

Meril Badger v. BWP Distributors, Inc. and Maynard's Auto Supply, Inc. (June 2, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Meril Badger

Opinion No. 05R-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

BWP Distributors, Inc.
and Maynard's Auto Supply, Inc.

For: Anne M. Noonan
Commissioner

State File Nos. AA-62692 and U-15282

RULING ON DEFENDANT BWP'S MOTION TO RECONSIDER AND CLARIFY

Defendant BWP moves for reconsideration of various aspects of the March 25, 2011 Opinion and Order in this claim.¹

Recoupment of Overpaid Unemployment Compensation

Defendant requests that it be permitted "to directly repay unemployment benefits paid during any period of awarded temporary total disability," rather than relying on Claimant to do so himself. Defendant asserts that because the Commissioner of Labor has jurisdiction over both workers' compensation and unemployment compensation, it is within my authority to issue such an order in the context of these proceedings.

It is true that this Department administers both the unemployment compensation and workers' compensation programs. This does not mean, however, that a claimant's right to unemployment compensation can be adjudicated in the context of a workers' compensation proceeding, or vice versa. The unemployment compensation statute sets out the appropriate procedure for recouping overpayments from benefit recipients. 21 V.S.A. §1347. It does not authorize the remedy Defendant suggests.

Permanent Partial Disability Award

The March 25, 2011 Opinion and Order awarded Claimant permanency benefits as compensation for a 9 percent whole person impairment referable to the lumbar spine. This amount represents Claimant's current 15 percent impairment, less the 6 percent that was rated and paid in conjunction with his 2004 injury. Defendant argues that Claimant's permanency award should have been reduced as well by the 5 percent impairment rated in conjunction with his 1997 injury.

¹ Defendant correctly notes that Claimant's Memorandum in Opposition to its Motion to Reconsider was not timely filed. It is within my discretion to consider Claimant's arguments nonetheless, however, and in the interest of both justice and efficiency I have elected to do so.

According to 21 V.S.A. §648(d), a permanent impairment rating “shall be reduced by any previously determined permanent impairment for which compensation has been paid.” To claim the reduction, therefore, Defendant must show not only that an impairment was previously rated, but also that it was paid.

Here, the evidence establishes only that Claimant settled his 1997 claim, which alleged injuries to his wrists, neck, low back, leg and psyche, and in which Claimant sought benefits for both temporary and permanent total disability, on a full and final (Form 15) basis for \$70,000.00. The settlement agreement did not allocate that amount to any particular injury, nor to any particular benefit. Without such allocation, there is no way to determine if in fact Claimant was paid compensation for a 5 percent impairment referable to his lumbar spine or not. Thus, there is no basis for reducing his current award beyond what already has been allowed.

Application of Amended Rule 10 to Current Claim

Workers’ Compensation Rule 10.1210, which establishes the rate at which an award of attorney fees to a prevailing claimant is to be calculated, was amended effective June 15, 2010. The amended rule raises the reimbursement rate from \$90.00 per hour to \$145.00 per hour. Defendant argues that because the amendment is substantive, not procedural, it should not have been applied to any of the fees incurred in the current claim, which arose well before the amendment’s effective date.

This issue is amply discussed in *Erickson v. Kennedy Brothers*, Opinion No. 36A-10WC (March 25, 2011). The amended rule does not create a new right to attorney fees where one did not exist before; it merely changes the rate at which such fees are to be awarded. It is properly characterized as procedural, therefore. *Estabrook v. New England Precision*, Opinion No. 10-00WC (May 16, 2000). The attorney fee award stands.

Claimant’s Itemization of Attorney/Paralegal Time

Defendant argues that Claimant’s itemized billing improperly utilizes minimum quarter-hour billing units, and therefore is not sufficiently precise to merit an award of fees. I am satisfied that quarter-hour billing was not used as a minimum and that, where appropriate, tenth-hour billing was applied.

Medical Expert Fees

Defendant asserts that there is insufficient information from which to determine the extent to which Dr. Bucksbaum's fees comply with the Workers' Compensation Medical Fee Schedule. I agree that Claimant is only entitled to reimbursement of those fees that do not exceed the maximum allowed under Workers' Compensation Rule 40. Specifically:

- For Dr. Bucksbaum's independent medical evaluation (CPT code 99456), the maximum allowable charge is \$44.00 per unit. Rule 40.021 and Appendix I. For the 22 units charged, therefore, reimbursement is limited to \$968.00, a reduction of \$132.00 from the amount previously awarded.
- For Dr. Bucksbaum's hearing testimony, the maximum allowable charge is \$300.00 per hour. Rule 40.111.

It is unclear from the billing submitted how much time Dr. Bucksbaum allocated to his formal hearing testimony, and therefore, I cannot determine the appropriate reimbursement. Claimant shall have 30 days from the date of this ruling within which to supply additional information so that I might do so.

Telephone Charges

To the extent that the telephone charges included in Claimant's reimbursement request reflect office overhead rather than actual long-distance calling charges, they do not qualify as reimbursable litigation costs. These charges, which total \$27.00, are disallowed.

Mileage and Travel Time

I am satisfied that the charges Defendant has questioned are properly reimbursable.

ORDER:

Defendant's Motion to Reconsider and Clarify is **DENIED** in all respects, except as to the award of litigation costs to Claimant. As to these, the March 25, 2011 Order is amended to provide for reimbursable costs totaling \$2,138.20. This represents the amount previously awarded less: (a) a reduction of \$132.00 for Dr. Bucksbaum's excess independent medical evaluation charges; (b) a reduction of \$1,100.00 for Dr. Bucksbaum's hearing testimony charges;² and (c) a reduction of \$27.00 for non-reimbursable telephone charges.

DATED at Montpelier, Vermont this 2nd day of June 2011.

Anne M. Noonan
Commissioner

² As noted above, Claimant shall have 30 days from the date of this ruling within which to submit additional information, following which some or all of Dr. Bucksbaum's hearing testimony charges may be allowed.