

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Thomas Kibbie

Opinion No. 05A-16WC

v.

By: Jane Woodruff, Esq.
Administrative Law Judge

Killington, Ltd.

For: Anne M. Noonan
Commissioner

State File No. Z-58225

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

The Commissioner previously decided this claim on February 23, 2016. Two disputed issues were presented: (1) whether ongoing treatment for Claimant's neck pain was within the terms of the medical benefits foreclosed by the parties' Modified Form 15 Settlement Agreement; and (2) to what other medical benefits, if any, was Claimant entitled.

The Commissioner ruled in Claimant's favor as to Defendant's responsibility to pay for treatment referable to his vision deficits, dental injuries, headaches and psychological condition. She ruled against him on his claim that the Settlement Agreement did not foreclose treatment for his cervical injury, and also on his claim for mileage reimbursement.

In accordance with 21 V.S.A. §678(e), Claimant now submits his petition for costs totaling \$719.00 and attorney fees totaling \$14,752.00.

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.

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, all of the costs Claimant incurred were for Dr. Miller's expert witness deposition. Although some portion of this deposition was devoted to issues upon which he failed to prevail, it was a necessary component 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 \$719.00.

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.

Claimant submitted a request for attorney fees totaling \$14,752.00. His request was supported by detailed time entries documenting a total of 64.5 attorney hours expended in pursuing his claim. At \$145.00 per hour, the maximum rate at which attorney fees can be awarded to a prevailing claimant under Workers' Compensation Rule 10.1210,¹ I consider the total amount of his fee request to be \$9,352.50.

The issues upon which both parties concentrated most of their efforts were Claimant's entitlement to treatment for his cervical injuries, which he lost, and Defendant's responsibility to pay for his vision deficits, dental injuries, headaches and psychological treatment, which he won. In monetary terms, the treatment for Claimant's dental injuries alone are quite substantial. Combining that treatment with ongoing treatment for his headaches, vision deficits and psychological treatment may well exceed the costs for the cervical treatment that he also sought, but did not prevail on.

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 one-half of the hours he sought, or 32.25 hours. At the appropriate reimbursement rate of \$145.00 per hour, this yields a total award of \$4,676.25.

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.

¹ Rule 10.1210 is now re-codified as Rule 20.1310.

ORDER:

Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$719.00; and
2. Attorney fees totaling \$4,676.25.

DATED at Montpelier, Vermont this 24th day of May 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.