STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MICHAEL NAKOPINSKI	)	
	)	
VS.	)	W.C.C. 04-01368
	)	
STEVEN DYER	)	
MICHAEL T. NAKOPINSKI	)	
	)	
VS.	)	W.C.C. 04-00046
	)	
STEVEN DYER	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. These two (2) matters were consolidated before the trial court and remain consolidated for decision by the appellate panel. The employee, through his counsel, has appealed the amount of the counsel fee awarded by the trial judge. After review of the decision of the trial judge and consideration of the arguments presented by the parties, we deny the appeal and affirm the decision and decree of the trial judge.

W.C.C. No. 04-00046 is an employee's original petition alleging that Mr. Nakopinski injured his head, neck, chest, and back on November 21, 2003 when he was struck in the head by a tree limb during the course of his employment in Mr. Dyer's tree cutting business. The petition

was granted at the pretrial conference and the employee was awarded weekly benefits for partial incapacity from November 22, 2003 to November 28, 2003 caused by a scalp laceration, head contusion and cervical strain he sustained on November 21, 2003. Both the employer and employee claimed a trial.

W.C.C. No. 04-01368 is an employee's petition to review alleging that the employer failed to reimburse the employee for the cost of a cervical collar and several prescription medications, and failed to give permission to attend physical therapy. The petition was denied at the pretrial conference and the employee filed a claim for trial. The matter was then consolidated with W.C.C. No. 04-00046 for trial.

The employee introduced records of Rhode Island Hospital, CVS Pharmacy, the Hope Jackson Fire Department, the Dr. John E. Donley Rehabilitation Center and Northeast Orthotics and Prosthetics and the deposition, affidavits and records of Dr. Randall L. Updegrove. The employee was the only witness to testify before the court. Although the employer acknowledged that Mr. Nakopinski was struck by a tree limb while working for Mr. Dyer on November 21, 2003, questions were raised as to the length of incapacity and the effect of several previous injuries in 1998, 1999, and 2002. Mr. Nakopinski did return to work with a different employer on June 25, 2004. At the close of the trial, counsel for the employee submitted an Affidavit of Costs and Attorney's Fees requesting a fee in the amount of Nine Thousand Eight Hundred Ninety-seven and 50/100 ($9,897.50) Dollars for 57.50 hours spent on the case by attorneys Lawrence L. Goldberg and Danielle A. Britto and their support staff, and reimbursement of costs in the amount of One Thousand Six Hundred Seventy and 34/100 ($1,670.34) Dollars.

The trial judge found the employee's testimony to be credible and persuasive. As a result, she also accepted the medical opinions which were in part based upon the representations

made by the employee to his medical care providers. The trial judge concluded that the employee sustained a head contusion, scalp laceration, and neck strain on November 21, 2003 and that he was totally disabled from November 22, 2003 to February 26, 2004 and partially disabled from February 27, 2004 to June 25, 2004. She also granted the requests for reimbursement of the cost of prescription medication, reimbursement for the cost of a cervical collar, and permission for physical therapy. The trial judge awarded a counsel fee in the amount of Five Thousand Five Hundred and 00/100 ($5,500.00) Dollars and reimbursement of costs in the amount of One Thousand Three Hundred Seventy and 34/100 ($1,370.34) Dollars. Counsel for the employee then filed a claim of appeal.

The employee's attorney has filed a three (3) page document entitled "Reasons of Appeal" from which we have gleaned three (3) basic contentions: (1) that the trial judge improperly insisted upon the filing of the fee affidavit prior to the decision being rendered; (2) that the trial judge should have awarded the fee and costs requested in the affidavit as no other evidence was presented on the issue; and (3) that the trial judge did not provide any itemization as to how she arrived at the fee awarded. After thoroughly reviewing the record and considering the arguments put forth by the respective parties, we deny the appeal and affirm the decision and decree of the trial judge.

In the document entitled "Reasons of Appeal," counsel states that the trial judge's "insistence upon filing a premature attorney's fee affidavit can not be correct." First, we would note that there was no objection stated in the record to the timing of the request for a fee affidavit. It is a well-settled doctrine of appellate review that the court "will not consider an issue raised on appeal that has not been raised in reasonably clear and distinct form before the

trial justice." D'Ambra Constr. v. Machado, W.C.C. 01-00374 (App. Div. 7/25/03) (quoting Town of Smithfield v. Fanning, 602 A.2d 939, 942 (R.I. 1992)).

The following exchange took place between counsel for the employee and the trial judge on March 31, 2005:

> "MS. BRITTO: Judge, regarding the fee, I don't know how you want to handle that, if you would like to make a decision and let me reserve the right to enter a fee affidavit subsequent to your decision, or if you would like me to . . .
>
> "THE COURT: Usually I like that before I render the decision just so that we have everything and I don't have to go back on the record, so if you want to do that on the 21st, I will let you reopen for that.
>
> "MS. BRITTO: Good. Thank you, Judge."

Tr. 60. There is no indication from this dialogue that counsel took issue with submitting the affidavit on the final date of the trial. Consequently, any objection to the request to file the fee affidavit at the close of the trial has been waived and cannot be considered by this panel.

The employee further contends that because the affidavit of fees and costs was the only evidence submitted regarding the attorney's fee, the trial judge was obliged to award the amounts requested in the affidavit. He cites the Rhode Island Supreme Court's decision in Colonial Plumbing & Heating Supply Co. v. Contemporary Constr. Co., 464 A.2d 741 (R.I. 1983), in support of his argument, but our reading of that decision does not compel such a simplistic approach to the fee-setting process.

Section 28-35-32 of the Rhode Island General Laws provides that costs, including counsel fees, shall be awarded to employees who successfully prosecute petitions for compensation benefits. There is no statutory formula for determining the amount of the counsel fee awarded. That decision is left to the sound discretion of the trial judge which must be

exercised in the context of the circumstances of the particular case, taking into account the well-established elements that must be considered and evaluated in arriving at a fair and reasonable fee. Colonial Plumbing, 464 A.2d at 743; Palumbo v. U. S. Rubber Company, 102 R.I. 220, 224, 229 A.2d 620, 622-23 (1967). In Palumbo, the Rhode Island Supreme Court explained these elements as follows:

> What is fair and reasonable depends, of course, on the facts and circumstances of each case. We consider the amount in issue, the questions of law involved and whether they are unique or novel, the hours worked and the diligence displayed, the result obtained, and the experience, standing and ability of the attorney who rendered the services. Each of these factors is important, but no one is controlling.

Id. at 223-24, 229 A.2d at 622-23 (citations omitted). On review, we will not disturb the trial judge's award of a counsel fee unless we find that the trial judge clearly abused her discretion in determining the amount of the fee. Fallon v. Skin Medicine & Surgery Centers of R. I., Inc., 713 A.2d 777, 780 (R.I. 1998).

The Colonial Plumbing case was an action in Superior Court on a promissory note. In explaining the basis for the amount of the counsel fee he awarded to the successful plaintiff, the trial judge stated:

> The Court computes the reasonable attorney's fee on the basis of charges usually charged by Counsel involving proceedings in this Court involving collection matters wherein the fee is one-third of the first $500 and 25 percent of the sum in excess of $500.

Colonial Plumbing, 464 A.2d at 742. In vacating the counsel fee award, the Rhode Island Supreme Court rejected the plaintiff's contention that, considering the trial judge's experience as an attorney and judge, he could take judicial notice of the standard formula utilized to calculate legal fees in commercial collection cases. The trial judge erred in determining the award based

solely on the fee customarily charged in the area, rather than taking into account each of the factors set forth in Palumbo.

The Court provided further guidance for the fee-setting process by holding that affidavits or expert testimony addressing the criteria which form the basis for determining the fee are required to assist the trial judge in arriving at a fair and reasonable fee. This rule was based upon the rationale put forth by the Vermont Supreme Court that when a trial judge is

> [i]nvolved in an original evaluation of the worth of the legal services rendered, rather than reviewing for reasonableness a particular fee already reduced to a precise figure, [the court] had a need for precise factual information. The court needed data, not in this case to test the value placed on the services by the attorneys, but to arrive at that very value as an original matter.

Colonial Plumbing, 464 A.2d at 744, quoting Young v. Northern Terminals, Inc., 130 Vt. 258, 261, 290 A.2d 186, 189 (1972)).

It is clear then that the fee affidavit submitted by counsel serves to provide the trial judge with necessary information as to some of the elements to be considered in the fee-setting determination such as the time expended and tasks performed regarding the case both in and out of court, the attorney's usual hourly billing rate, and the experience and ability of the attorney with regard to the particular subject matter of the case. However, the time expended and the hourly billing rate stated in the affidavit are not binding on the court. On the contrary, the affidavit simply provides the trial judge with certain information which will assist her in making an original determination as to a reasonable fee. The trial judge is then obliged to use her personal observation of the quality of counsel's services during the course of the trial and her knowledge of the particular circumstances of the case to arrive at a fair and reasonable award.

In the present matter, the trial judge noted that the issues involved were not unique or novel and that the employee, Mr. Nakopinski, was the only witness presented to the court,

despite the fact that depositions of four (4) other potential witnesses were taken prior to trial. The deposition of Dr. Randall Updegrove was the only medical testimony submitted, along with affidavits and records regarding other medical treatment. While the trial was pending, the employee's treating physician released him to full duty and the employee began working for another employer on June 25, 2004, thereby limiting the amount in issue to compensation for approximately six (6) months. Although the trial judge acknowledged the diligence of the employee's attorneys, she also found the minimum billing of a quarter of an hour objectionable. Furthermore, despite complimenting the attorneys' experience, standing and ability in the area of workers' compensation, the trial judge indicated that the hourly rate noted in the fee affidavit was excessive for the legal services provided. This evaluation of the pertinent elements involved in the fee-setting process provides a sufficient basis for the trial judge's fee award.

We would also note that counsel for the employee had previously been compensated for services rendered up to the entry of the pretrial order in this matter on January 21, 2004. The fee awarded at that stage of the proceedings represents the fair and reasonable compensation for all services rendered to that point and is not merely to be taken as a credit against a total fee request for services provided from the initial interview of the client.

After reviewing the trial judge's decision with regard to the award of the counsel fee in accordance with the standards set forth in the relevant case law, we find that she did not clearly abuse her discretion in awarding a fee of Five Thousand Five Hundred and 00/100 ($5,500.00) Dollars for the successful prosecution of the employee's original petition. We also find no abuse of discretion in the trial judge's decision to not reimburse the cost of a witness subpoena and the cost of a private investigator. The entries in the listing of the expenses prepared by employee's counsel provide minimal information. There is no indication in the file that the witness ever

testified by deposition or in court, or what relevant information she was to provide. The attorneys also provided no information as to what services the private investigator provided that were necessary to the prosecution of the case. The burden rests with the attorney to adequately substantiate these expenses as appropriate for reimbursement. We find no abuse of discretion in the trial judge's denial of reimbursement for these two (2) items.

For these reasons, the employee's appeals are denied and dismissed and the decision and decrees of the trial judge are affirmed. In accordance with Sec. 2.20 of the Rules of Practice of the Workers' Compensation Court, final decrees, copies of which are enclosed, shall be entered on

Ricci and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Ricci, J.

_____
Hardman, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MICHAEL NAKOPINSKI)
)
VS.) W.C.C. 04-01368
)
STEVEN DYER)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on June 3, 2005 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

PER ORDER:

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Ricci, J.

_____
Hardman, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Lawrence L. Goldberg, Esq., and Nicholas R. Mancini, Esq., on

_____

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