacon and The Hartford both have moved to dismiss the petition on various grounds, discussed below.

Discussion

In support of his petition for attorney fees and costs, which he asserts should be awarded against either One Beacon or The Hartford, Claimant cites to those provisions of the workers' compensation statute and rules dealing with awards in claims that are resolved short of formal hearing. Specifically, 21 V.S.A. §678(d) provides:

> 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.

Workers' Compensation Rule 10.1300 provides further guidance:

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

As to the timeliness of a request for an award of attorney fees, the statute specifically provides that an attorney representing a claimant "shall submit a claim for attorney fees and costs within 30 days following a decision in which the claimant prevails." 21 V.S.A. §678(e).

Claimant clearly has failed to meet the timeliness requirement, as against either Defendant. His petition for attorney fees was not submitted until May 2011, almost six months after the Department ordered One Beacon to pay benefits and some four months after The Hartford voluntarily agreed to do so. Claimant has offered no extenuating circumstances to justify the delay, nor can I discern any reason to overlook it. That being the case, Claimant's petition for attorney fees deserves to be rejected on those grounds alone.

Even were I to overlook the fact that Claimant's petition for fees was not timely filed, Rule 10 provides no basis for an award against either Defendant. As against One Beacon, Claimant asserts that his claim was denied without reasonable basis (Rule 10.1320), and that his attorney's representation was necessary to resolve the issue (Rule 10.1350). I do not accept either of these assertions. The fact that The Hartford voluntarily accepted responsibility for the benefits owed Claimant is justification enough for One Beacon's denial. That The Hartford was even in the case, furthermore, occurred as a result of One Beacon's advocacy, not Claimant's. Given the ultimate disposition of the claim in One Beacon's favor, there is no basis for an award of fees against it.

Claimant all but concedes that Rule 10.1300 provides no basis for an award against The Hartford. Instead he argues that by accepting Claimant's claim for benefits The Hartford somehow stepped into One Beacon's shoes and thereby inherited One Beacon's responsibility for attorney fees. Claimant cites no legal authority for this proposition and I cannot accept it. Even if I could, having just determined that One Beacon is not liable for Claimant's attorney fees, there is nothing for The Hartford to inherit.

The discretion granted by §678(d) to award fees in cases that are resolved prior to formal hearing is broad. Rule 13 directs that this discretion is to be exercised only in limited circumstances, and only when specific requirements are met. This is not one of those circumstances.

Last, as for The Hartford's request that the attorney fees it has incurred in defending Claimant's petition be assessed against Claimant, neither the statute nor the rule authorizes me to do so.

Defendants' Motions to Dismiss Claimant's Petition for Attorney Fees and Costs are **GRANTED**. Claimant's Petition for Attorney Fees and Costs is **DISMISSED**.

DATED at Montpelier, Vermont this 17th day of November 2011.

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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.