

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Bonnie Clark

Opinion No. 16F-25WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Collaborative Solutions Corp.

For: Kendal M. Smith
Commissioner

State File No. RR-58330

RULING ON CLAIMANT'S PETITION FOR COSTS AND ATTORNEY FEES

APPEARANCES:

Heidi S. Groff, Esq., for Claimant
William J. Blake, Esq., for Defendant

EXHIBITS:

Claimant's Exhibit 1: Affidavit of Attorney Fees and Costs
Claimant's Exhibit 2: Contingent Fee Agreement
Claimant's Exhibit 3: Attorney Fee Lien Acknowledgment
Claimant's Exhibit 4: Attorney Time Entry Report
Claimant's Exhibit 5: Paralegal Time Entry Report
Claimant's Exhibit 6: Law Firm Expense Report

Defendant's Exhibit A: Actuarial Life Expectancy Table

BACKGROUND:

The parties presented their dispute at a two-day hearing in April of 2025. On July 9, 2025, the Department awarded Claimant some of the benefits she sought. *Clark v. Collaborative Solutions Corp.*, Opinion No. 09-25WC (July 9, 2025) ("*Clark I*"). The Department also awarded Claimant costs and attorney fees "commensurate with her success," in amounts to be determined. *Clark I*, at 18. Claimant filed her petition for costs and attorney fees on July 30, 2025.

The Extent of Claimant's Success

Claimant asserted a workers' compensation claim for injuries she sustained when she fell in a mop closet at work on January 16, 2022. Defendant accepted her cervical spine and rib fractures as compensable, but disputes arose concerning her claims for certain other benefits. At the hearing, the Department considered two disputed issues: (1) Claimant's permanent impairment rating; and (2) whether she is permanently and totally disabled as a result of her compensable injuries.

Permanent Impairment Rating

The parties disputed three components of Claimant's permanent impairment rating, and Claimant prevailed on two of them.

First, the parties agreed that Claimant had a work-related impairment of her spine. Claimant's expert assessed a 25 percent impairment for her spine, and Defendant's expert assessed 23 percent. Claimant prevailed on this dispute and was awarded permanent partial disability benefits for the additional two percent impairment.

Second, the parties disputed whether Claimant's deep vein thrombosis was work-related. Claimant prevailed on this issue, which entitled her to permanent partial disability benefits based on a 10 percent impairment for this condition, as well as medical benefits. Depending on how her deep vein thrombosis fares in the future, she may be entitled to additional benefits for this condition someday.

Third, Claimant contended that she suffered cognitive impairment when she fell at work, and she offered an expert medical opinion that she had a 29 percent impairment for her cognitive deficits. *See Clark I*, JME 1029. However, Claimant did not prevail on this issue, as she failed to establish a causal connection between her cognitive condition and her work injury.

Permanent Total Disability

The second issue for hearing was whether Claimant is permanently and totally disabled due to her compensable work injury. Claimant lost on this issue. Had she prevailed, she would have been entitled to at least 330 weeks of permanent total disability benefits under 21 V.S.A. § 645, less the amount she had already received for permanent partial disability benefits. As of the date of the *Clark I* decision, Claimant had been paid about 109 weeks of permanent partial disability benefits. *See Defendant's Response*, at 2. Thus, at a minimum, Claimant would have been entitled to 221 weeks of permanent total disability benefits had she prevailed on this claim.

Request for Costs and Attorney Fees

Claimant's counsel requests \$5,074.36 in costs and \$43,021.00 in attorney fees. Defendant objects to both amounts. It contends that the awards should be in the range of 8.5 to 13 percent of the total amount of attorney time and costs incurred, based on its assessment of her level of success, as discussed below.

DISCUSSION:

Cost Award

Pursuant to 21 V.S.A. § 678(b)(1), the Commissioner "shall" award necessary costs to a prevailing claimant. 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); *Hatin v. Our Lady of Providence*, Opinion No. 21S-03WC (October 22, 2003).

The total costs incurred in connection with this two-day hearing exceeded \$12,000.00. *Claimant’s Petition*, at 2. Of that amount, Claimant’s counsel has identified \$5,074.36 as relating directly to the issues upon which she prevailed.

Claimant’s cost itemization includes \$1,319.50 for obtaining medical records and \$4.86 for obtaining hearing recordings from the Department. I find these amounts to be necessary costs related to the issues upon which Claimant prevailed.

Claimant’s cost itemization also includes \$3,750.00 for Dr. Backus’ hearing preparation and testimony. Dr. Backus testified about multiple issues, some of which Claimant prevailed upon and some of which she lost. It is common for expert witnesses to testify about multiple issues, and separating out the costs of their testimony on successful versus unsuccessful claims is often not feasible. In such situations, the Commissioner has discretion to award the full costs of expert testimony 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).

In this case, there is no reliable method for allocating the cost of Dr. Backus’ hearing preparation and testimony among the winning and losing issues. Accordingly, I award the entire cost of his testimony, in the amount of \$3,750.00, as a necessary cost of the proceeding. Claimant is not seeking an award of the cost of Dr. Backus’ separate addendum report, as that report specifically addressed an issue upon which she did not prevail.

Based on the foregoing, Claimant’s request for a cost award of \$5,074.36 is approved.

Attorney Fee Award

Under the workers’ compensation statute, the Commissioner may also award reasonable attorney fees to a prevailing claimant. 21 V.S.A. § 678(b)(2). A claimant does not automatically forfeit an award of attorney fees under Section 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. Trustaff, Inc.*, Opinion No. 05A-12WC (April 27, 2012), citing *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003).

Claimant here prevailed on two out of three components of her claim for permanent partial disability benefits; she did not prevail on her claim for permanent total disability benefits. The Department does not have a one-size-fits-all methodology for determining the amount of an attorney fee award when a claimant prevails on some, but not all, of her claims. Rather, the Department considers the circumstances of each case and determines what an appropriate award of reasonable attorney fees is under those circumstances.

Claimant's Approach

Claimant asks the Department to base the fee award on her itemized time entries, after exclusion of the entries that relate to the issues she lost. Claimant's counsel has carefully reviewed her itemized statements of attorney and paralegal time to capture just the time spent on the winning issues, totaling by her calculation \$43,021.00. Claimant's counsel has excluded the time related to the issues she lost, to the best of her ability.

The problem with this approach is that it is impossible to accurately separate out the time spent on winning versus losing issues. Claimant's counsel acknowledges that she cannot exactly determine the amount of time spent on the winning issues, as that time was "undoubtedly intertwined" with the time spent on the issues she lost. *Claimant's Petition*, at 1.

I have reviewed Claimant's itemized statements of attorney and paralegal time. For certain tasks, such as the time spent preparing the proposed findings, Claimant's counsel has reduced the time by 50 percent. For other tasks, she has reduced the time by significantly less. For example, for the entries dated April 1 and April 3, 2025, for hearing preparation, she has reduced the time by about 27 percent. For tasks specifically related to the claims for cognitive impairment and permanent total disability benefits, upon which she did not prevail, she has largely eliminated those time entries.¹

Overall, Claimant's counsel reduced the attorney time by about 25 percent and the paralegal time by about 15 percent. Counsel then applied the statutory hourly rates for attorney and paralegal time and calculated a fee award of \$43,021.00.

Based on my review of the itemized statements, I find that Claimant's counsel made a good faith and reasonable effort to identify the time entries relevant to the issues upon which she prevailed. However, the process of allocating time among the various contested issues necessarily involves an element of guesswork, as the time entries are woven together. Accordingly, I decline to award attorney fees of \$43,021.00 without making an additional adjustment.

Defendant's Approach

Defendant suggests a different approach to calculating an attorney fee award. This approach is to compare the weeks of benefits awarded with the total weeks of benefits that Claimant sought at the hearing. Using this methodology, Defendant calculated that Claimant succeeded in obtaining 13 percent of the benefits she sought. Defendant asks us to apply this "success ratio" to the total number of attorney hours expended and award fees in that amount.²

¹ Not every time entry pertaining to the cognitive impairment claim was removed. The itemized statements still include a March 5, 2023 attorney time entry relating to Defendant's expert neuropsychologist and a March 28, 2024 paralegal time entry relating to the same expert.

² Defendant calculated a range of success ratios from 8.5 to 13 percent. The variation arises because the amount of a claimant's permanent total disability benefits depends on his or her future lifespan, with a statutory minimum of 330 weeks. 21 V.S.A. § 645. Defendant contends that Claimant is actuarially likely to outlive the 330-week minimum, based on a life expectancy table that it submitted into evidence. *Defendant's Exhibit A*. I find Defendant's

I decline to adopt Defendant's methodology here. I find that this formula fails to capture Claimant's counsel's time and effort and unreasonably discounts her success. In particular, Claimant's counsel established that Claimant's deep vein thrombosis is causally related to her work injury, entitling her to permanent partial disability and medical benefits now and possibly additional benefits in the future. This is a significant victory. Under the circumstances, awarding attorney fees of 13 percent of the total hours spent on the claim would seriously undervalue Claimant's counsel's efforts. See, e.g., *Patterson v. Westrock Services, Inc.*, Opinion No. 20F-22WC (October 24, 2022) (rejecting defendant's request that fees be awarded based on a 23 percent success ratio as undervaluing claimant's counsel's advocacy and instead allocating 75 percent of claimant's counsel's time to the issues upon which he prevailed).

Department's Analysis

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, nor is it a matter of simply computing the ratio of success in terms of the benefits awarded to a claimant who partially prevailed at hearing. Rather, in determining a reasonable attorney fee, 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).

The issues before the Department here were numerous and complex; handling those issues required significant diligence and skill on the part of both attorneys, including participation in a two-day hearing. Further, Claimant's counsel's efforts were integral in establishing deep vein thrombosis as a compensable injury. Acknowledging that the allocation of attorney time to the issues won and lost is not an exact science, I conclude that a reasonable attorney fee here may be based on the itemized time that Claimant's counsel allocated to the winning issues, with a 20 percent downward adjustment to account for the time entries that necessarily included work performed on all issues and to account for her overall degree of success.

Calculation of the Fee Award

Claimant has requested an attorney fee award in the amount of \$43,021.00, after reviewing her itemized time statements and removing the entries related to the issues she lost. Because it is not possible to perform that task with precision, I have reduced that amount by 20 percent. Thus, I calculate a fee award of \$34,416.80.³ This additional reduction fairly acknowledges that Claimant did not obtain all the benefits that she sought, while nevertheless establishing her right to important benefits.

calculation of Claimant's life expectancy to be speculative, as there is no evidence showing how the actuarial life expectancy table relates to her personal medical history and current medical conditions.

³ \$43,021.00 minus 20 percent = \$34,416.80.

ORDER:

Defendant is hereby ORDERED to pay to Claimant's counsel, as provided in Workers' Compensation Rule 20.1700, the following amounts in a lump sum:

1. Costs of \$5,074.36; and
2. Attorney fees of \$34,416.80.

DATED at Montpelier, Vermont this 5 day of November 2025.

Kendal M. Smith
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.