

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Robert Bushey

Opinion No. 07F-22WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Adecco

For: Michael A. Harrington
Commissioner

State File No. HH-57891

RULING ON CLAIMANT'S REQUEST FOR COSTS AND ATTORNEY FEES

The parties presented this claim at a two-day hearing on July 14 and August 11, 2021. On September 30, 2021, Claimant included a request for an award of costs and attorney fees in his proposed findings of fact and conclusions of law. On December 13, 2021, the Commissioner found in Claimant's favor on two of three issues presented at hearing and ordered Defendant to pay costs and attorney fees "commensurate with Claimant's success." Defendant filed a response to Claimant's request for costs and attorney fees on January 14, 2022, and Claimant filed a reply letter on January 20, 2022.

The parties presented three issues at hearing: (1) the date when Claimant reached an end medical result for his work-related back injury; (2) the correct permanent impairment rating for his back injury; and (3) whether he sustained a work-related psychological injury. Claimant prevailed on the first and third issues; Defendant prevailed on the second issue.

Claimant requests an award of costs plus an attorney fee award for at least 66 hours of time expended. Sixty-six hours represents about 80 percent of the total hours expended, as set forth on the attorney time itemization.¹

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 an award of 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 typically exercises the discretion granted by the statute to award those attorney fees that are commensurate with the claimant's success. *Lydy v. Trustaff, Inc.*, Opinion No. 05A-12WC (April 27, 2012), citing *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003). As to costs, the Commissioner typically endeavors to award only those costs that are

¹ Claimant submitted an itemization of 83.2 attorney hours and requested that the amount be reduced by 15 to 20 percent to reflect the degree of his success. See *Claimant's January 20, 2022 reply letter*.

“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).

Attorney Fees

A. Degree of Claimant’s Success

Claimant prevailed on two out of three issues presented at the hearing. The first issue on which he prevailed was end medical result. Claimant’s expert testified that he reached end medical result on August 2, 2018; Defendant’s expert testified that Claimant reached end medical result on April 20, 2018. The Commissioner was persuaded by Claimant’s expert and, as a result, Claimant was entitled to 15 additional weeks of benefits. The second issue on which Claimant prevailed was the establishment of a causal relationship between his psychological condition and his accepted work injury. Accordingly, Claimant is entitled to whatever workers’ compensation benefits flow from that determination. Claimant did not prevail on the parties’ dispute about his permanent impairment rating. On that issue, Defendant’s expert persuaded the Commissioner that Claimant has a 7 percent whole person impairment, rather than the 13 percent whole person impairment that Claimant sought.

Assessing how much of an attorney’s time and effort is commensurate with a claimant’s success is not necessarily a matter of counting the number of issues won and lost and apportioning the fees in that ratio. Rather, it is appropriate to take into consideration 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. *Rowell v. Northeast Kingdom Community Action*, Opinion No. 25-11WC (August 31, 2011), citing *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003).

Here, the psychological injury was the most important issue, and Claimant’s counsel’s efforts were integral to establishing his right to compensation for this injury. This issue required Claimant’s counsel to devote substantial time and effort to presenting relevant evidence, including skillful presentation of testimony from two medical experts and cross examination of Defendant’s medical expert. The other two issues, end medical result and permanent impairment, were minor in comparison, both involving a closed period of additional benefits. Thus, not only did Claimant prevail on two out of three issues, but he prevailed on the most significant issue presented at the hearing. Acknowledging that the allocation of attorney time to the issues won and lost is not an exact science, I conclude that a fair allocation of attorney time is 85 percent to the issues upon which Claimant prevailed and 15 percent to the issue upon which he did not prevail.

B. Specific Line Item Adjustments

Before calculating the attorney fee award based on the above allocation, I find it appropriate to make the following adjustments to the itemized statement of attorney time:

On June 15, 2021, Claimant filed a motion *in limine* to prevent Defendant's expert Dr. White from offering his opinion as to Claimant's permanent impairment on the grounds that he allegedly misapplied the *AMA Guides to the Evaluation of Permanent Impairment*. The motion was denied. On June 30, 2021, Claimant filed a motion to exclude all testimony of Defendant's expert Dr. Nash on the grounds that his testimony would be immaterial and prejudicial. That motion was also denied. After the hearing, on August 26, 2021, Claimant filed a post-hearing motion to strike the hearing testimony of Dr. Nash. That motion was denied as well.

I have excluded the attorney time for these motions from the fee award for three reasons. First, Claimant did not prevail on any of the motions. Second, the purpose of the hearing is to evaluate and weigh the evidence. It is generally unnecessary to review an expert's opinion prior to hearing to determine whether the expert correctly applied the *AMA Guides* or formed an opinion that is relevant and material to the claim. Third, proceedings before the Department are supposed to be conducted in accordance with the Rules of Civil Procedure and Rules of Evidence, but only insofar as they do not defeat the informal nature of the proceedings. *21 V.S.A. §§ 602, 604; Workers' Compensation Rule 17.1100*. I find that the motions here were not just unnecessary but were also at odds with the informal nature of this proceeding. Accordingly, after reviewing the itemized statement, I have excluded 13.5 hours² of attorney time related to these motions, thus reducing the total time from 83.7 hours to 70.2 hours.

Defendant contends that Claimant's counsel spent an excessive amount of time on certain tasks, including preparation of the hearing exhibits and the proposed findings. However, I note that Claimant's itemization of attorney time does not include any time for deposing the medical experts, preparing pretrial disclosures, meeting with the client, or any staff time. Claimant also did not update his fee request to include the time spent replying to Defendant's response. Accordingly, I decline to remove any other attorney time from the itemization.

C. Calculation of the Attorney Fee Award

Applying the allocation set forth above that 85 percent of the attorney time expended is recoverable, I base the fee award on 85 percent of 70.2 hours, or 59.67 hours of attorney time. Of that amount, 8.25 hours were expended prior to July 1, 2021, when the maximum rate for a fee award was \$215.00; the remaining 51.42 hours were expended on and after July 1, 2021, when the maximum rate was \$225.00. Accordingly, I calculate a fee award of \$13,343.25.³

² The following time was excluded: June 15: 2.0 hours; June 16: 1.5 hours; June 25: 4.0 hours; June 27: 1.0 hour; June 28: 2.0 hours; June 30: 0.2 hours; and August 26: 2.8 hours.

³ (8.25 hours x \$215) + (51.42 hours x \$225) = \$13,343.25.

Recoverable 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. Trustaff, 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 various costs.

Claimant seeks \$2,400 for expert fees for psychologist Laurance Thompson and \$800 for expert fees for physician assistant Nathaniel Burns, both of whom offered testimony concerning the psychological issue on which he prevailed. I find these costs necessary and appropriate. Dr. Bucksbaum testified about end medical result and permanent impairment. His invoices totaled \$6,300. As he testified on two issues, only one of which Claimant prevailed upon, Claimant seeks an award of 50 percent of Dr. Bucksbaum’s invoice, or \$3,150. I find this cost necessary and appropriate as well.

Next, Claimant is seeking \$1,545 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. Further, the claim on which Ms. Bowen prevailed was a relatively minor one. No such considerations apply here. See *Whitney v. Porter Medical Center, Inc.*, Opinion No. 10F-21WC (July 28, 2021). Accordingly, I am allowing recovery of Claimant’s mediation cost of \$1,545.

Finally, Claimant seeks an award of \$377.35 for transcription costs, \$97.05 for medical and social security records, and \$81.75 for postage. I find these charges appropriate. Accordingly, the total amount of recoverable costs is \$8,451.15.

Order:

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

1. Costs totaling \$8,451.15; and
2. Attorney fees totaling \$13,343.25.

DATED at Montpelier, Vermont this 4th day of March 2022.

Michael A. Harrington
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.