

Gloria Crowe v. The Fonda Group, Inc.

(May 2, 2011)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Gloria Crowe

Opinion No. 02A-11WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

The Fonda Group, Inc.

For: Anne M. Noonan  
Commissioner

State File No. S-13358

**RULING ON CLAIMANT'S MOTION FOR ATTORNEY FEES AND COSTS**

The Commissioner previously decided this claim on January 25, 2011. Two issues were presented: first, whether Claimant was entitled to permanency benefits in accordance with Dr. Backus' 18% whole person rating or Dr. Johansson's 5% rating; and second, whether Defendant was obligated to sign a treatment authorization form that it felt was overly broad and therefore objectionable.

As to the first issue, the Commissioner ruled that Dr. Backus had applied a more appropriate analysis to determining Claimant's impairment than Dr. Johansson had, but that his rating still was deficient because it relied on outdated electrodiagnostic test results. As an alternative to awarding benefits, the Commissioner ordered Defendant to pay for repeat electrodiagnostic testing so that her permanent impairment could be rated more accurately.

As to the second issue, the Commissioner ruled in Defendant's favor.

The Commissioner also ruled that Claimant had at least partially prevailed on her claims and therefore was entitled to an award of costs and attorney fees commensurate with the extent of her success. In accordance with that ruling, Claimant now seeks an award of costs totaling \$536.83 and attorney fees totaling \$8,885.50.<sup>1</sup>

Defendant objects to any award of costs or fees. It argues that because the Commissioner did not grant the relief Claimant sought – permanency benefits based on Dr. Backus' 18% impairment rating – Claimant cannot be said to have prevailed at all.

Defendant ignores an important component of the Commissioner's Opinion. The Commissioner did find that Dr. Backus' analysis was more credible than Dr. Johansson's, and in that sense Claimant did prevail. The Commissioner also found that Defendant's failure to pay for repeat diagnostic testing when Dr. Backus first requested it was improper. Had Defendant chosen otherwise, possibly a formal hearing on the permanency issue could have been avoided. From this perspective as well, it is appropriate to consider an award of costs and fees.

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<sup>1</sup> This is in accordance with Claimant's Amended Petition for Fees and Costs, filed on April 14, 2011.

Defendant is correct that Claimant has not yet proven her entitlement to an award of permanency benefits based on Dr. Backus' 18% impairment rating. It was on those grounds that Claimant was deemed to have only partially prevailed. Commensurate with the extent of her success, she is entitled to only a partial award of costs and/or fees. *See, e.g., Hill v. CV Oil Co.*, Opinion No. 15-09WC (May 26, 2009); *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003).

I conclude that Claimant is entitled to an award of her costs as submitted, totaling \$536.83.

As for attorney fees, in exercising the discretion granted by 21 V.S.A. §678 the Commissioner typically considers such factors as whether the attorney's efforts were integral to establishing the claimant's right to compensation and whether the claim for fees is proportional to the attorney's efforts in light of the difficulty of the issues raised and the skill and time expended. *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003), and cases cited therein. Where, as here, the case has not yet reached final resolution, it is appropriate as well to consider whether the fees sought bear a reasonable relationship to the position of the case overall. *Wilson v. Black*, Opinion No. 54-03WC (January 28, 2004). With that factor particularly in mind, I conclude that it is appropriate to award Claimant 40% of the fees requested, or \$3,554.20.

**ORDER:**

Based on the foregoing, Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$536.83; and
2. Attorney fees totaling \$3,554.20.

**DATED** at Montpelier, Vermont this 2<sup>nd</sup> day of May 2011.

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Anne M. Noonan  
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.