

**STATE OF VERMONT
DEPARTMENT OF LABOR**

David Brown

Opinion No. 19A-15WC

v.

By: Phyllis Phillips, Esq.
Administrative Law Judge

Casella Waste Management

For: Anne M. Noonan
Commissioner

State File No. Y-00301

**RULING ON CLAIMANT'S PETITION FOR AWARD OF ATTORNEY FEES
AND COSTS**

The Commissioner previously decided this claim on September 3, 2015. Four disputed issues were presented: (1) Claimant's entitlement to retroactive and ongoing temporary total disability benefits on account of his July 13, 2006 compensable work injury; (2) medical benefits covering a recent course of physical therapy; (3) medical benefits covering Claimant's ongoing use of Suboxone for pain management; and (4) a determination whether the work injury had aggravated or exacerbated Claimant's preexisting anxiety and depression.

The Commissioner ruled in Claimant's favor as to Defendant's responsibility to pay for both the physical therapy and the ongoing Suboxone prescriptions. She ruled against him on his claim for additional temporary total disability benefits, and also on his claim for workers' compensation benefits referable to the alleged aggravation of his preexisting anxiety and depression.

In accordance with 21 V.S.A. §678(e), Claimant now submits his petition for costs totaling \$1,663.42 and attorney fees totaling \$16,443.00 (113.4 hours at \$145.00 per hour).

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. Here, for example, most of the costs Claimant incurred were for Dr. Johansson's and Dr. Erickson's expert witness depositions. Although some portion of each deposition was devoted to issues upon which he failed to prevail, both were necessary components of his success with respect to the claims he won. With that in mind, I conclude that it is appropriate to award Claimant all of the costs he has requested, totaling \$1,663.42.

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). Other factors deserve consideration as well, such 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. *Id.*, and cases cited therein.

The issues upon which both parties concentrated most of their efforts here were Claimant's entitlement to temporary total disability benefits, which he lost, and Defendant's responsibility to pay for his ongoing use of Suboxone, which he won. The latter issue in particular posed a question that has not previously been litigated in this forum, and for that reason required greater skill and effort to present successfully. And although the cost to Defendant in dollars may be less than the cost of the temporary disability benefits Claimant sought, the value of having ongoing prescription coverage is substantial.

Weighing all of these considerations, and acknowledging that the exercise of discretion in these matters is at best an imperfect science, I find it appropriate to award Claimant a total of \$7,743.00 in attorney fees.¹

I acknowledge Claimant's argument that because all of the issues he litigated involved a "common core of facts," there should be no reduction of his fees at all. Claimant cites to the Supreme Court's ruling in *The Electric Man v. Charos*, 2006 VT 16, as support. In that case, the Supreme Court admonished the trial court against viewing a lawsuit between a contractor and a homeowner as "a series of discrete claims" in fashioning an award of attorney fees to the "substantially prevailing party" under 9 V.S.A. §4007(c), the so-called "prompt payment act." *Id.* at ¶10, citing *L'Esperance v. Benware*, 2003 VT 43. Given that in such lawsuits "virtually all of the evidence is relevant to all of the claims," the court reasoned that it was too difficult to allocate or apportion the attorney hours expended on a claim-by-claim basis. *Id.*

Litigation in the workers' compensation arena, however, typically involves exactly the type of separate and distinct claims, for separate and distinct statutory

¹ This amount represents one half of the total fees requested, after deducting charges that either (a) did not pertain to the disputed issues tried at formal hearing; and/or (b) were incurred after the record-closing date (except for those pertaining to drafting the pending fee petition). The hours deducted totaled 6.6, leaving a balance of 106.8.

benefits, that the Court could not discern in *The Electric Man*. Thus, for example, although the determination of an injured worker's entitlement to one benefit may share the same "common core of facts" relevant to the initial work-related accident as his or her claim for another benefit, each is likely nevertheless to stand or fall based on its own distinct factual and/or legal analysis.

I find that to be the case here. Here, Claimant's claim for temporary total disability benefits was denied in large part because the expert testimony he presented did not credibly establish the required causal relationship between his current disability and his 2006 work injury. However, alluding to entirely separate facts as a basis for their opinions, the same experts testified convincingly that Claimant's ongoing use of Suboxone for chronic pain management was medically necessary and causally related, and therefore constituted reasonable treatment. The injury upon which both claims were based was the same, but after that, the evidence triggered entirely separate factual and legal analyses.

Given the particular circumstances of this case, I therefore conclude that it is a proper exercise of the discretion granted by §678(a) to apportion Claimant's entitlement to attorney fees with reference to the extent of his success on the various claims he litigated.

ORDER:

Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$1,663.42; and
2. Attorney fees totaling \$7,743.00.

DATED at Montpelier, Vermont this ____ day of _____, 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.