

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

Antonio Sanz	)	Opinion No. 25-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Douglas Collins	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. L-14865

MAILED  
APR 26 2005  
VT Dept of  
Labor & Industry

**RULING ON CLAIMANT'S REQUEST FOR FEES AND COSTS**

Prior to any hearing in this case, the carrier agreed to pay the claimant permanent total disability (PTD) benefits, which the Commissioner declined to order paid in a lump sum. See Opinion No. 15-05WC (February 11, 2005). At issue in the motion now before the Department is whether claimant is entitled to attorney fees and costs.

The file indicates that claimant was injured in 1998 when he hit his head at a construction site and fell 10 to 15 feet. As a result he developed multiple problems, including incomplete quadriplegia, spasticity, neuropathic pain, neurogenic bladder, mild traumatic brain injury, and depression. By 2000 he was assessed with a permanent impairment rating of 76% whole person by his treating physician for his physical injuries. In 2003 the carrier's physician assessed medical end result with a 60% rating, an assessment that formed the carrier's basis to discontinue temporary total disability benefits. Also, based on that assessment, the carrier offered the claimant a Form 22 settlement for 243 weeks, based on the 60% rating.

Claimant then hired counsel who retained the services of an occupational therapist, vocational rehabilitation expert, and psychologist. The occupational therapist determined that claimant had no work capacity; the VR expert determined that claimant was not employable and the psychologist, Dr. Rodger Kessler, assessed a psychological impairment at 22%, over and above the previous ratings for physical impairment. These reports were sent to defense counsel in October 2003.

Defendant had a functional capacity evaluation (FCE) of the claimant performed on January 26, 2004. The evaluator, Ginni Reeves, reported that claimant walked with a cane, had spasticity in the lower extremities, poor balance because of spasticity and weakness. Her conclusion confirmed claimant's position that he had no residual work capacity. However, defendant refused to turn over its FCE report to claimant until ordered to do so by this department. It finally disclosed that report in July 2004.

With no response from the defendant by February 2004, claimant filed a Notice and Application for Hearing for permanent total disability benefits, which defendant continued to deny based on its 60% whole person rating. However, no agreement for PTD was filed until August 2004.

Section 678(a) of title 21 provides that a claimant is entitled to an award of necessary costs and reasonable attorney fees “when the claimant prevails.” When one has prevailed after hearing, such a question is addressed in the hearing decision. However, a claimant “prevails” and may be awarded fees even without a formal hearing in limited instances and if the criteria listed in Workers’ Compensation Rule 10.1300 are met:

- 10.1310 the employer or insurer carrier is responsible for undue delay in adjusting the claim, **or**
- 10.1320 that the claim was denied without reasonable basis, **or**
- 10.1330 the employer or insurance carrier engaged in misconduct **or** neglect, **and**
- 10.1340 that legal representation to resolve the issues was necessary, **and**,
- 10.1350 the representation provided was reasonable, **and**,
- 10.1360 that neither the claimant nor the claimant’s attorney has been responsible for any unreasonable delay in resolving the issues.

Once defendant had ample evidence that claimant was permanently and totally disabled in January 2004, a conclusion confirmed by its own FCE, its continuing denial of PTD was without reasonable basis (10.1320). Clearly claimant needed legal representation (10.1340), the representation provided was reasonable (10.1350) and neither the claimant nor his attorney has been responsible for any delay (10.1360). Therefore, the necessary criteria under Rule 10.1300 have been met, justifying an award of fees.

Defendant makes much of the fact that claimant was continuing to receive benefits during the time of the dispute, but those benefits were toward the 60% rating defendant obtained and would have ended after 243 weeks had defendant prevailed. Only because of the efforts of his attorney will claimant receive benefits due for PTD.

Next, is the question whether the award should be an hourly or contingency fee. Pursuant to 21 V.S.A. § 645, one who is permanently and totally disabled as a result of a work related injury is entitled to a minimum of 330 weeks of benefits. If the claimant has no reasonable prospect of finding regular employment after that time, benefits continue.

Because the actual amount due Mr. Sanz is uncertain at this time, making a contingency fee unrealistic, an hourly fee is the most appropriate award. The bill submitted reflects the required minimum billing unit of 0.10 hour. The complexity of the issues presented and resistance mounted despite strong evidence supports an award, but only for the time following the unreasonable denial, a necessary criterion under Rule 10.1300, which was in January 2004 when all parties had ample evidence that this claimant is permanently and totally disabled. Counsel’s request acknowledges this. Therefore claimant is entitled to the fees for hours worked from January 26, 2004 through August 20, 2004.

Finally, claimant seeks reimbursement for necessary costs, including a charge for the permanency rating Dr. Kessler assessed for claimant's psychological impairment. A carrier is responsible for at least one permanency examination and impairment rating from the claimant's treating physician under the WC Rules. Further, "[a]t the commissioner's discretion, the employer may be ordered to pay for additional permanent impairment evaluations." Rule 11.2400

In this case, it was clear during rehabilitation that claimant suffered from depression from his work related injury, although that aspect of his health was not rated when the first permanent partial impairment rating was done. In fact, it is not clear that those treating the claimant were qualified to perform a rating for a psychological impairment. The rating performed by Dr. Kessler was a necessary part of the overall impairment for this claimant and, given the discretion granted by Rule 11.2400, is a cost recoverable from the carrier, less the administrative costs and no show fee.

In sum, defendant is ordered to pay the claimant fees and costs as detailed above.

Dated at Montpelier, Vermont this 26<sup>th</sup> day of April 2005.

  
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Laura Kilmer Collins  
Commissioner