

NEW HAMPSHIRE COMMISSION FOR HUMAN RIGHTS

JUNE BOWERS

v.

PROFESSIONAL PHYSICAL THERAPY SERVICES, LLC

**No. ED 0051-10
16D-2010-00054**

ORDER ON REQUEST FOR ATTORNEY'S FEES

The Claimant seeks \$25,059.46 in attorney's fees for her representation by counsel John Vanacore from the inception of the case, through a pre-hearing conference and conciliation (essentially a mediation), and a day long hearing in Concord, New Hampshire, before the undersigned Commissioners. Respondent, through its counsel, Andru Volinsky, objects to the fees requested and suggests that an award, if any is made, be capped at \$7,500.

Courts typically calculate reasonable attorney's fees by determining the product of reasonable time expended times reasonable rates to develop the "lodestar" of a reasonable fee. *See, e.g.*, Herbert B. Newberg, *Attorney Fee Awards* § 4.04 (Shepard's/McGraw-Hill 1986) ["Newberg"] (citing and quoting, *e.g.*, *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1939 (1983)). This figure "is presumed to be the reasonable fee to which counsel is entitled." *See, e.g. id.* (citing and quoting, *e.g.*, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S.Ct. 3088 (1986)). Time expended in litigating attorney's fees issues is compensable at its usual rate. *See, e.g. id.* § 4.23 (and citations therein from all United States Courts of Appeal, including *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978)). "The loadstar calculation need bear no

proportionate relationship to the monetary results obtained.” Newberg § 606 (citing *Hensley v. Eckerhart*).

The Commission hearing panel has reviewed all of the pleadings submitted in connection with the Claimant's request for attorney's fees and costs, including all submissions by the Respondent. As to Respondent's counsel's objections, although they are timely and assertively well stated the Commission finds them unpersuasive.

Respondent's counsel first argues that any award of attorney's fees that is larger than the damage award made by the Commission is *per se* unreasonable. Based on the federal case law set forth above, which is indicative of the common law followed by New Hampshire and fairly universal in regard to any consideration of a request for attorney's fees, the Commission disagrees. Limiting attorney's fees awards to the amount of damages awarded would have a chilling effect on any claimant's ability to find legal representation on a contingent or hourly deferred fee basis for discrimination cases that are worthy but entail insufficient damages.

The Commission also refers to New Hampshire Rule of Professional Conduct 1.5(a), which states:

- (a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee or expenses include the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent, and the factors for determining an appropriate attorneys fee as set forth therein.

Applying the above factors to the circumstances of this case, including, but not limited to, Claimant's counsel's experience, the complexity of the issues involved, the time that was necessary to spend on the matter, the results obtained, the preclusion of other employment by Claimant's counsel, and the prevailing billing rates of similarly situated and experienced counsel, the fee award sought by Claimant is not unreasonable.

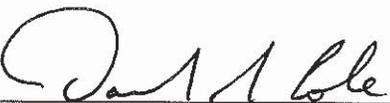
Respondent next argues that some of the fees sought were not contemporaneously recorded. The Commission agrees with Respondent that fees should be contemporaneously recorded. If they are not, the practice may lead to inaccurate billing and makes any such billing questionable. The fees at issue here that were not contemporaneously recorded total \$350 and 1.4 hours of expended time. At the same time, the hearing panel notes that Claimant's counsel has not requested fees incurred in the preparation of Claimant's request for attorney's fees and the contested motion practice that accompanied her request, fees that would have been permitted. Accordingly, as a quid pro quo in recompense for Claimant's counsel's time incurred in

preparing, filing, and arguing her attorney's fee request (time that certainly exceeded 1.4 hours), for which a further award will be neither entertained nor awarded, the Commission does not disallow the \$350 fees included in the total amount Claimant seeks.

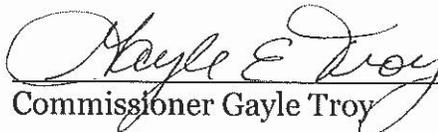
Respondent's counsel finally argues that in light of the award granted by the hearing panel and the previous failure by Claimant to seek a settlement near that amount, the fees should be disallowed except as to \$7,500. Assuming, *arguendo*, that the hearing panel should ignore the general evidentiary and jurisprudential prohibition against the admission of settlement discussions, given the explication by Claimant's counsel that prior to the hearing in Concord the Respondent offered considerably less than the amount finally awarded by the Commission, the Commission finds that the Claimant's decision to go forward with a hearing was not unreasonable. Accordingly, the Respondent's assertion that Claimant's recalcitrance led to the unnecessary incurring of attorney's fees is unpersuasive.

Further finding that all submissions of Claimant's attorney's fee requests were timely made, the Commission awards the Claimant her attorney's fees in the amount of \$25,059.46. Respondent shall pay this amount to the Commission by check payable to the Claimant and her attorney within thirty five consecutive calendar days from the date of the Commission's mailing of this Order unless the Respondent files a Motion to Reconsider or appeals the matter to a judicial authority. The Commission will then forward the check to Claimant's counsel.

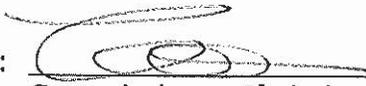
Date: August 1, 2013

By: 
Commissioner David N. Cole, Esq.
Panel Chair

Date: August 2, 2013
August 1, 2013

By: 
Commissioner Gayle Troy

Date: August 1, 2013

By: 
Commissioner Christine C. Wellington

cc: John G. Vanacore, Esq.
Andru H. Volinsky, Esq.
Joni Esperian, Esq., Executive Director