STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-01574
Pamela Wells	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Michael and Betty Gingras	)	For: R. Tasha Wallis
and	)	Commissioner
Liberty Mutual	)	
	)	Opinion No. 24-00WC

Issue submitted on the briefs
Record closed on June 1, 2000

APPEARANCES:

Heidi S. Haught, Esq. for the claimant
Barbara H. Alsop, Esq. for the defendant

ISSUE:

Is the claimant entitled to attorney's fees, costs and interest?

OPINION AND ORDER

On the eve of the hearing in this case involving a dispute over permanency, the carrier offered to pay the claimant permanency based on the 5% whole person rating she had sought. Because the defendant denied claimant's demand for attorney's fees, costs and interest, the present dispute followed.

This case dates back to July of 1997 when claimant was injured in the course of her employment. Liberty Mutual, the carrier for the employer, accepted the claim, paid temporary total disability benefits and medical expenses. Based on a medical opinion of Dr. Susan Hetman, who determined that claimant had reached a medical end result with a 0% permanent partial impairment, the carrier discontinued temporary total disability benefits and determined that no permanency benefit was due. The Form 27 with that determination was filed with the Department on May 15, 1998 with the stated intention of discontinuing benefits on May 24, 1998. On May 25, 1998 the Department approved the termination of temporary benefits to the claimant. No Form 22 was filed at that time, in all probability because no permanency was assessed. There is no indication in the record to demonstrate that the carrier informed the claimant of her entitlement to seek a permanency opinion from her treating physician, a right that is specified prominently on a Form 22.

Dr. Hetman did not report the 0% rating in her note immediately following the April 7,

1998 examination. It was not until two weeks later, without examining the claimant, that she reported that the claimant had no permanency. She also ordered a functional capacity evaluation (FCE) and x-rays. The claimant argues that Dr. Hetman's permanency rating was not a valid basis for the carrier's reliance because it was not determined at the time of her examination and because she found the need for x-rays and a FCE. A careful review of the record suggests otherwise. Dr. Hetman ordered the FCE because the claimant had "not been working for over nine months." At the time of the examination, the claimant's physical examination was negative except for non-work related bilateral tender lipomas of her lumbar back. Specifically, examination of the vertebrae revealed no tenderness. Claimant's range of motion in the lumbar area was normal. Strength, sensation, pulses, and reflexes in her legs were normal. And the straight leg-raising test was normal. The x-rays that followed that examination were negative. Consequently, a permanency rating two weeks later without a second examination was not unreasonable. The subsequent surgery was to remove the lipomas on her back, not for a work-related injury.

One year later, on June 7, 1999, the claimant obtained a permanency rating from Dr. Jonathan Fenton who determined that the claimant had a "DRE Category 2, Lumbosacral spine impairment, resulting in a 5% impairment of the whole person."

Because the carrier maintained that the claimant had no permanency and the claimant sought benefits based on Dr. Fenton's 5% rating, this case was referred to hearing. At the pretrial conference, the defendant gave notice of its intent to call Dr. Hetman as a witness. The claimant then took her deposition on January 18, 2000. The hearing was scheduled for February 10, 2000, but was continued to March 9, 2000 when the parties learned that Dr. Hetman was not available for the February date.

On February 14, 2000 at a status conference, the claimant stated her intention to call Dr. Fenton as a witness at the hearing. The hearing was then rescheduled for April 7, 2000 to accommodate Dr. Fenton's schedule and to give the defendant an opportunity to depose him. Because of an illness in defense counsel's family, the deposition was rescheduled for April 4 and the hearing for April 7. Based on the information discovered in Dr. Fenton's deposition, on April 6, 2000 the defendant agreed to pay the claimant the 5% permanency. It did not agree to pay attorney fees, costs, or interest. It now argues that it agreed to settle the case in part to avoid the payment of fees, costs and interest.

The awarding of attorney's fees in a worker's compensation case is a matter of discretion with the Commissioner. *Paini v, Twin City Subaru*, Opinion No. 17-99WC (May 17 & Apr. 2, 1999) and cases cited therein; 21 V.S.A. § 678 (a); WC Rules 10 (a)(3).

In *Paini*, this Department held that "attorneys fees should be awarded in workers' compensation proceedings when an employer or carrier causes undue and unreasonable delay which necessitates the legal representation of a claimant." An attorney fee award was appropriate in that case because it was "manifestly evident that the defendants acted in complete contravention with the purpose of the Workers' Compensation Act, as well as the Department's goal and, therefore, an award of attorney fees is appropriate." In *Paini*, the claim was denied from the beginning and the denial was unsubstantiated.

The carrier draws a sharp contrast between this case and *Paini*. It maintains that it paid all benefits as they came due and arranged for a permanency evaluation to be performed by a

competent physician. At the same time, its notice of discontinuance did not tell the claimant that she had the right to obtain her own evaluation. The carrier suggests that by waiting a full year for an examination by a non- treating physician of her choice, the claimant contributed to the delay in this case. However, the more likely explanation is that she waited a year because she was unaware of the right to obtain another permanency opinion.

An attorney fee award may be made in a proceeding not requiring a formal hearing when the claimant is able to demonstrate that:

1. the employer is responsible for undue delay in adjusting the claim, or
2. the claim was denied without reasonable basis, or
3. the employer or insurance carrier engaged in misconduct or neglect, and
4. the legal representation to resolve the issues was necessary, and
5. the representation provided was reasonable, and that neither the claimant nor the claimant's attorney has been responsible for any unreasonable delay in resolving the issues.

Rule 10 (a)(3) The Workers' Compensation Rules; see also *Paini, supra; Morrisseau v. Legac,* 123 Vt. 70 (1962).

Unlike the situation in *Paini*, supra, the defendant in this case never denied the claim; the dispute was over the degree of permanent partial disability rating assessment (0% v. 5%). Both ratings had sound medical support. However, in this case the carrier neglected to tell the claimant she could obtain another permanency opinion in 1998 when it terminated temporary total benefits. Although the claimant would have received that advice had a Form 22 been employed, and some permanency been paid, the fact that a Form 27 was used meant that the claimant did not receive that information. Clearly, legal representation of the claimant was necessary to obtain another opinion and the carrier's agreement to accept the 5%. That representation has been reasonable.

Accordingly, the claimant has demonstrated her entitlement to fees. However, the unique facts in this case, including the reasonable basis for the defendant's position, suggest that the positions of the parties on this subject carry equal strength. In the interest of fairness to both parties, the discretionary award for attorney fees is awarded on the basis of 25 hours at $60 per hour, one half of that requested.

In addressing the issue of an interest award, as evidenced by the language of the statute 21 V.S.A. § 664, if an employee prevails at a hearing, the employee is entitled to interest "at the statutory rate computed … on the total amount of unpaid compensation." When construing a statute in an effort to effectuate the intent of the legislature, a presumption exists for the application of the plain meaning of the language within the statute. *Badger v. Town of Ferrisburgh*, 168 Vt. 37 (1998). The plain meaning of § 664 only permits an award of interest when a claimant prevails at a hearing. *Paini*. Since the claimant did not prevail as a result of a hearing, she is not statutorily entitled to an interest award.

However, pursuant to common law, claimant is entitled to an award of interest from the date of the settlement agreement, April 6, 2000, until payment of all benefits. *Marsigli's Estate v. Granite City Auto Sales, Inc.,* 124 Vt. 161 (1962). Consequently, an award of interest, at the

statutory rate of 12% from April 6, 2000 is due on the unpaid amount of the award.

An award for costs is mandatory, as a matter of law if claimant prevails in a workers' compensation proceeding. *21 V.S.A. § 678(a); Paini.* Since the claimant prevailed in this matter, an award for necessary costs of $482.32 is proper.

ORDER:

The employer is hereby ORDERED to pay the claimant:

1. $1500 in attorney's fees;

2. 12% interest on the unpaid permanency due; and

3. costs totaling $482.32

Dated at Montpelier, Vermont this 30th day of August 2000.

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R. Tasha Wallis
Commissioner