

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Michael Hathaway

Opinion No. 03F-17WC

v.

By: Phyllis Phillips, Esq.
Administrative Law Judge

Engineers Construction, Inc.

For: Lindsay H. Kurrle
Commissioner

State File No. FF-55659

RULING ON CLAIMANT'S REQUEST FOR ATTORNEY FEES AND COSTS

The Commissioner previously decided this claim on February 10, 2017 and issued an amended opinion and order on February 27, 2017. The parties had presented five disputed issues at hearing: (1) whether Claimant's low back condition was causally related to his 2013 work accident; (2) whether his work injury aggravated his pre-existing erectile dysfunction; (3) whether he suffered a traumatic brain injury causally related to his work accident; (4) whether his complaints of depression were causally related to his work injury; and (5) whether he had reached an end medical result.

Defendant prevailed on four out of five claims. The Commissioner found that Claimant's low back condition, erectile dysfunction and depression were not causally related to his 2013 work accident. She further found that he was at an end medical result for his accepted shoulder injury. Claimant prevailed only on his claim that he had sustained a mild traumatic brain injury causally related to his work accident.

As Claimant prevailed on one issue, the Commissioner invited him to submit a request for costs and attorney fees commensurate with the extent of his success. In accordance with 21 V.S.A. §678(e), Claimant has submitted a petition for costs totaling \$13,634.28 and attorney fees totaling \$11,469.15.

Statutory Basis for Awarding Costs and Attorney Fees

Vermont's workers' compensation statute requires the Commissioner to assess the necessary costs of proceedings against the employer or its carrier, and grants discretion to award reasonable attorney fees, "when the claimant prevails." 21 V.S.A. §678(a).

The Supreme Court has held that a claimant does not automatically forfeit entitlement to costs and attorney fees under §678(a) merely because he or she did not prevail on every issue litigated at the formal hearing. *Hodgeman v. Jard Co.*, 157 Vt. 461, 465 (1991). The Commissioner instead considers the extent of the claimant's success in making any such awards. See *Workers' Compensation Rule 20.1100* (providing that the Commissioner may award reasonable attorney fees to an injured worker who "substantially prevails" in either formal or informal dispute resolution procedures).

Where the claimant only partially prevails, the Commissioner typically endeavors to award only those costs that are "clearly related" to the successful claims. *See, e.g., Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003).

The parties here devoted most of their efforts and resources to Claimant's low back and end medical result claims. The low back claim in particular was complex and highly contested. Had Claimant prevailed on these claims, his resulting entitlement to benefits would have been substantial.

Claimant devoted significantly less time and resources to the remaining three claims, and as noted above, prevailed only on the traumatic brain injury claim. That injury was relatively minor, did not cause any disability from work, had no effect on end medical result and required no ongoing medical treatment.

Thus, while I acknowledge that Claimant's victory on the traumatic brain injury claim appropriately triggers his right to an award of attorney fees and costs, I must also acknowledge that most of the costs and fees he incurred were more closely related to the claims he lost.

Costs

Claimant seeks reimbursement of the following litigation costs: (a) \$9,612.50 for Dr. Huyck's evaluation and testimony; (b) \$250.00 for consultation with Dr. Lishnak; (c) \$1,622.75 for Dr. Boucher's depositions; (d) \$89.10 for Claimant's own deposition; (e) \$1.36 for postage; (f) \$258.57 for medical records; and (g) \$1,800.00 for a functional capacity evaluation.

I find that the medical records, deposition and postage costs, which total \$349.03, are sufficiently related to the claim upon which he prevailed to justify reimbursement. The functional capacity evaluation was not related, and therefore that cost is excluded.

The costs associated with the medical expert evaluations and testimony, which between Drs. Huyck, Lishnak and Boucher total \$11,485.25, require further consideration. It is common for expert witnesses to testify about multiple issues, and separating out the costs attributable to their testimony on successful versus unsuccessful claims is not always possible. In such situations, the Commissioner has discretion to award the full costs to the claimant. *See, e.g., Griggs v. New Generation Communication*, Opinion No. 30A-10WC (December 29, 2010); *Brown v. Casella Waste Management*, Opinion No. 19A-15WC (December 4, 2015).

While this approach is generally reasonable, the circumstances here weigh against it. Here, the extent of Claimant's success was so small that it would be manifestly unfair to award him the full costs associated with the medical expert evaluations and testimony, most of which dealt primarily with the issues he lost. Recognizing that allocating costs among various claims is inherently inexact, and taking into consideration both his counsel's time and effort in securing victory on the claim in which he prevailed and that claim's potential value, I allocate ten percent of the costs associated with Dr. Huyck's, Dr. Lishnak's and Dr. Boucher's charges to the successful traumatic brain injury claim, for a total of \$1,148.53.

I thus allocate costs totaling \$1,497.56 to the single claim upon which Claimant prevailed.

Attorney Fees

Claimant seeks an award of 45 percent of the total hours billed by his attorney for work on his claim.

An award of attorney fees to a prevailing claimant is discretionary under 21 V.S.A. §678(a). 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. *Estate of Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003). Other relevant factors include the extent to which 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 considering the difficulty of the issues and the time expended. *Id.*; *Griggs v. New Generation Communication*, Opinion No. 30A-10WC (December 29, 2010).

Determining what percentage of an attorney's time and effort was "commensurate with the extent of the claimant's success" does not necessarily require a straight ratio of "claims won" to "claims lost." Here, the single claim on which Claimant prevailed represented a far less significant investment of skill, time and effort and resulted in a relatively minimal award. His attorney fee award should reflect that.

Defendant estimates that the low back and end medical result claims consumed at least 90 percent of the parties' efforts, with the remaining ten percent allocated equally among depression, erectile dysfunction and minor traumatic brain injury. Accordingly, Defendant contends that the traumatic brain injury consumed no more than 3.33 percent of the parties' litigation efforts and that the award of attorney fees, if any, should be limited to that percentage of the total fee.

The Commissioner endorsed Defendant's approach in *Griggs v. New Generation Communication*, Opinion No. 30A-10WC (December 29, 2010). There the claimant pursued three claims, prevailing on the claim to which the parties devoted most of their efforts and achieving some success on a second claim. Based on the time and effort expended, and the relative value of the claims on which he prevailed, the Commissioner awarded the claimant ninety percent of the fees he requested. *See also Wood v. Hoiles*, Opinion No. 30-02WC (July 10, 2002) (awarding attorney fees of just ten percent of total hours worked when claimant prevailed on a claim for limited medical benefits but not on her claims for temporary total benefits or a cervical injury).

Claimant attempts to circumvent this approach by citing two cases outside the realm of workers' compensation. *The Electric Man, Inc. v. Charos*, 2006 VT 16, involved a dispute between a contractor and a homeowner. The contractor prevailed on several claims and sought an award of attorney fees under the Prompt Payment Act, 9 V.S.A. §4007(c). The Court held that the contractor's claims should not be viewed as a series of discrete claims for purposes of allocating attorney fees because the claims shared one common core of facts that formed the basis for multiple theories of recovery. *The Electric Man*, at ¶10. Accordingly, virtually all the evidence was relevant to all the claims, and attorney fees could not be apportioned among them. *Id.*

The other case Claimant cites, *L'Esperance v. Benware*, 2003 VT 43, was a landlord-tenant dispute. The tenants brought an action for multiple claims, including violation of the Consumer Fraud Act. The court granted the landlord summary judgment on some claims, and the jury awarded the tenants damages for negligence and consumer fraud. On appeal, the Supreme Court found that the tenants were entitled to an award of all their attorney fees under the Consumer Fraud Act, not just the fees related to the consumer fraud claim, because their claims had all involved a common core of facts.

Relying on both *The Electric Man* and *L'Esperance*, Claimant here contends that because his claims involved a common core of facts, he is entitled to an award of attorney fees without having to allocate his time specifically to one or another of them.

Workers' compensation claims are distinguishable from the type of claims involved in either *The Electric Man* or *L'Esperance*, however. An injured worker's claimed entitlement to different workers' compensation benefits is typically grounded in the same "common core of facts," in the sense that all of the benefits claimed derive from the same underlying work accident. Nevertheless, each claim must be considered separately, and will succeed or fail based on its own distinct factual and/or legal analysis. *Griggs v. New Generation Communication*, Opinion No. 30A-10WC (December 29, 2010), *see also Brown v. Casella Waste Management*, Opinion No. 19A-15WC (December 4, 2015).

Here, for example, Claimant's claim for benefits referable to his low back condition failed in large part because the expert testimony he presented did not credibly establish the required causal connection between his 2013 work accident and his ongoing symptoms. However, alluding to entirely separate facts as a basis for her opinion, the same expert testified convincingly that Claimant sustained a mild traumatic brain injury in the 2013 work accident. The accident upon which both claims were based was the same, but after that, the evidence triggered entirely separate factual and legal analyses.

I conclude that it is a proper exercise of discretion under 21 V.S.A. §678(a) to apportion Claimant's entitlement to attorney fees in accordance with the extent of his success on the claims he litigated. Under the particular circumstances presented by this case, I conclude that it is appropriate to apportion ten percent of his attorney's time to the single claim upon which he prevailed.

Calculation of the Attorney Fees Award

Workers' Compensation Rule 20.1310 was amended effective November 1, 2016 to increase the maximum hourly rate for attorney fee awards from \$145.00 to \$200.00. The increased rate applies to work performed on or after November 1, 2016. *Jalbert v. Springfield School District*, Opinion No. 04-17WC (February 16, 2017).

Claimant's counsel submitted an itemized statement of his hours, documenting a total of 129.9 hours on the case through April 21, 2016, the date on which the record closed. Of the additional billings thereafter, I have disallowed all but 3.8 hours ó 1.2 hours spent preparing a successful motion to strike, and 2.6 hours preparing the pending fee petition.¹

Applying the rate of \$145.00 per hour for the 129.9 hours billed prior to November 1, 2016 yields a fee of \$18,835.50. Ten percent of this amount, or \$1,883.55, is allocated to the successful mild traumatic brain injury claim. In addition, applying the rate of \$200.00 per hour for the 3.8 hours spent on the fee petition and the successful motion to strike yields an additional fee of \$760.00. The attorney fee award thus totals \$2,643.55.

ORDER:

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

1. Costs totaling \$1,497.56; and
2. Attorney fees totaling \$2,643.55.

DATED at Montpelier, Vermont this 11th day of April 2017.

Lindsay H. Kurrle
Commissioner

¹ A prevailing claimant may include the time spent preparing a fee petition in his or her request for attorney fees. *Kendrick v. LSI Cleaning Service, Inc.*, Opinion No. 07A-16WC (May 2, 2016), citing *Human Rights Commission v. LaBrie, Inc.*, 164 Vt. 237, 252 (1995).