STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Ross Brown	)	Opinion No. 02A-04WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
S.D. Ireland Concrete	)	
Construction Corp.	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. T-20643

RULING ON CLAIMANT'S UNOPPOSED MOTION FOR FEES AND COSTS

On January 21, 2004, this Department issued a ruling in favor of the claimant, holding that an injury he incurred arose out of and in the course of his employment. That ruling followed the defendant's denial of the claim, the filing of a record and legal arguments of counsel. In this post decision request, claimant's counsel seeks attorney fees and costs. In support of this request, counsel filed the attorney contingency fee agreement and affidavit listing a total of $1,302.22 in expenses.

Under 21 V.S.A. § 678 (a) and Workers' Compensation Rule 10.000, an award of reasonable attorney fees is discretionary and an award of necessary costs mandatory when supported by the fee agreement and evidence establishing the amount and reasonableness of the request.

An early purpose of § 678 was to discourage unreasonable delay and unnecessary expense in the enforcement of a claim under the Workers' Compensation Act. *Morrisseau v. Legac*, 123 Vt. 70 (1962); *Grassette v, Beecher Falls Division of Ethan Allen*, Op. No. 68-95WC (1995). In addition, as the Court later explained, the right to recover fees for a workers' compensation claimant is often an access to justice. See *Fleury v. Kessel/Duff Constr. Co.*, 149 Vt. 360, 364 (1988).

Mindful of the purposes underlying the Act, this Department has considered one or more of several factors when exercising the discretion necessary for an award of fees. Those factors include: whether the efforts of the claimant's attorney were integral to the establishment of the claimant's right to compensation, *Marotta v. Ascutney Mountain Resort*, Op. No. 12-03WC (2003); *Jacobs v. Beibel Builders*, Op. No. 17-03 (2003); *Deforge v. Wayside Restaurant*, Op. No. 35-96WC (1996); the difficulty of the issues raised, skill of the attorneys and time and effort expended, *Dickenson v. T.J. Maxx*, Op. No. 13-03 WC (2003); and whether the claim for fees is proportional to the efforts of the attorney, *Vitagliano v. Kaiser Permanante*, Op. No. 39-03 WC (2003*); Fitzgerald v. Concord General Mutual*, Op. No. 6A-94WC (1995).

In this case because of the insurer's denial, counsel's efforts were crucial to the claimant's right to receive compensation. The skill of counsel, lack of delay and proportion integral to a contingency award are factors supporting a discretionary award in this case.

Therefore, an award based on 20% of the total compensation due, not to exceed $9, 000, is ordered. WC Rule 10.1220. In addition, the necessary costs of $1,302.22 are also awarded.

Dated at Montpelier, Vermont this 3rd day of May 2004.

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Michael S. Bertrand
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.

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Submitted on depositions, records and briefs on an expedited basis;
Record closed on December 17, 2003

APPEARANCES:

Robert A. Mello, Esq., for the Claimant
Thomas P. Simon, Esq., for the Defendant

ISSUE:

Is this claim compensable?

JOINT EXHIBITS:

I:	Ross Brown, Report of a Motor Vehicle Accident for accident of 8/26/02
II:	Donald Sawyer, Report of a Motor Vehicle Accident for accident of 8/26/02
III:	Ross Brown, Report of a Motor Vehicle Accident for accident on 9/5/02
IV:	Dorothy Grover, Report of a Motor Vehicle Accident on 9/5/02
V:	State of Vermont Uniform Crash Report for accident on 9/5/02
VI:	Ross Brown, Report of a Motor Vehicle Accident for accident on 3/24/03
VII:	State of Vermont Uniform Crash Report for accident on 3/24/03
VIII:	Workers Compensation Proof of Claim
IX:	Medical Records
X:	Ross Brown, deposition transcript, October 6, 2003
XI:	Scott Ireland, deposition transcript, December 2, 2003
XII:	Steven Meyers, deposition transcript, December 2, 2003

FINDINGS OF FACT:

1. Claimant, Ross Brown, began working for S.D. Ireland (Ireland) on June 28, 1995. At all times relevant to this action, he was an "employee" and Ireland his "employer" within the meaning of the Workers' Compensation Act (Act).

2. Claimant worked as an estimator and sales representative.

3. Ireland provided claimant with a pick-up truck with a company logo. Although claimant was free to use it without restriction, Ireland paid for gasoline, insurance and maintenance on the truck.

4. On August 26, 2002, claimant was in an accident while driving the truck, an accident that arose out of and in the course of his employment. He struck his head with resultant concussion, nausea, light-headedness, ataxia and vertigo for which he sought medical care.

5. On September 5, 2002, claimant was involved in a second motor vehicle accident while working. He blacked out, causing him to hit a car in front of him. At the time, he was still feeling nausea, light-headedness and vertigo from the first accident.

6. A third accident occurred on March 24, 2003 while claimant was driving the pick-up truck in morning from his home to work at his usual time. He struck his head in the accident and suffered a post-concussion syndrome. Claimant has not worked since.

7. Claimant continues to complain of dizziness, confusion and an inability to concentrate.

8. Among claimant's treatment providers is Dr. Kenneth Ciongoli, a neurologist, who determined that all three of claimants accidents have contributed to his post concussion syndrome, that he had not recovered from the first two when the third occurred and that it would be hard to determine precisely the degree of harm attributable to each of the three.

DISCUSSION:

1. A worker who receives an injury that arises out of and in the course of the worker's employment is entitled to workers' compensation benefits from his employer or its insurance carrier. 21 V.S.A. § 618 (a).

2. The claimant-worker has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). He must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

3. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17 (1941).

4. The analytical focus in this case is on the third of the motor vehicle accidents described above. If it arose out of and in the course of the claimant's employment, claimant clearly is entitled to benefits. § 618. Equally clear is that claimant would also be entitled to benefits if third accident itself is not compensable, but led to the recurrence of a condition caused by the previous work-related injuries. WC Rule 2.1312. On the other hand, the injury resulting from that third accident is not compensable if was a superseding intervening cause of the claimant's condition and itself did not arise out of and in the course of his employment. See *Wood v. Fletcher Allen Health Care*, 169 Vt. 419 (1999) (superseding intervening cause discussed).

The Coming and Going Rule

5. As a general rule, a worker is not entitled to benefits if injured off the employer's premises while "coming and going" to work. See 1 Larson's Workers' Compensation Law § 13.01. There is an exception to this general rule, however, when one is injured in a vehicle provided by the employer, see id. § 14.07; *Frost v. Cook*, Opinion No. 1-89 (1990), or in vehicle controlled by the employer. Larson § 15.0.

6. Defendant urges this Department to deny compensation by finding an exception to this exception, and in doing so, bring the case back into the usual coming and going rule, as has been done in other jurisdictions. See *White v. State*, 61 N.W.2d 31 (Mich. 1953) (compensation denied to worker injured in state car he was driving without any employer-imposed restrictions); *Funk v. A.F. Scheppmann & Son Constr. Co*., 1999 N.W. 2d 791 (Minn.1972) (compensation denied when car was merely for employee's personal convenience).

7. However, the reasoning adopted by those courts is not consistent with this state's precedent. Analogous cases in Vermont have found claims to be compensable when one was on call twenty-four hours a day and used the vehicle only for work, see *Hall v. Jay Peak*, Opinion No. 81-81WC (1981); or when a company car assisted claimant in performing his travel-related responsibilities. See *Frost*, supra.

8. Underlying a finding of compensability in those cases where a claimant was injured in a company car are the well-grounded principles that a company car can be an inducement for employment, Larson, § 14.07[2] and that its use furthers the interests of the employer and promotes good will. See *Holmquist v.Mental Health Services*, 139 Vt 1 (1980); *Kenney v. Rockingham School*, 123 Vt. 344 (1963).

9. Those principles apply here. Use of a company vehicle is an inducement for hiring and keeping employees. One with a company logo, as in this case, serves as an advertisement for the business. The employer's continued maintenance of the truck indicates that it exercised a degree of control over it. Overall, therefore, claimant's use of that truck furthered the interests of his employer who is liable for associated workers' compensation benefits because injuries from that accident together with those from the two previous accidents combined to explain claimant's current condition.

CONCLUSION AND ORDER:

10. Under the well-established Larson exception to the going and coming rule for vehicles provided by the employer and this department's precedent, the third accident incurred by the claimant was compensable.

THEREFORE, based on the foregoing findings and conclusions, defendant is ORDERED to adjust this claim.

Dated at Montpelier, Vermont this 21st day of January 2004.

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Michael S. Bertrand
Commissioner

Appeal:

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