

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Sharon Fenton

Opinion No. 11F-24WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Frank Cooper, Inc.

For: Michael A. Harrington
Commissioner

State File No. MM-00417

RULING ON CLAIMANT’S PETITION FOR COSTS AND ATTORNEY FEES

APPEARANCES:

Vanessa B. Kittell, Esq., for Claimant
Bonnie J. Badgewick, Esq., for Defendant

EXHIBITS:

Claimant’s Exhibit 1:	Itemization of Attorney Time
Claimant’s Exhibit 2:	Itemization of Staff Time
Claimant’s Exhibit 3:	Itemization of Costs
Claimant’s Exhibit A:	Supplemental Itemization of Attorney Time

BACKGROUND:

The parties presented this claim at a four-day hearing on November 8, November 9, December 6 and December 13, 2023. On April 17, 2024, the Department issued a decision awarding benefits to Claimant. *See Fenton v. Frank Cooper, Inc.*, Opinion No. 04-24WC (April 17, 2024) (“*Fenton I*”). The Department also ordered costs and attorney fees in an amount to be determined. *Fenton I*, at 22.

On May 16, 2024, Claimant’s counsel filed a timely petition for costs and attorney fees. Defendant filed a partial objection on June 17, 2024, and Claimant’s counsel filed a reply with a Supplemental Itemization of Attorney Time on July 1, 2024.

The Extent of Claimant’s Success

This is an accepted claim for a work-related injury arising out of and in the course of Claimant’s employment at Defendant’s dry-cleaning business. Although two of Claimant’s ankle conditions were accepted as compensable, multiple disputes arose concerning the specific benefits to which she is entitled. At the four-day hearing, the Department considered six disputed issues. Claimant fully prevailed on four issues and partially prevailed on two.

Foremost, Claimant established her entitlement to temporary total disability benefits from the date of her ankle surgery on March 13, 2020, through the date of end medical result on January 25, 2023. Defendant had contended that no temporary total disability benefits were due. It also disputed the end medical result date and contended that Claimant declined a suitable offer of employment in July 2020. Claimant fully prevailed on all aspects of her claim for temporary total disability benefits. *See Fenton I, Issues 2 and 3.*

Next, in February 2021, Defendant paid Claimant for 18.5 weeks of temporary total disability benefits in a lump sum, on a paid-without-prejudice basis. Three months later, Defendant formally denied those benefits and offset the lump sum against Claimant's permanent partial disability benefits. Claimant opposed the offset, and she prevailed on this issue at hearing. *See Fenton I, Issue 5.*

As to temporary partial disability benefits, Claimant established her entitlement to such benefits from December 11, 2019, through March 12, 2020; she did not prevail on her claim for such benefits from November 1, 2019, through December 10, 2019. Although she did not fully prevail, Claimant was awarded most of the temporary partial disability benefits that she sought. Further, Claimant's counsel did not devote much, if any, effort to advocating for benefits from November 1 through December 10, 2019. Rather, counsel focused on the period starting December 11, 2019, when Claimant's medical provider restricted her to part-time employment. *See Fenton I, Issue 1; Claimant's Proposed Findings of Fact, at 4.*

Next, Claimant prevailed on her claim for payment of two medical bills from November 2019, although without the award of interest that she requested. *See Fenton I, Issues 4 and 6.*

Finally, Claimant prevailed on her claim for pre-judgment interest at the statutory rate of 12 percent per annum on her temporary total and temporary partial disability benefits. She did not prevail on her claim for a penalty. *See Fenton I, Issue 6.*

In short, Claimant prevailed on her claim for almost three years of temporary total disability benefits, with 12 percent interest, and most of her claim for temporary partial disability benefits, again with interest. She also successfully opposed the offset to her permanent partial disability benefits and obtained an order that Defendant pay the two disputed medical bills. The only claims on which she did not prevail were about five weeks of temporary partial disability benefits, interest on two medical bills, and her request for a penalty.

Claimant requests an award of costs in the amount of \$18,209.68 and an attorney fee award for 201.1 hours of attorney time and 19.1 hours of staff time. Defendant does not object to the cost award, but it has objected to some of the time included on the attorney fee petition.

DISCUSSION:

Cost Award

Pursuant to 21 V.S.A. § 678(b)(1), when a claimant prevails in either a formal or informal proceeding, the Commissioner “shall” award necessary costs. 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 directly relate 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 costs in the amount of \$18,209.68, to which Defendant has not objected.

Of the requested amount, \$15,525.00 is for payment to Dr. Bucksbaum for his independent medical examination, trial preparation, and testimony over two days of formal hearing. In addition, Claimant seeks an award of \$800.00 for Dr. Michelson’s deposition. I find these expert witness costs, totaling \$16,325.00, to be necessary and directly related to the issues upon which Claimant prevailed.

Claimant also seeks \$1,065.30 for court reporters, \$200.00 for an IME videographer, \$546.50 for medical records, \$64.02 for postage and \$8.86 for obtaining a copy of the hearing transcript, totaling \$1,884.68. I find these costs both necessary and related to the issues upon which she prevailed.

Accordingly, Claimant’s request for a cost award in the amount of \$18,209.68¹ is approved.

Attorney Fee Award

When a claimant prevails in either a formal or an informal proceeding, the Commissioner may award reasonable attorney fees. 21 V.S.A. § 678(b)(2). A claimant does not automatically forfeit an award of attorney fees under § 678(b)(2) 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. Truststaff, Inc.*, Opinion No. 05A-12WC (April 27, 2012), citing *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003).

Claimant here substantially prevailed on the issues litigated before the Department. Although she did not prevail on her request for about five weeks of temporary partial disability benefits, interest on two unpaid medical bills, or a penalty, those claims were minor when compared to her successes. Further, Claimant’s counsel did not devote significant effort to the issues upon which she did not prevail.

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

¹ \$16,325.00 + \$1,884.68 = \$18,209.68.

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, Claimant's counsel's efforts were integral to establishing Claimant's entitlement to almost three years of temporary total disability benefits, with prejudgment interest. Counsel's efforts were also necessary to establish Claimant's entitlement to over 13 weeks of temporary partial disability benefits, with interest, and coverage for two unpaid medical bills. Counsel's efforts also resulted in the disallowance of an offset against Claimant's permanent partial disability benefits. Had Claimant not retained counsel, it is highly unlikely that she would have prevailed on any of these issues.

The issues before the Department were numerous and complex; handling those issues required significant diligence and skill on the part of both attorneys, including participation in a four-day 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 95 percent to the issues upon which Claimant prevailed and 5 percent to the issues upon which she did not prevail. However, before calculating the attorney fee award based on this allocation, I must review Claimant's counsel's itemized statements and Defendant's specific objections.

1. Adjustments to Staff Time

Defendant objects to the itemized staff time submitted by Claimant's counsel on the grounds that the time is administrative in nature, rather than paralegal. *See Exhibit 2*. Defendant further contends that some of the itemized staff time is duplicative of Claimant's counsel's efforts.

Some law firms refer to the legal assistance provided by non-attorney employees as paralegal time. Other offices may refer to such assistance as staff time. The term is not dispositive; the nature of the work performed determines whether the time spent is recoverable as paralegal time or not recoverable as administrative time. *See Workers' Compensation Rule 20.1310* (paralegal time is recoverable).

I have reviewed Claimant's itemization of staff time, considering both the nature of the work performed and whether such time was duplicative of work performed by Claimant's counsel. I also considered whether the tasks were related to the issues that were litigated at the hearing. After review, I find that most itemized tasks were paralegal in nature, not administrative. The sole exceptions were the instances where counsel drafted correspondence and the staff member sent it out. I consider such staff time to be administrative.

As to duplicative time entries, a paralegal and an attorney may work cooperatively on the same task, such as having a paralegal draft a letter or pleading to be revised by the attorney. Other times, they may duplicate efforts. Here, I found just one staff entry that appeared duplicative of the attorney's efforts.

Lastly, some tasks itemized by the staff member here do not relate to the issues that were tried at the hearing. Accordingly, I have disallowed the time entries pertaining to vocational rehabilitation, social security disability and mileage reimbursement.

After review, I have removed the following itemized entries from staff time:

DATE	HOURS	REASON FOR REMOVAL
5/1/20	0.2	Duplicative
6/3/20	0.2	VR not relevant
9/21/20	0.1	Administrative
10/21/20	0.1	Administrative
11/2/20	0.2	Administrative
1/26/21	0.2	Administrative
2/8/21	0.1	Administrative
2/17/21	0.3	VR not relevant
3/9/21	0.1	Administrative
3/29/21	0.1	Administrative
5/18/21	0.2	Mileage not relevant
10/22/21	0.3	SSDI not relevant
8/8/22	0.2	SSDI not relevant
9/6/22	0.2	SSDI not relevant
10/25/22	0.1	VR not relevant
TOTAL TIME REMOVED	2.6 HOURS	

2. Adjustments to Attorney Time Related to the Medicare Set Aside

Exhibit 1 sets forth an itemization of time spent by Claimant’s counsel for which she seeks an attorney fee award. The itemization includes 13.5 hours spent working on the Medicare Set Aside (MSA) that the parties obtained in connection with their fall 2021 mediation and subsequent settlement negotiations. Defendant contends that this time should be excluded from the fee award because the parties did not engage in litigation about the MSA at the formal hearing.

I disagree. Mediation of workers’ compensation disputes is mandatory under the statute. 21 V.S.A. § 663a. The purpose of mediation is to attempt to resolve disputes short of formal hearing. Thus, the efforts that the parties devote to mediation are made necessary by the underlying disputes and are therefore related to those disputes.

For claimants who are eligible for Medicare, preparation for mediation often includes obtaining an MSA and submitting it to a federal agency for approval. In such cases, dealing with an MSA is an integral part of the mediation and settlement process, all of which relates to the parties’ dispute. In this case, the MSA presented particular challenges. Under the circumstances, I find that it was reasonable for Claimant’s counsel to devote 13.5 hours to the MSA.

Finally, the workers’ compensation statute provides that the cost of mediation (*i.e.*, the mediator’s fee) shall be divided equally between the claimant and the employer; the claimant

may then recover this cost when he or she prevails. 21 V.S.A. § 663a(b); *see also* Workers' Compensation Rules 18.1920 and 20.1600. Although Claimant here did not include her share of the mediator's fee in her request for a cost award, the fact that the statute provides for such an award confirms that mediation is an integral part of a claimant's overall effort to bring a disputed claim to resolution. This statutory scheme further supports the conclusion that time spent by Claimant's counsel on the MSA is appropriate for inclusion in the fee award.

3. Adjustments to Attorney Time Related to the Specificity of the Work Description on Claimant's Counsel's Itemization

Defendant contends that certain time entries on Claimant's counsel's itemization of attorney time lack the specificity required by Workers' Compensation Rule 20.1200. Defendant's opposition lists 14 entries that allegedly lack sufficient specificity to qualify for an award of attorney fees. After receiving this opposition, Claimant's counsel filed a timely reply providing additional detail relevant to the disputed time entries. *Exhibit A*.

I have reviewed Claimant's initial attorney time itemization, Defendant's specific objections, and Claimant's expanded itemization. Having done so, I find that Claimant's time entries include enough specificity to meet the requirements of Rule 20.1200 to be eligible for a fee award. Accordingly, I decline to remove any time from consideration of a fee award on this basis.

4. Other Adjustments to Attorney Time

Finally, I have reviewed Claimant's counsel's itemization of attorney time with an eye on whether the time spent on certain tasks was reasonable and proportionate to the needs of the case and whether the attorney time expended was related to the issues that were presented for hearing. On this basis, I have removed the following time entries from consideration of an attorney fee award:

DATE	HOURS	REASON FOR REMOVAL
6/3/20	0.3	VR not relevant
8/8/22	0.3	SSDI not relevant
10/4/23	2.5	Disproportionate for the task
10/24/23	1.5	Disproportionate for the task
TOTAL TIME REMOVED	4.6 HOURS	

Calculation of the Attorney Fee Award

After making the above adjustments, I find the following attorney and paralegal time to be reasonable and recoverable:

Attorney time:²

Time expended on or after July 1, 2019	2.6 hours
Time expended on or after July 1, 2020	12.7 hours
Time expended on or after July 1, 2021	20.6 hours
Time expended on or after July 1, 2022	36.6 hours
Time expended on or after July 1, 2023	124.0 hours

Paralegal time:

Time expended on or after July 1, 2019	1.1 hours
Time expended on or after July 1, 2020	4.6 hours
Time expended on or after July 1, 2021	1.3 hours
Time expended on or after July 1, 2022	5.0 hours
Time expended on or after July 1, 2023	4.5 hours

Applying the maximum hourly rates from the statute, *see* 21 V.S.A. § 678 and Workers' Compensation Rule 20.1340, I compute the amount of attorney fees as follows:

Attorney time:

2.6 hours x \$215 = \$559.00
12.7 hours x \$215 = \$2,730.50
20.6 hours x \$225 = \$4,635.00
36.6 hours x \$235 = \$8,601.00
124.0 hours x \$245 = \$30,380.00
TOTAL: \$46,905.50

Paralegal time:

1.1 hours x \$75 = \$82.50
4.6 hours x \$75 = \$345.00
1.3 hours x \$80 = \$104.00
5.0 hours x \$85 = \$425.00
4.5 hours x \$90 = \$405.00
TOTAL: \$1,361.50

Adding together the total attorney time and paralegal time yields a provisional attorney fee award of \$48,267.00.

Next, I reduce the provisional attorney fee award by five percent so that the award is commensurate with Claimant's success. *See Background Section, supra*, at 1-2. The fee award is therefore \$45,853.65.³

² Claimant's Exhibit 1 states that the total for attorney time is 201.1 hours. My calculation of that figure is 201.5 hours. I have accepted Claimant's calculation and have adjusted the time expended on or after July 1, 2023 by 0.4 hours.

³ \$48,267.00 minus 5 percent = \$45,853.65.

ORDER:

Based on the foregoing Background and Discussion, Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$18,209.68; and
2. Attorney fees totaling \$45,853.65.

DATED at Montpelier, Vermont this 7th day of August 2024.

Michael A. Harrington
Commissioner

Appeal:

Within 30 days after copies of this Order 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.