

Robert Bruno v. Directech Holding Co.

(August 5, 2010)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Robert Bruno

Opinion No. 18A-10WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Directech Holding Co.

For: Valerie Rickert
Acting Commissioner

State File No. Y-50514

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

The Commissioner previously decided this claim on May 19, 2010. Two issues were presented: first, whether Claimant had reached an end medical result for his work-related injury, and if so, when that occurred; and second, what the appropriate permanent impairment rating referable to Claimant's injury was.

The Commissioner ruled in Claimant's favor on the first issue, finding that he was entitled to an additional 66 weeks of temporary disability benefits. As to the second issue, however, the Commissioner ruled that Defendant's expert opinion was more credible. Had the Commissioner accepted Claimant's expert opinion, he would have been awarded an additional 44.55 weeks of permanency benefits over and above what he received in accordance with Defendant's proffered rating.

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.

Here, Claimant prevailed only on his claim for temporary disability benefits, but not on his claim for additional permanency benefits. In such cases, the commissioner routinely awards only those costs that relate directly to the successful claim. As for attorney fees, the award typically is reduced to be commensurate with the extent of the claimant's success. *See, e.g., Hill v. CV Oil Co.*, Opinion No. 15-09WC (May 26, 2009); *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003).

Citing to *Electric Man v. Charos*, 179 Vt. 351 (2006), Claimant asserts that because both of the issues he litigated involved the same core of primary facts, there should be no apportionment of his costs and attorney fees between the claim he won and the claim he lost. I disagree. In contrast to the situation that the Supreme Court considered in *Electric Man*, the claims that Claimant litigated here were for separate and distinct statutory benefits that required separate and distinct proof. Under these circumstances, it is appropriate to fashion an award of costs and fees that compensates Claimant only to the extent that he prevailed.

With that standard in mind, I find that Claimant's allowable costs should be reduced by those relating to Dr. Zweber's testimony, which was directed primarily towards the permanency issue. This reduction totals \$3,000.00. Subtracting that amount from the total requested, \$5,860.61, leaves a balance of allowable costs totaling \$2,860.61.

As for attorney fees, Claimant has requested an award of \$11,844.00. I acknowledge how difficult it is to separate out the extent to which Claimant's attorney's efforts were devoted to the successful claim versus the unsuccessful one. I find it appropriate to award 75 percent of that amount, or \$8,883.00.

In accordance with the above, Defendant is hereby **ORDERED** to pay costs totaling \$2,860.61 and attorney fees totaling \$8,883.00.

DATED at Montpelier, Vermont this 5th day of August 2010.

Valerie Rickert
Acting Commissioner