

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Kim Sheehan

Opinion No. 07F-26WC

v.

By: Stephen W. Brown
Administrative Law Judge

Northeast Kingdom Human Services, Inc.

For: Kendal M. Smith
Commissioner

State File No. LL-55613

RULING ON CLAIMANT’S PETITION FOR COSTS AND ATTORNEY FEES

APPEARANCES:

Kelly Massicotte, Esq., for Claimant
William J. Blake, Esq., for Defendant

Background

Claimant has timely moved for an award of costs and attorneys’ fees after prevailing on her claim for permanent total disability at a formal hearing. Claimant’s attorney has invoiced costs relating to this claim in the amount of \$22,301.53, most of which is attributable to expert witness fees. She has also tabulated 68.6 hours of attorney time and 34.4 hours of paralegal time attributable to Claimant’s claim for permanent total disability benefits, billed at the maximum allowable hourly rates published by the Department for each year from 2022 through 2025.

As to the amount of attorneys’ fees requested, Claimant has pled in the alternative, asking the Commissioner to exercise her discretion and choose between awarding fees based on documented hourly rates amounting to \$20,656.50, versus fees based on a contingency fee of twenty percent of the amount recovered from prevailing on her claim for permanent total disability benefits. Claimant asserts, and Defendant does not deny, that she has received \$203,745.12 in permanent total disability benefits and interest pursuant to the formal hearing decision in which she prevailed. Twenty percent of that figure is \$40,749.02.

Defendant concedes that Claimant’s tabulation of costs is reasonable and well-documented; I agree. Defendant also concedes that Claimant is entitled to recoup attorneys’ fees and concedes that both the tabulation of hours and the hourly rates billed are reasonable; I agree.

Defendant objects, however, to an award of attorneys’ fees based on a contingency fee, citing a dearth of published decisional authority documenting awards of attorneys’ fees on a contingency fee basis, and noting that issuing an award based on a contingency fee in this case

would effectively double the amount of the award. For the reasons below, I find that awarding attorneys' fees to Claimant's counsel based on a contingency fee is appropriate in this case.

Legal Standards

When a workers' compensation claimant prevails at a formal hearing, Vermont law provides for the award of attorneys' fees and costs as follows:

Necessary costs of proceedings under this chapter, including deposition expenses, subpoena fees, and expert witness fees, shall be assessed by the Commissioner against the employer or its workers' compensation carrier when the claimant prevails. The Commissioner may allow the claimant to recover reasonable attorney's fees when the claimant prevails. Costs shall not be taxed or allowed either party except as provided in this section.

21 V.S.A. § 678(a).

The determination of "reasonable attorney fees" lies "within the commissioner's discretion, and counsel has the burden of providing evidence to justify an award." *Hodgeman v. Jard Co.*, 157 Vt. 461, 466 (1991). Attorneys' fees may be based on either an hourly or contingency basis, and the selection of which computation method lies "[a]t the Commissioner's discretion." See Workers' Compensation Rule 20.1300. If based on an hourly fee, the award shall not exceed a charge of \$200.00 per hour for attorney time, and \$75.00 per paralegal time, subject to annual increases based on inflationary indices beginning in 2017, reflected in a table published by the Department. See Workers' Compensation Rules 20.1310 and 20.1340. If based on a contingent fee, the award may not exceed 20 percent of the compensation or benefits awarded. Workers' Compensation Rule 20.1320.

Discussion

In opposing an award of fees based on a twenty percent contingency formula, Defendant cites *Kendrick v. LSI Cleaning Service, Inc.*, Opinion No. 07A-16WC (May 2, 2016), in which the Department rejected Defendant's request to award the prevailing claimant fees based on a contingency formula that would have been *less* than the amount based on hourly rates. In rejecting this request, the Department held:

I also disagree with Defendant's assertion that Claimant's attorney fees should be calculated on a contingent rather than hourly basis, as is permitted under Workers' Compensation Rule 20.1300. Doing so would reduce her fees below what is reasonable considering the work performed and the skill required.

The posture in *Kendrick* was the effective reverse of this case: the defendant there sought to force a calculation of fees based on a contingency formula because that would have been less money than an hourly rate. Here, Defendant seeks to limit the award of fees to an hourly rate computation because that yields a lower dollar amount than a contingency-based award.

However, the implicit position advocated by the defendants in both cases is that the Department, when presented with an option to award fees based on either an hourly rate or contingency fee, should select whichever approach yields the lower dollar figure. Defendant here also argued that the relative dearth of reported decisions awarding attorneys' fees based on contingency fees that would exceed the hourly rate computation strongly suggests that "the best measure of the reasonableness of the time incurred [*is*] the actual corresponding time entries."

In this case, I find that an award of fees based on a contingency fee is reasonable. Although it yields a figure almost twice as much as an hourly rate computation, this does not make such an award unreasonable given the complexity and difficulty in pursuing a claim for permanent total disability. This case involved a two-day formal hearing with multiple expert witnesses and called for the application of the intrinsically fact-specific odd lot doctrine. The Department and the public have an interest in fostering attorney representation particularly the cases involving the highest stakes and greatest uncertainty as to outcome; this was such a case.

This ruling should not suggest that the Department will by default select the higher option when presented with competing computations. The choice between hourly and contingency fee computations remains discretionary, and in this case, I find that the higher-yielding formula fairly captures not only the time investment but also the overall risk profile of an attorney accepting and pursuing a claim like this one.

ORDER:

Defendant is hereby **ORDERED** to pay costs of \$22,301.53 and attorney fees of \$40,749.02. Payment shall be made to Claimant's counsel in a lump sum as provided in Workers' Compensation Rule 20.1700.

DATED at Montpelier, Vermont this 23rd day of April 2026.

Chris Winters
Deputy 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.