

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Barbara Grimes

Opinion No. 17A-12WC

v.

By: Jane Woodruff, Esq.
Hearing Officer

City of Burlington

For: Anne M. Noonan
Commissioner

State File No. AA-59038

RULING ON CLAIMANT'S PETITION FOR COSTS AND ATTORNEY FEES

The Commissioner previously decided this claim on June 6, 2012. The disputed issue was whether or not Claimant's right shoulder pain and discomfort were causally related to her compensable work related injuries. Claimant prevailed on this claim and was awarded medical benefits.

In accordance with 21 V.S.A. §678(e), Claimant submitted an initial petition for costs totaling \$3,372.40 and attorney fees totaling \$7,544.00. 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 objected to several expert witness costs, specifically:

- \$675.00 for Dr. Davignon's "Depo Prep/Depo-Balance not paid by OppAtty," dated 12/19/2011;
- \$1,400.00 for "Assoc in OrthopSurg [sic] –Prepay-Dr. Frenzen Prep & Depo," dated 1/24/2012; and
- \$787.50 for "Dr. PDavignon – Telephone Testimony and Prep," dated 4/9/2012.

Defendant argued that these costs exceeded the maximum allowed by the Workers' Compensation Fee Schedule (Rule 40). Defendant did not raise any objection to the amount of attorney fees.

Claimant responded to Defendant's objection with a modified request of \$2,684.90. Claimant revised her request for reimbursement for Dr. Frenzen's discovery and preservation depositions to \$300.00 per deposition. As those costs comply with Rule 40, they are allowed, for a total of \$600.00.

With respect to Dr. Davignon's deposition preparation and testimony, I find that Dr. Davignon is entitled to be reimbursed for the time he spent reviewing Claimant's lengthy medical file, 1.75 hours at the rate of \$350.00 per hour, or \$612.50.¹ Clearly, Claimant also is entitled to recoup the costs associated with Dr. Davignon's deposition testimony as well, a total of 1.25 hours at \$300.00 per hour, or \$375.00. The total amount awarded for Dr. Davignon's deposition preparation and testimony, therefore, is \$987.50.

With respect to the formal hearing, Dr. Davignon spent 1.25 hours reviewing the medical file and 45 minutes in actual testimony. He charged \$350.00 per hour for his records review. I find that this is a recoverable cost and therefore award Claimant \$437.50 for this preparation. In accordance with Rule 40, Claimant is entitled to reimbursement of \$300.00 for Dr. Davignon's hearing testimony.

The total allowable of the disputed costs is \$2,325.00. When added to the undisputed costs of \$509.90, the sum total of allowable costs is \$2,834.90.

ORDER:

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

1. Costs totaling \$2,834.90; and
2. Attorney fees totaling \$7,544.00.

DATED at Montpelier, Vermont this 8th day of August 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.

¹ Such charges, for time spent reviewing a claimant's medical file, are to be distinguished from charges for time spent discussing the expert's anticipated testimony with the claimant's attorney. The latter are considered a matter of litigation strategy, and are not recoverable. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03WC (October 22, 2003).