

March 23, 2022



State of Vermont  
Department of Labor  
P.O. Box 189  
Montpelier, VT 05601-0189  
[www.labor.vermont.gov](http://www.labor.vermont.gov)

[telephone] 877-214-3332 toll-free  
[fax] 802-828-9191  
[tdd] 800-650-4152

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Christopher McVeigh, Esq.  
McVeigh Skiff, LLP  
P.O. Box 1112  
Burlington, VT 05402

Jennifer K. Moore, Esq.  
Boxer Blake & Moore, PLLC  
P.O. Box 948  
Springfield, VT 05156

Re: Nicholas Mallow v. Bullrock Solar, LLC  
State File No. LL-63248

Dear Counselors:

I am in receipt of Claimant's January 10, 2022 petition seeking an award of \$2,102.50 for costs and \$3,748.00 for attorney fees in connection with his attorney's representation in a dispute about his correct permanent impairment rating. I received Defendant's response to the petition on February 8, 2022. Claimant's request is now ready for determination.

### Background

Claimant has an accepted claim for a low back injury sustained in April 2019. In August 2019, Defendant engaged Dr. Backus to perform an IME. *Defendant's Exhibit A*. Dr. Backus stated his opinion that Claimant was not at end medical result and that several possible treatment courses would be reasonable, including injections, an MRI, and a surgical consult. *Id.* Claimant followed up with his providers, who recommended steroid injections, rather than surgery.

In January 2020, Dr. Backus wrote an addendum to his report without performing another IME. *Defendant's Exhibit B*. He reiterated that injections would be a reasonable treatment. He further opined that, if injections provided some temporary improvement, then Claimant would be a potential candidate for discectomy at that level. If his improvement from injections were more long-lasting, then injection therapy alone might be sufficient. Dr. Backus then offered his opinion that Claimant was likely at end medical result in January 2020, even if he decided to undergo injections, as relief from injections would be temporary. However, if Claimant opted to pursue surgery, then he would not be at end medical result. Dr. Backus then used the DRE method to assess three alternate impairment ratings: 10 percent if Claimant decided not to pursue additional treatment; 5 percent if he underwent injections that eventually resolved his radiculopathy; and 10 percent if he ultimately had surgery. *See Defendant's Exhibit B*.

Claimant elected to undergo injections in January 2020 and September 2020. *See Defendant's Exhibit C*. In October 2020, Defendant authorized an MRI and a neurosurgical referral.



but Claimant didn't pursue these recommendations, nor did he pursue any other treatment until May 2021. *Defendant's Exhibit E.*

On March 25, 2021, Claimant's counsel requested that Defendant pay permanent partial disability benefits based on Dr. Backus' 10 percent impairment rating from the year before. *Claimant's Attachment 3.* However, Claimant had undergone treatment since then, and the current status of his radiculopathy was unknown. Defendant offered to commence PPD payments based on the 5 percent assessment while it determined which of Dr. Backus' impairment ratings was presently applicable, but Claimant declined that offer. *Defendant's Exhibit D.* The parties mediated on May 18, 2021, but did not settle. Claimant returned to his primary care provider on May 26, 2021, reporting a return of his radiculopathy symptoms. *Defendant's Exhibit E.*

Defendant then scheduled Claimant for a second IME with Dr. Backus on July 2, 2021, seeking an update or clarification of his multiple impairment ratings. Claimant declined to attend the July 2, 2021 IME on the grounds that nothing had changed since his August 2019 IME two years earlier. Accordingly, Defendant engaged Dr. Backus to use his time on July 2, 2021 to perform a medical records and surveillance review. Dr. Backus found that Claimant's activities as shown on surveillance were inconsistent with an active lumbar radiculopathy. *Defendant's Exhibit H*, at 19. Dr. Backus thus found Claimant's condition to fall within lumbar category II under the *AMA Guides*, and assessed a 5 percent permanent impairment. *Defendant's Exhibit H*, at 20. Defendant paid benefits based on the 5 percent impairment as a lump sum.

On July 6, 2021, Claimant's counsel requested a hearing on the parties' dispute concerning the correct permanent impairment rating. The Department's specialist held an informal conference on August 24, 2021 and found that the evidence did not support a 10 percent permanent impairment. She declined to issue an interim order.

On November 10, 2021, Dr. Gennaro performed a permanency evaluation at Claimant's request and assessed a ten percent impairment. Defendant then rescheduled the previously cancelled IME with Dr. Backus for December 6, 2021. After performing the IME, Dr. Backus placed Claimant in DRE lumbar category III, based on his then current radiculopathy, and assessed a 10 percent impairment. *Defendant's Exhibit J*, at 29.

On December 13, 2021, Defendant accepted the 10 percent impairment rating and notified the Department that the January 19, 2022 formal hearing could be cancelled. *Claimant's Attachment 1.*

#### Authority for Cost Awards

Claimant here seeks to recover \$852.50 for the cost for the mediator and \$1,250.00 for the cost of the doctor who performed a permanent impairment rating at his request, Dr. Gennaro.

Pursuant to 21 V.S.A. § 678(a), when a claimant prevails in a workers' compensation proceeding, necessary litigation costs "shall be assessed" against the employer. Necessary litigation

costs include deposition expenses, subpoena fees, expert witness fees and mediation costs. 21 V.S.A. § 678(a); Workers' Compensation Rule 20.1600.

As Claimant has prevailed here, I find that he is entitled to an award of the costs that he seeks. Accordingly, I award him \$852.50 for the mediator and \$1,250.00 for Dr. Gennaro, for a total of \$2,102.50.

Authority for Attorney Fee Awards

Unlike an award of costs to a prevailing claimant, an attorney fee award is discretionary. 21 V.S.A. § 678(a) provides that the Commissioner "may" award reasonable attorney fees when the claimant prevails. This provision applies whether the claimant prevails at the formal or the informal level. See Workers' Compensation Rule 20.1100.

21 V.S.A. § 678(d) further addresses attorney fee awards for claims resolved prior to formal hearing. It provides as follows:

In cases for which a formal hearing is requested and the case is resolved prior to formal hearing, the Commissioner may award reasonable attorney's fees if the claimant retained an attorney in response to an actual or effective denial of a claim and thereafter payments were made to the claimant as a result of the attorney's efforts.

In this case, Claimant's counsel continued to represent him after March 25, 2021, the date on which Defendant effectively denied his claim by declining to pay permanent partial disability benefits based on a 10 percent impairment. Claimant requested a hearing on July 6, 2021, and thereafter payments were made to him as a result of his attorney's efforts. Thus, I find that this fee request meets the statutory requirements set forth in § 678(d) allowing the Commissioner to consider a discretionary fee award under the statute.

Application of the Discretionary Criteria

The discretion to award fees at the informal dispute resolution level is intended to be exercised in limited circumstances and not as a general rule. Workers' Compensation Rule 20.1500. Thus, in addition to the criteria referenced in 21 V.S.A. § 678(d), I must also consider whether awarding fees will further the goals of (a) maintaining appropriate standards of employer and adjuster conduct; (b) discouraging excessive delay or unnecessarily adversarial conduct; and/or (c) encouraging the parties to make effective use of the informal dispute resolution process. *Id.*

In this case, I find that the discretionary criteria do not favor an attorney fee award. Broadly stated, I do not find that Defendant failed to maintain appropriate standards of employer or adjuster conduct. Here, Dr. Backus issued an unusual report providing three alternative impairment ratings under multiple future scenarios. When Claimant asked for payments to commence based on Dr. Backus' conditional 10 percent rating, Defendant offered to commence payments based on the

conditional 5 percent rating while seeking clarification of the report. Claimant declined this offer. The parties then appropriately proceeded with mediation, but were unable to reach a settlement.

Soon thereafter, Defendant scheduled Claimant for a second IME with Dr. Backus, to update and clarify his permanent impairment rating. Although Claimant last saw Dr. Backus for an IME in August 2019, he opted not to attend the second IME in July 2021. Further, Claimant did not schedule his own IME until November 2021.

Upon receiving Dr. Gennaro's permanent impairment rating, Defendant promptly rescheduled Claimant's second IME with Dr. Backus for December 6, 2021. When Dr. Backus assessed a 10 percent impairment rating, Defendant withdrew its hearing request and accepted that rating. I can find no failure to maintain appropriate standards of employer or adjuster conduct in this claim history. Rather, I find that the case proceeded as it did because of Dr. Backus' unusual addendum report in January 2020, which led to Defendant's reasonably seeking to schedule a second IME to clarify Dr. Backus' opinion.

As for awarding fees to discourage delay or unnecessarily adversarial conduct, I find that Defendant did not significantly delay resolution of this claim, nor did it act in an unnecessarily adversarial manner. Accordingly, I don't find that a fee award is necessary to discourage such conduct. Similarly, I do not find that a fee award is necessary to encourage Defendant to make effective use of the informal process.

Based on the foregoing, I conclude that an award of attorney fees would not meet the criteria set forth in Workers' Compensation Rule 20.1500 governing the exercise of discretion to award fees in cases that are resolved prior to formal hearing. Accordingly, I decline to make such an award.

**ORDER:**

Based on the foregoing, Defendant is hereby **ORDERED** to pay costs of \$2,102.50.

Yours sincerely,

Beth A. DeBernardi  
Administrative Law Judge