

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Stacey Bowen

Opinion No. 16F-19WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Novartis Pharmaceuticals
Corporation

For: Michael A. Harrington
Interim Commissioner

State File No. GG-63655

RULING ON CLAIMANT’S REQUEST FOR COSTS AND ATTORNEY FEES

On October 8, 2019, Claimant submitted a petition seeking costs and attorney fees related to the formal hearing in this matter. Defendant filed a response on November 5, 2019.

The parties presented two issues at hearing: (1) whether Claimant was entitled to additional vocational rehabilitation services, when it was undisputed that she could not return to her pre-injury average weekly wage; and (2) if so, was the February 28, 2018 proposed return to work plan, as amended May 24, 2019, reasonably necessary to restore her to suitable employment. Claimant prevailed on the first issue but not the second.

As Claimant partially prevailed, the Commissioner invited her to submit a request for costs and attorney fees commensurate with her success. Claimant has requested costs totaling \$2,321.66 and attorney fees totaling \$28,160.00.

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).

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 may consider 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); *see also Hathaway v. Engineers Construction, Inc.*, Opinion No. 03F-17WC (April 11, 2017) (addressing apportionment when an injured worker only partially prevails). As to costs when 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), citing *Brown v. Whiting*, Opinion No. 07-97WC (1997).

The parties here devoted most of their efforts to the second issue, whether the proposed return to work plan was reasonably necessary. That plan provided for Claimant to return to college to obtain a Bachelor of Science in Nursing degree. Had she prevailed on this claim, her resulting entitlement to benefits would have been substantial.

Both parties devoted significantly less time and effort to the first issue, namely whether Claimant was entitled to additional vocational rehabilitation services when it was undisputed that she could not return to her pre-injury average weekly wage. That dispute turned on the legal question of whether her inability to return to her pre-injury wage disqualified her from continued services. Claimant devoted only one paragraph of her proposed findings of fact and conclusions of law to this issue, in which she cited the definition of “suitable wage.”¹ In short, addressing the first issue required a minimal effort from the parties.

Thus, while Claimant’s success on the first issue appropriately triggers her right to an award of attorney fees and costs, I must consider that the substantial majority of the fees she incurred were related to the second issue upon which she did not prevail.

Costs

Claimant seeks reimbursement of the following litigation costs: (a) \$780.00 for the expert witness testimony of Gregory Morneau, certified work capacity evaluator; and (b) \$1,541.66 for mediation.

Mr. Morneau testified about Claimant’s work capacity and, more specifically, whether she had the capacity to work as a nurse case manager. This testimony was relevant to the reasonableness of the proposed return to work plan. It was not relevant to Claimant’s entitlement to vocational rehabilitation services given the fact that she could not return to her pre-injury wage. Thus, I decline to make an award of costs for this expert’s testimony.

Although mediation in workers’ compensation claims is mandatory, the issue on which Claimant prevailed was only one of several issues addressed at mediation. Notably, the mediation addressed not just her workers’ compensation claim but also her third-party claim. In such situations, the Commissioner has discretion as to how much of the cost to award to the claimant. *See, e.g., Griggs v. New Generation Communication*, Opinion No. 30A-10WC (December 29, 2010) (full amount awarded); *Brown v. Casella Waste Management*, Opinion No. 19A-15WC (December 4, 2015) (full amount awarded); *Hathaway v. Engineers Construction, Inc.*, Opinion No. 03F-17WC (April 11, 2017) (ten percent of certain costs allocated to the claims upon which the injured worker prevailed). Here, recognizing that allocating costs among various claims is inherently inexact, I award fifty percent of Claimant’s mediation costs, in the amount of \$770.83.

Attorney Fees

¹ *See* Claimant’s Proposed Findings of Fact and Conclusions of Law, at Conclusion of Law No. 3 (citing Vocational Rehabilitation Rule 51.2700 for the definition of “suitable wage.”)

Claimant also seeks an attorney fee award for the time itemized on the billing statement attached to her Petition as Exhibit B. While acknowledging that an award of fees is appropriate, Defendant objects to a number of the itemized billing entries as unrelated to the issues that went to hearing. In particular, it objects to all billing entries that relate to mediation, as the mediation addressed both her workers' compensation claim and her third-party claim.

Due to the mandatory nature of mediation, the parties would have mediated whether the mediation included a third-party claim or not. Accordingly, I find that the time Claimant's counsel spent attending the mediation to be appropriate for a fee award. However, I also find that counsel spent much more time preparing for mediation than she otherwise would have without the third-party claim, as reflected in the billing entries. I have therefore removed the billing entries for work on the third-party claim, totaling 13.0 attorney hours.² Following this reduction, the attorney time remaining on the itemized billing statement is 127.8 hours.

An attorney fee award 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 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 minimal investment of time and effort compared to the claim she lost. Nevertheless, Defendant did take the position that she was not entitled to ongoing vocational rehabilitation services as she could not return to her pre-injury wage. It was therefore necessary for her to request a hearing and address that issue.

Having reviewed the parties' proposed findings, the Department's September 9, 2019 decision and Claimant's itemized statement, I conclude that Claimant's attorney's efforts on the first issue constituted no more than ten percent of her overall efforts.

In *Griggs v. New Generation Communication*, Opinion No. 30A-10WC (December 29, 2010), 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

² I have removed time entries from the following dates: 8/7/18, 8/9/18, 8/10/18, 8/22/18, 8/24/18, 10/9/18, 10/10/18, 12/12/18, 12/13/18, 1/11/19, 3/5/19, 3/6/19, 3/7/19, 3/8/19 and 3/15/19. In addition, I have reduced by 50 percent the entry dated 12/7/18 for drafting Claimant's mediation statement but have not reduced the entry dated 1/9/19 for finalizing the mediation statement.

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).

Here 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 her success and the value of the claim upon which she prevailed. Although the time devoted to the winning claim was likely less than ten percent of the overall effort, the value of continued vocational rehabilitation services is substantial. Under the particular circumstances presented by this case, I conclude that it is appropriate to apportion 20 percent of Claimant's relevant attorney time to the single claim upon which she prevailed.

Calculation of the Attorney Fee Award

Claimant seeks an award of attorney fees for all time set forth on her itemized statement at the rate of \$200.00 per hour. That hourly rate is within the allowable amount set forth in Workers' Compensation Rule 20.1310, as amended from time to time. Accordingly, I find that hourly rate appropriate.

I have already found that 127.8 hours of attorney time is relevant to the two issues that went to hearing. At \$200.00 per hour, the value of the attorney time spent on those two issues is \$25,560.00. I have further found that 20 percent of the above attorney time may be allocated to the issue upon which Claimant prevailed. Twenty percent of \$25,560.00 yields a fee of \$5,112.00.

Order:

Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$770.83; and
2. Attorney fees totaling \$5,112.00.

DATED at Montpelier, Vermont this 11th day of December 2019

Michael A. Harrington
Interim Commissioner