STATE OF VERMONT
DEPARTMENT OF LABOR

Lee Patterson

v.

WestRock Services, Inc.

Opinion No. 20F-22WC

By: Beth A. DeBernardi
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. LL-62320

RULING ON CLAIMANT'S PETITION FOR ATTORNEY FEES

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Erin J. Gilmore, Esq., for Defendant

EXHIBITS:

Claimant's Exhibit 1:	*Patterson v. WestRock Services, Inc.*, Opinion No. 14-22WC
Claimant's Exhibit 2:	Claimant's counsel's itemized billing statement
Claimant's Exhibit 3:	Correspondence relating to Defendant's delay in producing Forms 25 and 32

DISCUSSION:

On August 4, 2022, Claimant filed a petition seeking attorney fees related to the parties' cross motions for summary judgment. Defendant filed a response on September 2, 2022, and Claimant replied on September 6, 2022.

In the underlying summary judgment motions, Claimant sought penalties and interest on Defendant's late payment of his retroactive temporary total disability benefits pursuant to 21 V.S.A. §§ 650(e) and 664, as well as a correction to the amount of temporary total disability benefits paid. Defendant responded that it paid the correct amount of temporary total disability benefits and that no penalties or interest were due. The Commissioner's ruling on the cross motions was mailed to the parties on July 5, 2022. *Claimant's Exhibit 1, Patterson v. WestRock Services, Inc.*, Opinion No. 14-22WC (July 1, 2022) ("*Patterson I*").

Commissioner's Ruling on the Parties' Cross Motions for Summary Judgment

First, the Commissioner found that Defendant underpaid Claimant's retroactive temporary total disability benefits, but not by the $925.74 that Claimant contended. The Commissioner found that Defendant owed an additional $41.14 in such benefits. Of particular note, when Defendant paid those benefits on November 23, 2021, it still had not

filed the required Wage Statement (Form 25) upon which the calculation of temporary total disability benefits is based, as required by Workers' Compensation Rule 3.2000.[1] *See Patterson I*, at Conclusion of Law Nos. 4-9.

Second, the Commissioner assessed a ten percent penalty on Claimant's retroactive temporary total disability benefits under 21 V.S.A. § 650(e) because those benefits were not paid until 50 days after they became due and payable. The penalty amount was $1,272.46. *See Patterson I*, at Conclusion of Law Nos. 10-16.

Third, Claimant sought an award of $3,643.05 in interest, but the Commissioner found that he did not meet the criteria for an interest award under 21 V.S.A. § 664. Accordingly, Defendant prevailed on the third issue. *See Patterson I*, at Conclusion of Law Nos. 17-21.

As Claimant partially prevailed on the cross motions for summary judgment, the Commissioner invited him to submit a request for attorney fees commensurate with his success. *See Patterson I*, at 7. Claimant has requested attorney fees totaling $3,150.00.

Statutory Basis for Awarding Attorney Fees

Attorney fee awards to prevailing claimants in workers' compensation claims are always discretionary. The statute grants the Commissioner discretion to award reasonable attorney fees "when the claimant prevails." 21 V.S.A. § 678(a).

A claimant does not automatically forfeit eligibility for an attorney fee award merely because he or she did not prevail on every issue litigated by the parties. *See Hodgeman v. Jard Co.*, 157 Vt. 461, 465 (1991). In cases where the claimant did not prevail on every issue, the Commissioner considers the extent of the claimant's success in making a discretionary award of attorney fees. *See* Workers' Compensation Rule 20.1100 (providing for a fee award to an injured worker who "substantially prevails"); *see also Hathaway v. Engineers Construction, Inc*., Opinion No. 03F-17WC (April 11, 2017) (addressing apportionment of the attorney fee award when an injured worker partially prevails).

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).

[1] WC Rule 3.2000 provides that, in all cases where the injured worker is alleged to have been disabled from work for at least three calendar days, the employer or carrier shall "immediately" complete a Wage Statement (Form 25). Claimant's injury here was first reported on March 31, 2019. *Patterson I*, at Background No. 1.

Application of 21 V.S.A. § 678(a) to Claimant's Fee Petition

Claimant prevailed on a correction to the amount of his retroactive temporary total disability benefits, although the correction was substantially less than he contended. He also prevailed on his claim for a ten percent late payment penalty. He did not prevail on his claim for interest.

Defendant suggests that I make a fee award, if at all, based on the amount of Claimant's recovery compared to the amount he sought in his filing with the Department. By Defendant's calculation, Claimant received 23 percent of the amount that he asked the Department to order. *See Defendant's Response to the Fee Petition*, at 2. Under the circumstances presented here, however, such a calculation undervalues Claimant's counsel's advocacy. Defendant agreed to accept Claimant's claim two days prior to the formal hearing, at which time the retroactive temporary total disability benefits became payable immediately. Defendant did not pay these benefits for another 50 days. Further, it did not file the required Wage Statement, miscalculated the amount of the retroactive benefits, and failed to include the ten percent late payment penalty.[2] Even though Claimant did not prevail on his claim for interest, I decline to perform the 23 percent apportionment requested by Defendant under these circumstances. *See, e.g., Kendrick v. LSI Cleaning Service, Inc*., Opinion No. 07A-16WC (July 8, 2016) (extent of claimant's success not necessarily measured by comparing what she sought to what she recovered).

In valuing Claimant's counsel's services, I am mindful that Claimant sought an award of interest upon which he did not prevail. A review of his summary judgment motion and itemized billing statement, however, reveals that counsel did not spend a disproportionate amount of time on the interest issue compared to the two issues upon which he prevailed.[3]

Acknowledging that the allocation of attorney time to the issues won and lost is not an exact science, and in light of the necessity of attorney assistance here to ensure payment of Claimant's wage replacement benefits, I exercise my discretion under § 678(a) to allocate 75 percent of the total attorney time to the issues upon which Claimant prevailed and 25 percent to the issue upon which he did not.

The Electric Man, Inc. v. Charos

Claimant contends that, because all the issues he litigated involved a common core of facts, there should be no reduction of his attorney's fees at all. In support of this position, Claimant cites *The Electric Man, Inc. v. Charos*, 2006 VT 16. In that case, the Supreme Court admonished the trial court against viewing a lawsuit between a contractor and a homeowner as "a series of discrete claims" in fashioning an award of attorney fees to the

[2] Claimant's August 4, 2022 fee petition states that Defendant is now holding up the payment of his permanent partial disability benefits by still not filing the Wage Statement (Form 25) and the Agreement for Temporary Disability Compensation (Form 32). *Fee Petition*, at 3; *Claimant's Exhibit 3*. As this allegation is not relevant to an award of fees pursuant to *Patterson I*, I have not considered it here.

[3] The billing entry dated June 10, 2022 for 2.9 hours includes revising the response to Defendant's summary judgment opposition and legal research on "prejudgment interest." *See Claimant's Exhibit 2.*

substantially prevailing party under 9 V.S.A. § 4007(c). *Id.* at ¶ 10, citing *L'Esperance v. Benware*, 2003 VT 43, ¶ 24. Given that in such lawsuits "virtually all of the evidence is relevant to all of the claims," the Court reasoned that it was too difficult to allocate or apportion the attorney hours expended on a claim-by-claim basis. *Id.* Claimant here asks the Department to extend the "common core of facts" analysis to fee awards in the workers' compensation context and award him the full amount of his attorney fees.

The statute construed by the Court in *Electric Man* is known as the Prompt Pay Act. 9 V.S.A. §§ 4001-4009. The Act requires prime contractors to pay subcontractors for their work within seven days of the prime contractor's receipt of payment. 9 V.S.A. § 4003(c). Section 4007(c) of the Prompt Pay Act provides as follows:

> Notwithstanding any contrary agreement, the substantially prevailing party in any proceeding to recover any payment within the scope of this chapter shall be awarded reasonable attorney's fees in an amount to be determined by the court or arbitrator, together with expenses.

The attorney fee provision set forth in the Prompt Pay Act differs significantly from the workers' compensation attorney fee provision set forth in 21 V.S.A. § 678(a). First, the Prompt Pay Act provides for a fee award to whichever party substantially prevails; in contrast, the workers' compensation fee provision provides for an award only to a prevailing claimant.

Second, the workers' compensation fee provision grants the Commissioner *discretion* to award attorney fees. In contrast, the attorney fee provision in the Prompt Pay Act is not discretionary. It provides that the substantially prevailing party *shall* be awarded reasonable attorney fees. Implicit in the Commissioner's discretion to award attorney fees in workers' compensation claims is the authority to exercise that discretion by awarding fees commensurate with the claimant's success. No such discretion is set forth in the attorney fee provision of the Prompt Pay Act. Accordingly, the two provisions are not comparable.

Further, the Department previously considered and rejected the "common core of facts" analysis in the workers' compensation fee award context on several occasions. For example, in 2015 the Commissioner wrote:

> Litigation in the workers' compensation arena, however, typically involves exactly the type of separate and distinct claims, for separate and distinct statutory benefits, that the Court could not discern in *The Electric Man*. Thus, for example, although the determination of an injured worker's entitlement to one benefit may share the same "common core of facts" relevant to the initial work-related accident as his or her claim for another benefit, each is likely nevertheless to stand or fall based on its own distinct factual and/or legal analysis.

Brown v. Casella Waste Management, Opinion No. 19A-15WC (December 4, 2015). *See also Griggs v. New Generation Communication*, Opinion No. 30A-10WC (December 29, 2010) (rejecting the common core of facts analysis for attorney fee awards in workers' compensation cases).

The Department's longstanding practice is to award attorney fees commensurate with a claimant's success, and I find no reason to depart from that practice in favor of the "common core of facts" approach here. As set forth above, Claimant's case included the types of separate and distinct claims that the Commissioner referred to in *Brown* and *Griggs* as being common in the workers' compensation arena: the Commissioner recalculated Claimant's retroactive temporary total disability benefits under 21 V.S.A. § 642. He applied 21 V.S.A. § 650(e) to impose a ten percent penalty. Finally, the Commissioner reviewed 21 V.S.A. § 664 and determined that the statutory provision for interest did not apply to the payment of Claimant's benefits. Although all three issues involved the payment of Claimant's benefits, the issues required entirely separate factual and legal analyses. Accordingly, each claim was considered separately, and succeeded or failed based on its own distinct factual and legal analysis.

I therefore decline to extend the analysis set forth in *The Electric Man, Inc. v Charos* to award Claimant all of the attorney fees he seeks here. Rather, I conclude that apportioning the attorney fees commensurate with the extent of his success is a proper exercise of the discretion granted by 21 V.S.A. § 678(a), as set forth above.

Calculation of the Attorney Fee Award

Claimant's itemized billing statement includes 11.3 hours of attorney time expended between December 21, 2021 and June 16, 2022, to which the maximum rate of $225 per hour applies, and 3.6 hours of attorney time expended on or after July 1, 2022, to which the maximum rate of $235 per hour applies. *Claimant's Exhibit 2; see* 21 V.S.A. § 678(c); Workers' Compensation Rules 20.1310 and 20.1340. Applying the applicable rates to these hourly expenditures produces a total invoice amount of $3,388.50.[4]

Applying the allocation set forth above that 75 percent of the attorney time expended is recoverable, I calculate an attorney fee award in this case of $2,541.38.[5]

ORDER:

Defendant is hereby **ORDERED** to pay attorney fees totaling $2,541.38.

DATED at Montpelier, Vermont this 24th day of October 2022.

Michael A. Harrington
Commissioner

[4] (11.3 hours x $225) + (3.6 hours x $235) = $3,388.50.

[5] $3,388.50 x 75% = $2,541.38.

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.