

Deborah Lydy v. Trustaff Inc

(April 27, 2012)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Deborah Lydy

Opinion No. 05A-12WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

Trustaff, Inc.

For: Anne M. Noonan
Commissioner

State File No. Z-63780

RULING ON CLAIMANT'S PETITION FOR ATTORNEY FEES AND COSTS

The Commissioner previously decided this claim on February 8, 2012. Claimant had presented four issues for determination. Three of the four issues related to the extent of the injuries she suffered as a result of her May 21, 2008 work accident, specifically, whether she had suffered (1) a psychological injury; (2) a left ankle injury; and/or (3) a left knee injury. The fourth issue addressed whether Defendant's contribution to Claimant's group health insurance premium should have been included in her average weekly wage and compensation rate calculation.

The Commissioner ruled in Claimant's favor on the first issue, and against her on the other issues.

In accordance with 21 V.S.A. §678(e) and Workers' Compensation Rule 10, Claimant now has submitted her petition for costs totaling \$3,975.25 and attorney fees totaling \$26,839.50. This amount represents a total of 194.2 hours billed, minus a 5 percent proposed reduction in consideration of the claims upon which she failed to prevail.

Defendant objects to Claimant's fee request on the grounds that the proposed fee reduction does not adequately reflect the number of hours billed on account of her unsuccessful claims. It notes that Claimant's attorney began representing her in July 2008 but did not allege a psychological injury until February 11, 2010. Defendant argues that any fee award should reflect this fact, and should not include the 60.2 hours billed prior to that date.

For the same reason, Defendant objects to any costs incurred prior to February 11, 2010. Last, Defendant objects to \$412.41 in costs incurred after that date on the grounds that these were unrelated to Claimant's psychological claim.

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. *Id.* Where the claimant prevails on some, but not all of the disputed issues, the award of fees and costs typically is tailored to cover only those costs that relate directly to the successful claims, and only those fees that are commensurate with the extent of his or her success. *Lyons v. American Flatbread*, Opinion No.

36A-03WC (October 24, 2003); *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003).

I conclude from reviewing Claimant's petition that all of the requested costs reasonably can be attributed to her successful psychological claim rather than to the claims upon which she failed to prevail. All of the requested costs are allowed, therefore.

As for attorney fees, I conclude that although Claimant's attorney did not allege a psychological injury prior to February 11, 2010 it would be unfair to ignore entirely his work up until that date. Given the complexity of her psychological claim, Claimant would have had a much more difficult time proving her entitlement to benefits had her attorney not already been intimately familiar with the facts of her case. With this in mind, I conclude that it is reasonable to award Claimant 50 percent of the hours her attorney expended prior to February 11, 2011, or 30.1 hours.

I conclude that 18 of the attorney hours billed after February 11, 2011 were not related to Claimant's psychological claim, and therefore these are excluded as well.

The total amount of attorney fees awarded, therefore, is \$21,184.50, representing 146.1 hours billed.

ORDER:

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

1. Costs totaling \$3,975.25; and
2. Attorney fees totaling \$21,184.50.

DATED at Montpelier, Vermont this 27th day of April 2012.

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.