STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

THOMAS CAPPALLI)
)
VS.) W.C.C. 2009-00576
)
CITY OF PROVIDENCE, as successor)
to PROVIDENCE CIVIC CENTER

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WORKERS' COMPENSATION COURT

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employee's claim of appeal in which he takes issue with the amount of the counsel fee awarded by the trial judge. After thorough review of the record and thoughtful consideration of the arguments of the respective parties, we grant the employee's appeal and modify the amount of the award.

A brief review of the travel of this case is necessary for a full understanding of this issue. Mr. Cappalli was injured on March 22, 2003 while working at the Dunkin' Donuts Center as an operations supervisor. Shortly thereafter, he began receiving weekly benefits for partial incapacity pursuant to a Memorandum of Agreement which described his injury as a neck sprain. The description of the injury was subsequently amended to read "neck strain, cervical myelopathy with spasticity, left shoulder girdle strain." Ee's Ex. 2.

In accordance with R.I. Gen. Laws § 28-33-18(d), the insurer notified the employee that his weekly benefits would be discontinued as of March 29, 2009 after receiving partial incapacity benefits for 312 weeks. The employee then filed a petition to review pursuant to R.I.

Gen. Laws § 28-33-18.3(a)(1), seeking the continuation of his partial incapacity benefits on the grounds that his partial incapacity resulting from his work-related injury posed a material hindrance to his ability to find employment suitable to his limitations. The matter proceeded to trial during which the employee and a vocational rehabilitation counselor testified and the depositions of two (2) physicians were admitted along with extensive medical records from the Lahey Clinic. The trial judge denied the employee's petition based upon his determination that testimony was elicited from one of the physicians and from the vocational rehabilitation counselor indicating that the employee was capable of some type of sedentary work such as a greeter at Wal-Mart. The employee claimed an appeal from this decision.

In a decree entered on May 29, 2012, the Appellate Division granted the employee's appeal and reversed the trial judge, finding that the trial judge had erred in his evaluation of the testimony of the physician and the vocational rehabilitation counselor. After conducting its own *de novo* review of the record, the Appellate Division concluded that the employee had established that his partial disability posed a material hindrance to his ability to obtain employment suitable to his limitations and ordered the continuation of his partial incapacity benefits. The appellate panel awarded a counsel fee in the amount of Eight Thousand One Hundred Fifty and 00/100 ($8,150.00) Dollars to the employee's attorney for services rendered in the prosecution of the appeal. The matter was remanded to the trial judge to determine the amount of a counsel fee for services rendered during the pretrial and trial stages.

After entry of the decree of the Appellate Division, the employer filed a petition for writ of certiorari to the Rhode Island Supreme Court, along with a motion to stay the decree of the Appellate Division. A temporary stay was granted on June 12, 2012 and then continued by the

Court on October 12, 2012. On June 5, 2013, the Court issued an order denying the petition for certiorari and denying the motion for stay.

In determining the amount of the counsel fee, the trial judge considered the fee affidavit and supplemental affidavit submitted by the employee's attorney, the employer's Memorandum in Opposition to Requested Attorneys' Fees, and the employee's response to the employer's objection and memorandum. Counsel for the employee requested Twenty-one Thousand Twenty-nine and 93/100 ($21,029.93) Dollars which included reimbursement of costs in the amount of Two Thousand Five Hundred Forty-nine and 93/100 ($2,549.93) Dollars and One Thousand Two Hundred Eighty and 00/100 ($1,280.00) Dollars for services rendered regarding the remand to the trial judge for the purpose of determining the counsel fee. In a bench decision and subsequent order entered on October 17, 2013, the trial judge awarded a counsel fee in the amount of Four Thousand and 00/100 ($4,000.00) Dollars for services rendered at the pretrial and trial stages and ordered the reimbursement of One Thousand Three Hundred Sixty-nine and 00/100 ($1,369.00) Dollars in costs. The employee promptly filed a claim of appeal and has filed ten (10) reasons of appeal in which he takes issue with the trial judge's explanation of his fee award and provides support for the time expended on each task set forth in the fee affidavit.

The standard employed by the Appellate Division in reviewing the decision of a trial judge is very deferential. Section 28-35-28(b) of the Rhode Island General Laws provides that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." With regard to the fixing of an attorney's fee, the standard of review is similarly deferential.

> "Where attorney's fees are allowed by statute but the amount is not prescribed, the court within limits of judicial discretion has the power to fix the amount and unless abused an appellate court will not review the exercise of such discretion."

Gartner v. Gartner, 79 R.I. 399, 408, 89 A.2d 368, 374 (1952). Therefore, in order for this panel to conduct a *de novo* review of the record in this matter, we must first conclude that the trial judge abused his discretion in setting the amount of the counsel fee at Four Thousand and 00/100 ($4,000.00) Dollars and excluding certain costs from reimbursement.

Section 28-35-32 of the Rhode Island General Laws provides that ". . . costs shall be awarded, including counsel fees and fees for medical and other expert witnesses, including interpreters, to employees who successfully prosecute petitions for compensation; . . . ." In *Palumbo v. United States Rubber Co.*, 102 R.I. 220, 229 A.2d 620 (1967), the Rhode Island Supreme Court provided guidelines for the fee-setting process in the context of an employee's petition for the payment of medical expenses and for permission to exceed the statutory maximum for medical payments which was in effect at the time.

> The statute mandates a fee, and it directs that the commission or the court, as the case may be, shall fix an award which shall be "consistent with the services rendered," that is to say, which is fair and reasonable. 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). The Court further expounded upon the fee-setting process as follows:

> At the same time we reject the time spent by counsel as the decisive determinant. Instead we consider all the elements which properly enter into the fee-setting process giving each such weight as may be appropriate to the peculiar circumstances of the case.

Id. at 226, 229 A.2d at 624.

In subsequent cases, the Court addressed the use of fee affidavits in determining the amount of an award. In *Colonial Plumbing & Heating Supply Co. v. Contemporary Construction Co.*, 464 A.2d 741 (R.I. 1983), the Court cited with favor the rule adopted by the State of Vermont which states that when a trial court 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.

Id. at 744 (quoting *Young v. Northern Terminals, Inc.*, 130 Vt. 258, 261, 290 A.2d 186, 189 (1972)). In *Annunziata v. ITT Royal Electric Co.*, 479 A.2d 743 (R.I. 1984), the Rhode Island Supreme Court affirmed the use of fee affidavits and/or testimony as a method of providing the trial judge with the information needed to address the factors involved in the fee-setting process as set forth in *Palumbo.*

In his bench decision, the trial judge stated that he had reviewed the Rhode Island Supreme Court decisions in *Annunziata* and *Fallon v. Skin Medicine & Surgery Centers*, 713 A.2d 777 (R.I. 1998) regarding the elements to consider in setting a counsel fee; however, he does not state the elements nor provide an explanation of how he evaluated each of those criteria in arriving at a fee of Four Thousand and 00/100 ($4,000.00) Dollars, less than seventy-five percent (75%) of the amount documented in the fee affidavit. From our review of the decision, it appears that the trial judge cites the following reasons for his award: (1) the amount requested for the time up to and including the pretrial conference exceeded the standard amount awarded at the pretrial level; (2) excessive time was spent on certain tasks; (3) certain tasks could have been handled by paralegals and other support staff; (4) the issue in the case was not unique, unusual or difficult; and (5) the case involved only two (2) court appearances during which testimony was

taken and only two (2) doctors' depositions. We have reviewed the trial judge's decision in accordance with the case law and conclude that the trial judge abused his discretion in awarding a fee of Four Thousand and 00/100 ($4,000.00) Dollars.

The trial judge appears to indicate that there is a standardized or flat fee for an appearance at a pretrial conference; however, this is not the case. The services rendered by an attorney up to and including the pretrial conference should be evaluated utilizing those criteria set forth by the Rhode Island Supreme Court in arriving at a fair and reasonable counsel fee. It is evident from the fee affidavit that counsel spent a considerable amount of time gathering the documentation he believed necessary to prove his case prior to even filing the petition; however, the trial judge did not cite this as a concern, but simply stated that the amount requested exceeded the standard fee. We find this to be error.

Although the trial judge acknowledged the experience and ability of the employee's attorney, he indicated that counsel should have therefore been able to handle a case such as this expeditiously as the issues were not unique, unusual, or difficult. This view is in direct contradiction to the statements made by the Appellate Division in setting the counsel fee for services rendered at the appellate level that resulted in the reversal of the trial judge's decision.

> Clearly, the stakes were high in this case – the employee would either be awarded continuing partial disability benefits or those benefits would be terminated. Although the issue of whether this employee's partial disability poses a material hindrance to his ability to obtain suitable employment was no unique, these so-called "gate" cases are difficult due to the lack of definitive statutory guidelines and legal precedent. By their nature, these cases are extraordinarily fact-intensive and generally require not only expert medical evidence, but also vocational and functional capacity assessments and testimony. Mr. Cappalli's case was further complicated by the fact that he had a significant pre-existing condition which was aggravated by his work-injury.

We believe the trial judge mischaracterized the inherent difficulty of the issues and burden of proof posed by Mr. Cappalli's petition which apparently led in part to the inadequate fee award.

The trial judge also cited the fact that the matter involved only two (2) court appearances at which testimony was presented and two (2) doctors' depositions as support for his award; however, a counsel fee cannot be based solely upon the time spent before the court for live testimony and during depositions that are submitted into evidence. In addition to these tasks, the attorney appeared at the pretrial conference, the initial hearing, two (2) court dates on which trial exhibits were marked in evidence and post-trial memoranda and other documents were submitted, and at least two (2) status conferences not on the record. In addition, the attorney prepared for and appeared at the deposition of the employee taken by the employer's counsel. It appears from the record that the trial judge requested memoranda from the parties and counsel for the employee submitted a fourteen (14) page memorandum. All of these tasks as well as the appearances for live testimony and medical depositions must be considered in the fee determination.

There is also some indication that the trial judge viewed the amount of the counsel fee awarded for services rendered at the appellate level as a factor in his determination of the fee for services rendered at the pretrial and trial levels. This is clearly improper as that fee was solely for the successful prosecution of the employee's appeal and should have no influence upon the trial judge's determination.

For the aforesaid reasons, we are constrained to conclude that the trial judge abused his discretion in setting a fee of Four Thousand and 00/100 ($4,000.00) Dollars in this matter. Rather than remand the matter again for further review by the trial judge, we are confident that

we have more than sufficient information regarding the proceedings below to render an informed decision as to the fair and reasonable counsel fee in this matter.

Although counsel for the employee places great emphasis upon the detailing of the number of hours expended in the fee affidavit and the justification therefor, we would note that our determination of the fee is not dictated by a simple formula of multiplying time spent by a set hourly rate and the total fee request in the fee affidavit is not binding upon the court. *See Palumbo*, at 226, 229 A.2d at 624; *DeCastro v. G.M. Gannon Co., Inc.*, W.C.C. No. 97-01216 at *8 (App. Div. April 2, 1997). In arriving at a determination of a fee award it is not necessary to document an hour-by-hour analysis of the fee affidavit; however, the court must provide a clear explanation of the reasons or bases for the award. *Id.* (quoting *Jacobs v. Mancuso*, 825 F.2d 559 (1st Cir. 1987). We also recognize, as noted by the Court in *Jacobs*, that judges are often placed in an uncomfortable situation in explaining their fee awards.

> How much must he state when he is convinced, either that the diary entries are accurate and counsel were grossly inefficient, or, worse that the entries are overblown, even deliberately so? There is, moreover, a wide difference in ability between various members of the bar; yet how quick will counsel be to complain if he is not given the going rate although the judge well knows that he took twice as long to try his case as would have the lawyer who had appeared the week before? The judge then faces the particular annoyance of compensating counsel for having wasted his time....
>
> To a certain extent a judge should be allowed to draw conclusions and make adjustment without full articulation.

Jacobs v. Mancuso, 825 F.2d 559, 564 (1st Cir. 1987).

Much of the reasoning we applied in setting the fee for services rendered at the appellate level in this matter are equally applicable at the pretrial and trial levels. The factors to be considered are: (1) the amount in issue; (2) whether the questions of law presented are unique or novel; (3) the hours worked and the diligence displayed by counsel; (4) the result obtained; and

(5) the experience, standing and ability of the attorney. As noted previously, the amount in issue was significant – the employee's weekly benefits would either be continued likely for the rest of his life, or he would receive absolutely nothing. Also, as discussed above, we find that this type of "gate" case is difficult to prosecute successfully as it requires specific medical and vocational expert testimony directed to the burden of proving that the employee's partial incapacity resulting from the work injury is a material hindrance to his ability to obtain suitable employment. In addition, there are a limited number of decisions from the Rhode Island Supreme Court and the Appellate Division to provide clear and universally applicable guidelines for satisfying the burden of proof.

The fee affidavit indicates that counsel spent 92.4 hours in the prosecution of this matter through the conclusion of the trial and an additional 6.4 hours from the time of the denial of certiorari by the Rhode Island Supreme Court through the decision of the trial judge awarding the counsel fee on remand from the Appellate Division. The fee affidavit reflects that significant time was spent preparing for each court appearance and deposition, reviewing medical records on numerous occasions, and conducting research and drafting the post-trial memorandum. We commend the employee's attorney for his diligence and thoroughness in representing the employee in this matter and ultimately, his success in prosecuting this petition. The attorney is an accomplished practitioner for over twenty-two (22) years; however, by his own admission, he has practiced before the Workers' Compensation Court infrequently. As such, we do believe that he expended more time in research and preparation than would an attorney who appears before the court on a regular basis and has a greater familiarity with the process of prosecuting such a petition, the procedures of the court and the relevant case law.

Based upon the above discussion of the factors involved in the fee-setting process, we find that a counsel fee of Ten Thousand One Hundred and 00/100 ($10,100.00) Dollars is a fair and reasonable compensation for the services rendered at the pretrial and trial stages of this litigation. If the employer has paid the Four Thousand and 00/100 ($4,000.00) Dollars awarded by the trial judge, it shall be entitled to credit for that amount, resulting in a balance owed of Six Thousand One Hundred and 00/100 ($6,100.00) Dollars.

The employee also objected to the fact that the trial judge failed to award reimbursement of all of the costs requested. We have reviewed the employee's request for costs and the available supporting documentation in the record and have determined that the employer shall reimburse costs in the amount of Two Thousand Fifty-one and 12/100 ($2,051.12) Dollars as follows: $177.12 for BACTES Imaging Solutions for the Lahey Clinic records; $20.00 for the filing fee; $116.00 for a transcript of the employee's deposition; $245.75 for the stenographer's bill for the deposition of Dr. Joel Oster; $92.25 for a transcript of the deposition of Dr. Steven McCloy; and $1,400.00 for the expert witness fee of Dr. Joel Oster as documented in Ee's Exhibit 10. In addition, the employer shall pay (or reimburse) the expert witness fee of Dr. Amy Vercillo in the amount of $495.00 (this item was not listed in the fee affidavit). We do not find the amounts requested for photocopying, postage, mileage and parking to be appropriate for reimbursement by the employer as costs in this matter. The employer shall take credit for any costs which have been paid or reimbursed pursuant to the trial judge's order entered on October 17, 2013.

In light of the employee's successful prosecution of this appeal, the employer shall reimburse employee's counsel the sum of Forty-nine and 00/100 ($49.00) Dollars for the fee for filing the claim of appeal and the cost of the transcript of the hearings before the trial judge

regarding the remand by the Appellate Division. In addition, we find that a counsel fee in the amount of Two Thousand and 00/100 ($2,000.00) Dollars is fair and reasonable for services rendered before the Appellate Division in the prosecution of this appeal solely on the issue of the award of a counsel fee and costs.

Consistent with our decision, we hereby grant the employee's appeal and reverse the order of the trial judge entered on October 17, 2013. A new decree shall enter containing the following findings of fact and orders:

1. That on May 29, 2012, a final decree of the Appellate Division was entered granting the employee's appeal, reversing the trial judge's decision and decree, granting the employee's petition for continuation of partial incapacity benefits pursuant to R.I. Gen. Laws § 28-33-18.3(a)(1) and remanding the matter to the trial judge for the purpose of setting a counsel fee for services rendered at the pretrial and trial stages of the litigation and ordering reimbursement of appropriate costs.

2. That on October 17, 2013, the trial judge entered an order in compliance with the remand awarding a counsel fee of Four Thousand and 00/100 ($4,000.00) Dollars and ordering reimbursement/payment of costs in the amount of One Thousand Three Hundred Sixty-nine and 00/100 ($1,369.00) Dollars, which included the expert witness fee of Dr. Amy Vercillo.

3. That the trial judge abused his discretion in setting the counsel fee at Four Thousand and 00/100 ($4,000.00) Dollars and declining to reimburse certain costs.

It is, therefore, ORDERED:

1. That the employee's claim of appeal is granted and the order of the trial judge entered on October 17, 2013 is hereby reversed.

2. That the employer shall pay a counsel fee in the amount of Ten Thousand One Hundred and 00/100 ($10,100.00) Dollars to Michael R. DeLuca, Esq., attorney for the employee, for services rendered at the pretrial and trial stages of this matter.

3. That the employer shall reimburse the employee's attorney for costs incurred during the trial of this matter in the amount of Two Thousand Fifty-one and 12/100 ($2,051.12) Dollars and reimburse or pay the expert witness fee of Dr. Amy Vercillo in the amount of Four Hundred Ninety-five and 00/100 ($495.00) Dollars.

4. That the employer shall take credit for all payments made pursuant to the order entered by the trial judge on October 17, 2013 in compliance with the remand by the Appellate Division.

5. That the employer shall reimburse the employee's attorney the sum of Forty-nine and 00/100 ($49.00) Dollars for the cost of the filing of the claim of appeal and the cost of the transcript of the hearings before the trial judge regarding the remand by the Appellate Division.

6. That the employer shall pay a counsel fee in the amount of Two Thousand and 00/100 ($2,000.00) Dollars to Michael R. DeLuca, Esq., for services rendered in the successful prosecution of the employee's claim of appeal of the trial judge's order entered on October 17, 2013.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree incorporating the above findings and orders, a copy of which is enclosed, shall be entered on May 12, 2017 at 10:00 a.m.

Ferrieri, C. J. and Hardman, J., concur.

ENTER:

/s/ Ferrieri, C. J.

/s/ Olsson, J.

/s/ Hardman, J.