

Steven Matheny v. Best foods Baking Company

(November 28, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Steven Matheny

Opinion No. 18R-11WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Best Food Baking Company

For: Anne M. Noonan
Commissioner

State File No. R-02092

**RULING ON DEFENDANT'S REQUEST FOR RECONSIDERATION OF AWARD OF
COSTS AND ATTORNEY FEES**

Defendant seeks reconsideration of the Commissioner's October 26, 2011 award of costs and attorney fees to Claimant on three grounds, discussed below.

Reimbursement for Services of Two Attorneys at Hearing

Defendant argues that the Claimant's fee award should be reduced by \$1,400.00, representing the amount charged by one of the two attorneys who appeared on his behalf at the formal hearing.

I acknowledge that the Department has in the past declined to award fees for two advocates' appearance at a hearing. *Smith v. Skyline Corp.*, Opinion No. 20-02WC (July 25, 2002). Rather than impose a blanket prohibition, however, the better approach is to consider whether the combined hours billed by both attorneys were "reasonably expended," and to remove only those that were "excessive, redundant or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). I do not find that the hours billed in this claim merit exclusion under this standard. Therefore, I will not reconsider my prior award as to these fees.

Reimbursement for Fees Related to Withdrawn Back Injury

Defendant argues that Claimant's fee award should be reduced to eliminate the hours his attorneys charged to oppose summary judgment as to lower back and rib injuries he suffered after falling in his bathtub in February 2009. Claimant alleged that the fall occurred as a result of leg weakness caused by his compensable March 2000 low back injury. Notably, a similar mechanism of injury – leg weakness causing a fall in December 2000 – was what precipitated Claimant's right shoulder injury and led ultimately to the current litigation.

One of the issues raised by Defendant's summary judgment motion, and addressed in Claimant's opposition, was whether Claimant had "waived any and all claims related to his prior back injury" by withdrawing his claim for benefits related to his bathtub fall. Defendant asserts that the waiver issue had no bearing on Claimant's shoulder injury claim. Upon closer review of

Claimant's opposition motion, I must concur that the viability of his right shoulder claim was never questioned on waiver grounds.

I therefore agree that Claimant's fee award should be reduced by \$841.50, representing 9.35 hours charged for opposing Defendant's summary judgment motion.

Costs Associated with Retrieval of Utah Medical Records

Defendant argues that because Claimant himself knew that he did not treat for his right shoulder injury after moving to Utah in 2006, it was not necessary for him to have obtained and disseminated his Utah medical records, and therefore the expenses associated with doing so should be disallowed. I disagree. Medical records often are relevant not only for what they do contain, but also for what they omit. For that reason, I can well understand why counsel for both sides in a workers' compensation litigation typically find it necessary to obtain and review the records themselves. The incurred expenses were appropriate, and I will not disallow them.

Conclusion

Considering all of the foregoing, I conclude that it is appropriate to reduce Claimant's prior award of costs and attorney fees by \$841.50.

ORDER:

The Commissioner's prior Order, dated October 26, 2011, is rescinded, and Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$3,896.27 and;
2. Attorney fees totaling \$28,133.85.

DATED at Montpelier, Vermont this 28th day of November 2011.

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.