

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

Jean Butler	)	State File No. L-20151
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Huttig Building Products	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 35-03WC

**APPEARANCES:**

Richard H. Munzing, Esq., for the Claimant  
Keith J. Kasper, Esq., for the Defendant

**RULING ON CLAIMANT’S MOTION FOR ATTORNEY FEES**

This motion comes before the Department on order from the Supreme Court for consideration of the Claimant’s request for attorney fees and costs incurred at the hearing in this Department and on appeal. The Court awarded costs incurred on appeal as allowed under V.R.A.P. 39(c). See Entry Order, Supreme Court Docket Number 2002-113, July 1, 2003.

Claimant supports his request for fees with a copy of a contingency fee agreement with his attorney and invoice reflecting 191.25 hours worked. He seeks fees based on Workers’ Compensation Rule 10.1210 at \$90.00 per hour. The Defendant opposes any award of attorney fees on the basis that such an award to one who forfeited entitlement to medical, indemnity and vocational rehabilitation benefits because of false statements would be unfair.

Pursuant to 21 V.S.A. § 678(a) a claimant who prevails at the Department is entitled to necessary costs as a matter of law and reasonable attorney fees as a matter of discretion. Because Claimant did not prevail at the Department, his request for fees and costs for work done here is denied. *Id.*; *Barber v. Bennington Area Health Care Agency*, Op. No. 78A-95WC (1997).

However, following an appeal to a superior court or to the Supreme Court, a prevailing claimant “shall be entitled to reasonable attorney's fees as approved by the court, and interest at the rate of 12 percent per annum on that portion of any award the payment of which is contested. Interest shall be computed from the date of the award of the

commissioner.” § 678 (b). One needs not prevail on all claims to be considered “prevailing.” *Hodgman v. Jard Company*, 157 Vt. 461 (1991).

Although Jean Butler did not prevail on any issue at the Department, he successfully obtained entitlement to permanent partial disability benefits on appeal. Accordingly, the Court affirmed in part, reversed in part and remanded the case to the Department. It also ruled that the request for fees must first be addressed in this forum.

It cannot be ignored that Claimant suffered a significant work related injury with a resultant permanent impairment. That he can now recover for that impairment, which is unrelated to fraud, is due to the efforts of his attorney before the Vermont Supreme Court, thereby warranting an award of fees. However, a fee award based on the total number of hours worked would be disproportional to the partial success realized. More appropriately, a fee based on 25% of the hours expended on the appeal will be the fee award. Since it is not possible to determine from the invoice submitted what that total number is, Claimant may supplement his request within 20 days of this order. The supplement must list with specificity the hours worked on the appeal only.

**SO ORDERED**

Dated at Montpelier, Vermont this 3<sup>rd</sup> day of September 2003.

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Michael S. Bertrand  
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.