

Roger Rodrigue v. Enterprises Precision Inc.

(January 15, 2015)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Roger Rodrigue

Opinion No. 16F-14WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Enterprises Precision, Inc.

For: Anne M. Noonan
Commissioner

State File No. EE-59475

RULING ON CLAIMANT'S PETITION FOR ATTORNEY FEES AND COSTS

The Commissioner previously decided this claim on November 4, 2014. The issues presented included Claimant's entitlement to ongoing vocational rehabilitation services as well as temporary total and temporary partial disability benefits. The Commissioner ruled in his favor on his claim for disability benefits, but denied his claim for ongoing vocational rehabilitation services.

In accordance with 21 V.S.A. §678(e), Claimant now has submitted his petition for costs totaling \$104.49 and attorney fees totaling \$8,684.05. Defendant objects to this request on various grounds.

According to 21 V.S.A. §678(a), when a claimant prevails after formal hearing necessary litigation costs "shall be assessed" against the employer. The Commissioner has discretion to award attorney fees to a prevailing claimant as well.

The Supreme Court has held that a claimant does not automatically forfeit entitlement to costs and fees under §678(a) merely because he or she did not prevail as to every issue litigated at formal hearing. *Hodgeman v. Jard*, 157 Vt. 461, 465 (1991). With that in mind, where the claimant only partially prevails, the Commissioner typically endeavors to award only those costs that relate directly to the successful claims. *See, e.g., Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003).

It is not always possible to separate out the costs that are attributable to a successful claim as opposed to an unsuccessful one, however. I find from Claimant's submission that all of his costs are recoverable.

As for attorney fees, the Commissioner typically exercises the discretion granted by the statute to award only those attorney fees that are commensurate with the extent of the claimant's success. *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003). In the decision rendered November 6, 2014, the Commissioner directed Claimant to submit his request for attorney fees relative to the claim upon which he prevailed - the claim for indemnity benefits.

Claimant's request for attorney fees can be divided into three different categories. One category involves hours billed that are not recoverable at all. The second involves hours billed that are recoverable *in toto*. And the third group involves hours billed that cover both claims and are therefore recoverable commensurate with Claimant's success at formal hearing.

Unrecoverable Attorney Fees

The entries submitted for April 4, 2014 and May 9, 12, 13, and 20, 2014 are not recoverable at all. The two April 4, 2014 entries do not indicate that they concern the claim for indemnity benefits. The four May 2014 entries involve a claim of harassment Claimant alleged against a co-worker and do not involve the indemnity claim. All of these entries total 2.58 hours. Claimant is not entitled to attorney fees for these hours.

Recoverable Attorney Fees In Toto

Except for the four May 2014 entries involving the harassment claim noted above, the billing entries from April 8, 2014 through May 27, 2014 were devoted to pursuing Claimant's claim for indemnity benefits. These entries detailed time his attorney spent communicating with the Department's specialist on this issue. Similarly, the entries for June 26, 27, 30 and the first entry for July 1, 2014 dealt with requesting and reviewing payroll records necessary to pursue his claim for indemnity benefits. These hours, which together total \$2,727.45 (18.81 hours at \$145.00 per hour), are recoverable.

Attorney Fees Commensurate with Claimant's Success

The following entries in Claimant's submission concern both the issue of ongoing vocational rehabilitation services and the entitlement to indemnity benefits: five entries between June 13, 2014 and June 25, 2015, the second entry for July 1, 2014, nine of the claimed eleven hours on July 2, 2014 and all of the entries between July 9, 2014 and November 14, 2014. These entries totaled 36.5 hours.

Here, the issue upon which both parties concentrated most of their efforts at hearing and in their post hearing submissions was Claimant's ongoing entitlement to vocational rehabilitation services. This is the issue upon which Claimant failed to prevail. The issues upon which he succeeded represented a far less significant investment of skill, time and effort. Under these circumstances, I find it appropriate to award Claimant thirty percent of the fees he has requested in this category, or \$1,787.75.

Day of Formal Hearing

Claimant's attorney requested eleven billable hours for the day of the formal hearing for travel, meeting with Claimant and the actual hearing. Two hours are recoverable *in toto* for the travel to and from the hearing, or \$290.00. The other nine hours are accounted for in the previous paragraph.

ORDER:

Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$104.49; and
2. Attorney fees totaling \$4,605.20.

DATED at Montpelier, Vermont this 15th day of January 2015.

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.