

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Karen Kendrick

Opinion No. 07A-16WC

v.

By: Phyllis Phillips, Esq.
Administrative Law Judge

LSI Cleaning Service, Inc.

For: Anne M. Noonan
Commissioner

State File No. DD-51585

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

The Commissioner previously decided this claim on May 2, 2016. Four disputed issues were presented: (1) Whether Claimant had reached an end medical result as of September 26, 2014, the date upon which Defendant terminated her temporary disability benefits; (2) if not, whether Claimant was entitled to temporary disability benefits from that date through April 30, 2015; (3) whether Claimant was entitled to additional permanent partial disability benefits in accordance with Dr. Ensalada's five percent additional impairment rating; and (4) whether Defendant was obligated to pay the \$1,750.00 charge billed for Dr. Ensalada's permanency evaluation.

The Commissioner ruled in Claimant's favor on the first issue. As to the second issue, she awarded some, but not all, of the additional temporary disability benefits Claimant had sought. Similarly, she awarded only two percent of the five percent additional permanency Dr. Ensalada had rated. Last, having concluded that Claimant had "substantially prevailed," she ordered Defendant to pay the charges associated with Dr. Ensalada's evaluation as a litigation expense under 21 V.S.A. §678(a).

In accordance with 21 V.S.A. §678(e), Claimant now submits her petition for costs totaling \$4,340.51 and attorney fees totaling \$7,656.00 (52.8 hours at \$145.00 per hour).¹

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.

Defendant's Opposition to Requested Costs

Defendant objects to an award of the costs claimed for Dr. Ensalada's and Dr. Pierson's expert testimony on the grounds that they exceed the \$300 maximum hourly rate imposed by the workers' compensation medical fee schedule for deposition testimony, Workers' Compensation Rule 40.111(A). Claimant counters that the recent amendments to 21 V.S.A. §678(a) have superseded the rule, such that expert witness fees are now fully reimbursable.

¹ Included in this amount is an additional \$217.50, representing 1.5 hours spent responding to Defendant's opposition to Claimant's initial request for fees. See *Human Rights Commissioner v. LaBrie*, 164 Vt. 237, 252 (1995) (citation omitted) (allowing attorney fees for time spent preparing motion for fees).

As amended in 2014, §678(a) now reads:

Necessary costs of proceedings under this chapter, including deposition expenses, subpoena fees, and expert witness fees, shall be assessed by the Commissioner against the employer or its workers' compensation carrier when the claimant prevails. (Added language underlined).

Notably, the amended statute does not require that deposition and expert witness fees be limited in accordance with the workers' compensation medical fee schedule, as is the case with respect to reimbursement for medical services and supplies generally under 21 V.S.A. §640(c). Certainly had the Legislature desired to do so, it could have. That it chose not to is telling. *Smiley v. State of Vermont*, 2015 VT 42, ¶29.

To the extent that the rule now conflicts with the statute, the statute must control. *See In re Agency of Administration, State Buildings Division*, 141 Vt. 68, 80 (1982) (holding improper Environmental Board's interpretation of rule in such a manner as to violate statute); *Smiley, supra* (rejecting commissioner's interpretation of rule as inconsistent with statute). I thus conclude that the hourly fee limitations that Rule 40.111(A) purports to impose on charges for expert medical testimony are no longer valid. Provided that such charges are reasonable, they are fully reimbursable under §678(a).

I further conclude that the amendment to §678(a) is properly characterized as procedural rather than substantive, and therefore can be applied retroactively in this case. *Smiley, supra* at ¶¶17-18. The amended language did not create a new right to reimbursement for litigation costs; it merely clarified the types of expenses for which reimbursement can be sought.

Applying §678(a) as amended, I conclude that the expenses referable to Drs. Ensalada and Pierson's formal hearing testimony are fully reimbursable notwithstanding that they exceed the maximum hourly charge allowed under Rule 40.111(A).

As for Defendant's objection to certain other costs as impermissibly unspecified, I do not find that (a) postage charges totaling \$0.98 for two letters; or (b) copying charges totaling \$20.90 for 209 copies are so general as to warrant either outright rejection or further explanation. These are allowed as well, therefore.

Defendant's Opposition to Requested Attorney Fees

Regarding 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.

As Defendant correctly observes, although Claimant substantially prevailed, she did not recover one hundred percent of the benefits she sought. The Commissioner's Order awarded only 70 percent of the temporary disability benefits she had sought (22 of 31 weeks), and only 40 percent of the permanency benefits she requested (11 of 27.5 weeks). In all, Claimant recovered benefits totaling \$15,738.13,² or approximately 65 percent of the total she had sought.

In fashioning an award of attorney fees, I agree that it is appropriate to consider the extent of Claimant's success. I disagree, however, that "success" can only be measured by comparing what she sought to what she recovered. "Success" also includes consideration of what Defendant was ordered to pay versus what it asserted it owed, which in this case was zero.

I also disagree with Defendant's assertion that Claimant's attorney fees should be calculated on a contingent rather than hourly basis, as is permitted under Workers' Compensation Rule 20.1300. Doing so would reduce her fees below what is reasonable considering the work performed and the skill required.

Considering all of the above, I conclude in this case that it is appropriate to award Claimant 80 percent of the total fees incurred, or \$6,118.40.

ORDER:

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

1. Costs totaling \$4,340.51; and
2. Attorney fees totaling \$6,118.40.

DATED at Montpelier, Vermont this ____ day of July 2016.

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.

² This amount includes both interest on the indemnity benefits awarded and the fee for Dr. Ensalada's permanency evaluation.