

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Pamela Whitney

Opinion No. 10F-21WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Porter Medical Center, Inc.

For: Michael A. Harrington
Commissioner

State File No. JJ-64585

RULING ON CLAIMANT'S REQUEST FOR COSTS AND ATTORNEY FEES

On June 2, 2021, Claimant submitted a timely petition seeking costs and attorney fees related to the formal hearing in this matter. Defendant filed a response on June 7, 2021.

The parties presented two issues at hearing: (1) whether Claimant sustained a compensable low back injury as a result of her May 26, 2017 work-related fall; and (2) whether Claimant had reached an end medical result for her compensable May 26, 2017 work-related injuries. Although she failed to prevail on either issue, the Commissioner found that she had established a temporary, work-related *flare up* of her pre-existing low back pain. On that basis, she was awarded medical benefits for the reasonable treatment of her flare up through September 25, 2020. Claimant's fee petition includes a medical lien for this treatment in the amount of \$13,401.47.¹ *Claimant's Attachment B.*

Notably, the Commissioner did not make any award to Claimant for ongoing medical treatment after September 25, 2020, when her flare up returned to baseline. Further, there was no award of temporary disability benefits relating to her low back condition, nor any establishment of a low back injury sustained at work that might form the basis for permanent disability benefits in the future. In short, Claimant's success was limited to a closed period of medical benefits, most or all of which had already been paid by private insurance.

As Claimant nevertheless partially prevailed, the Commissioner allowed her to submit a request for costs and attorney fees commensurate with her success. Claimant has requested costs totaling \$4,791.50 and attorney fees totaling \$8,300.00.

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).

¹ This lien is from Blue Cross. MVP also paid for some treatment, but its lien amount is not currently available.

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). Rather, the Commissioner may consider the extent of the claimant's success in making an appropriate award. *See Hathaway v. Engineers Construction, Inc.*, Opinion No. 03F-17WC (April 11, 2017) (addressing apportionment of fees when an injured worker partially prevails). As to costs, 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).

Concerning the causation of Claimant's low back condition here, the parties devoted significant efforts to addressing whether she sustained a work-related back injury; they did not specifically address whether she suffered a work-related flare up of her pre-existing back pain. Nevertheless, the litigation concerning the causation of her low back condition resulted in the determination that she suffered a flare up. To the extent that she had some success here, Claimant's attorney's efforts resulted in that success.

The parties also devoted time and effort to the end medical result dispute, including preparation and presentation of expert witness testimony. However, Claimant's efforts on this issue did not achieve a favorable result.

Thus, while Claimant's partial success on the first issue makes her eligible for consideration of an award of attorney fees and costs, I must consider that a significant portion of the fees and costs she incurred were related to issues upon which she did not prevail. Recognizing this, Claimant's fee petition reports 93 hours of attorney time and seeks an award of 50 percent of that amount, or 41.5 hours.²

Costs

Pursuant to 21 V.S.A. § 678(a), when a claimant prevails after formal hearing, necessary litigation costs "shall be assessed" against the employer. Where the claimant prevails on just some, but not all, of the disputed issues, the award of costs is generally tailored to cover only those costs that relate directly to the successful claims. *Lydy v. Truststaff, Inc.*, Opinion No. 05A-12WC (April 27, 2012), citing *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003); *Hatin v. Our Lady of Providence*, Opinion No. 21S-03WC (October 22, 2003). With this guidance in mind, I consider Claimant's request for an award of three separate costs.

First, Claimant has submitted an invoice from Catamount Case Management for \$2,704.00 for an employability assessment done by certified vocational rehabilitation counselor Jay Spiegel. *Claimant's Attachment C*. An employability assessment pertains to whether an injured worker is permanently and totally disabled. Although such a report was

² Claimant's fee petition does not include any paralegal time or time spent preparing the fee petition itself, both of which are recoverable. Claimant asks me to take this into consideration in evaluating her petition, and I have done so. In particular, I note that Claimant's counsel's paralegal spent many hours setting up a laptop for Claimant's use and teaching her how to use it, so that she could participate in these proceedings remotely during the pandemic.

likely relevant to the parties' attempts to reach a full and final settlement, no claim for permanent total disability was on the formal docket here. As such, the assessment bears no relationship to the claim upon which Claimant partially prevailed. Accordingly, I find that this cost is not recoverable in the context of Claimant's current fee petition.³

Second, Claimant has submitted an invoice from Dr. Davignon for \$1,487.50 for his expert testimony at the hearing. *Claimant's Attachment C*. Dr. Davignon's testimony addressed both the causation of Claimant's low back condition and her end medical result status. In *Hathaway v. Engineers Construction, Inc.*, Opinion No. 3F-17WC (April 11, 2017), the Commissioner noted that expert witnesses commonly testify about multiple issues and that separating out the costs attributable to testimony on the successful versus the unsuccessful claims may not always be possible. In such situations, the Commissioner has discretion to award the full amount of 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). However, in cases where the extent of a claimant's success is relatively small, it would be manifestly unfair to award the claimant the full amount of his or her costs. *See Hathaway, supra*.

Here, as in *Hathaway*, Claimant's level of success was relatively small. Further, most of Dr. Davignon's hearing testimony addressed the issues upon which she failed to prevail. Recognizing that allocating costs among various claims is inherently inexact, and taking into consideration Claimant's counsel's efforts in securing a positive result on the flare up, as well as the potential value of that portion of her claim, I allocate approximately 25 percent of Dr. Davignon's invoice to the issue on which Claimant partially prevailed, for a recoverable cost of \$400.00.

Third, Claimant is seeking \$600 for her share of the mediator's invoice. Workers' Compensation Rule 20.1600 provides that the "necessary costs" awarded under the statute include mandatory mediation costs. In *Bowen v. Novartis Pharmaceuticals Corporation*, Opinion No. 16F-19WC (December 11, 2019), the claimant was awarded half of her mediation costs after partially prevailing at the formal hearing. In that case, however, the mediation was a global session that included the claimant's third-party claim in Superior Court. No such consideration applies here. Accordingly, I am allowing recovery of Claimant's full mediation costs in the amount of \$600.00.

Attorney Fees

Claimant seeks an attorney fee award based on the itemized statement accompanying her fee petition. The itemized statement shows that her counsel spent 93 hours on her claim from October 7, 2019 through May 25, 2021. *Claimant's Attachment A*. Claimant seeks a fee award of half of that time, in acknowledgement of her limited success.

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. *Lydy v. Truststaff*,

³ If Claimant pursues a permanent total disability claim in the future, and is successful in obtaining benefits, she may submit this cost for consideration in connection with any future fee petition.

Inc., Opinion No. 05A-12WC (April 27, 2012), citing *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003); *Hatin v. Our Lady of Providence*, Opinion No. 21S-03WC (October 22, 2003).

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." In *Hathaway v. Engineers Construction, Inc.*, *supra*, the Commissioner noted that the single claim on which the claimant prevailed represented a far less significant investment of skill, time and effort and resulted in a relatively minimal award. Accordingly, the Commissioner apportioned ten percent of the claimant's attorney's time to the single claim upon which he prevailed.

Similarly, in *Wood v. Hoiles*, Opinion No. 30-02WC (July 10, 2002), the claimant litigated the reasonableness of a particular medical treatment and her end medical result status. The Commissioner ruled in her favor on the medical treatment but not on the end medical result. Although the claimant prevailed on one of two issues, she was awarded ten percent of her attorney fees, not 50 percent. Upon her request for reconsideration, the Commissioner declined to change the fee award, noting that the claimant had also pursued a claim for a work-related cervical injury that she withdrew on the day of hearing. *Wood v. Hoiles*, Opinion No. 30R-02WC (October 7, 2002).

The claimant's level of success in *Wood* is analogous to Claimant's level of success here. Claimant here was awarded medical benefits for treatment of a flare up, but she lost on end medical result and on her effort to establish a work-related back injury for which she could receive indemnity benefits. In fact, Claimant's success here could be characterized as less than *Wood's*, as the medical treatment allowed in *Wood* did not have a specific end date.

Finally, the fee award in *Bowen v. Novartis Pharmaceuticals Corporation*, Opinion No. 16F-19WC (December 11, 2019) is also instructive. The claimant in *Bowen* prevailed on one out of two claims. The Commissioner awarded her 20 percent of her attorney fees on the basis that the claim upon which she prevailed (entitlement to vocational rehabilitation benefits) required significantly less time and effort than the one upon which she lost (reasonableness of her specific return to work plan).

As set forth in the Commissioner's decision in this matter, *Whitney v. Porter Medical Center, Inc.*, Opinion No. 10-21WC (May 5, 2021), Claimant here had limited success on the causal connection between her employment and her back condition, and no success on the end medical result issue. Further, the work-related flare up of back pain that she established resulted in a time-limited award of medical benefits only. Having considered the extent of Claimant's success in the context of *Hathaway*, *Wood* and *Bowen*, I conclude that she is entitled to an attorney fee award of 15 percent of the hours expended by her attorney.

Calculation of the Attorney Fee Award

Claimant's itemized statement sets forth 93 hours of attorney time. Accepting 15 percent of the 93 total attorney hours, I calculate the recoverable time to be 14 attorney hours. All attorney hours were expended after July 1, 2019 and before July 1, 2021. Workers'

Compensation Rule 20.1340 provides for an hourly rate of \$215.00 during this time period. Accordingly, I calculate an attorney fee award of \$3,010.00 (14 hours x \$215.00 per hour).

Order:

Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$1,000.00; and
2. Attorney fees totaling \$3,010.00.

DATED at Montpelier, Vermont this 28th day of July 2021.

Michael A. Harrington
Commissioner