

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

Tammy Tassie)	Opinion No. 55R-04WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
The Homestead)	For: Laura Kilmer Collins
)	Commissioner
)	
)	State File No. S-17957

ORDER ON CLAIMANT’S UNOPPOSED REQUEST FOR ATTORNEY FEES

As a prevailing claimant in Opinion No. 55-04WC (Dec. 9, 2004), Tammy Tassie seeks an attorney fee award based on 75.30 hours worked and \$278.22 in necessary costs.

The Workers’ Compensation Act provides for a discretionary award of reasonable attorney fees and mandatory award of necessary costs. 21 V.S.A. § 678(a). Factors considered in fashioning an award include the necessity of representation, difficulty of issues presented, time and effort expended, clarity of time reports, agreement with the claimant, skill of counsel and whether fees are proportional to the efforts of counsel. See *Hojohn v. Howard Johnson’s, Inc.*, Op. No. 43A-04WC (2004); *Estate of Lyons v. American Flatbread*, Op. No. 36A-03 (2003).

In this case, the benefits awarded do not easily translate into the basis for a contingency fee award because the costs of medical benefits are not yet known and cannot be calculated and the degree of permanency, if any, has not been determined. See *McMillan v. Bertek*, Op. No. 95-95WC (1996). Therefore, even though the attorney-client agreement is for a contingency fee, in the absence of a clear calculation of benefits, an hourly fee is more appropriate.

Claimant’s success in this case was due the efforts of her attorney who needed to spend 75.3 hours because of the carrier’s denial, difficulty of the issues presented, necessary research, and discovery involved.

Therefore, she is awarded fees of \$6,777 (75.30 hours at \$90.00 per hour) and costs of \$278.22.

Dated at Montpelier, Vermont this 25th day of January 2005.

Laura Kilmer Collins
Commissioner

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Pretrial conference on June 14, 2004
Hearing held in Montpelier on September 13, 2004
Record closed on October 15, 2004

APPEARANCES:

Bonnie B. Shappy, Esq., for the Claimant
John W. Valente, Esq., for the Defendant

ISSUE:

Did claimant incur a compensable work related left shoulder injury? If so, what benefits are owed?

EXHIBITS:

Joint I: Medical Records

Defendant's A: Email messages between claimant and adjuster

STIPULATIONS:

1. As of March 29, 2002, claimant Tammy Tassie was an employee of The Homestead in Woodstock, Vermont.
2. The Homestead is an employer as defined in the Workers' Compensation Act (Act).
3. AMGuard Insurance Company was the workers' compensation insurer for the defendant at all times relevant to this claim.

4. On or about March 29, 2002, claimant was employed as an aid at The Homestead with an average weekly wage of \$278.73. In the course of her employment, she was helping a resident get dressed with heavy support stockings when she suffered an injury to her right elbow.
5. The elbow injury of March 29, 2002 is compensable under the Act.
6. On March 29, 2002, claimant treated at Central Vermont Hospital (CVH). She was given a sling and told to rest and apply heat to her arm. Her primary care physician Dr., Kristopher Jensen, referred her to physical therapy.
7. Ms. Tassie engaged in a course of physical therapy at CVH.
8. The nurse case manager and senior adjuster for AmGuard referred claimant to the Occupational Disability Management Center. Ms. Tassie began treatment with Dr. Steven Mann on February 19, 2003.
9. Ms. Tassie began treating with massage therapist Trish Wyman Johndrow on April 21, 2003.
10. Ms. Tassie participated in aquatic therapy at Green Mountain Physical Therapy, held in an indoor pool. The steps of the pool are inset into the side of the pool.
11. Ms. Tassie injured her left shoulder while she was treating her compensable right elbow injury.
12. Since September 9, 2003, claimant has been unable to treat for her right elbow injury due to the degree of pain she has on the left.

FINDINGS OF FACT:

1. Since her high school graduation, claimant has worked as an aide for the elderly in various nursing homes, private homes, and in managed care community homes.
2. Claimant's work duties included giving patients showers, getting them dressed, giving medicine, moving patients, and providing general assistance.
3. After her March 29, 2002, right elbow injury, claimant treated at Fletcher Allen Health Care (FAHC) until February 11, 2003. Treatment included medication, physical therapy, a nerve block and an orthopedic evaluation.
4. Ms. Tassie participated in aquatic therapy at Green Mountain Physical Therapy, held in an indoor pool. The steps of the pool are inset into the side of the pool.
5. On August 13, 2002 claimant was referred to vocational rehabilitation.

6. Dr. Peterson determined that claimant was not likely to be able to return to her pre-injury job as an aide after performing an independent medical examination on October 30, 2002.
7. Next, the insurer referred claimant to Dr. Steven Mann at the Occupational Disability Management Center (ODMC) where treatment included aquatic therapy, physical therapy, massage therapy and six sessions with Dr. Lefkoe.
8. The massage therapist, Trish Johndrow, noted that claimant compensated for the right sided injury by using her left arm as much as possible, even teaching herself to write with her left hand. She noted that claimant's left upper trapezius muscles were tender to palpation.
9. After a session in April 2003, claimant began to feel pain in her neck on her left side. Ms. Johndrow noted the left neck and shoulder were too tender to palpate.
10. When claimant began PT at Green Mountain Physical Therapy on April 25, 2003, Ms. Johndrow accompanied her, explaining her theory that claimant left shoulder and neck pain were related to recent massage.
11. A May 2003 note indicates that claimant had left sided shoulder and neck pain at night when she rolled over in her sleep.
12. Claimant's aquatic therapy took place in a lap pool with inset steps and railing. She needed assistance getting out of the pool.
13. On May 12, 2003 claimant reported at a massage session that she had a difficult weekend after pulling with her arms to get out of the pool. She made a similar report to Dr. Lefkoe a few weeks later, on June 4, 2003. At that visit, Dr. Lefkoe noted signs of left subacromial bursitis, bicipital tendinitis and rotator cuff dysfunction. He attributed the symptoms to her participation in the pool exercises.
14. Reports regarding her satisfaction with pool therapy are inconsistent, with some stating that she enjoyed the therapy and others that she did not enjoy it at all after the "pool incident."
15. Dr. Lefkoe recommended that claimant first treat actively for her left sided symptoms and then participated in a program of functional exercise and work conditioning.
16. Claimant treated for persistent left sided pain with several health care providers, including Barbara Byers, Dr. Lefkoe, Dr. Mann, Dr. Donald Anderson, and Ms. Johndrow.

17. Claimant continues to work with Wagner Rehabilitation in an effort to find her suitable work but without success to date.

Medical Opinions

18. Dr. Lefkoe is a specialist in physical medicine and rehabilitation. He opined that claimant left shoulder complaints are not directly related to the work-related injury. He spoke with the aquatherapist, who provided a different version of the pool incident than the claimant did, and then concluded that when getting out of the pool, claimant put extra strain on her right shoulder, not the left. In his opinion, the left shoulder pain did not arise until the night when she rolled over in bed.
19. Dr. Lefkoe saw claimant six times and had records from Dr. Mann and Green Mountain Physical Therapy. He had few of the massage therapy records. He attributes claimant's symptoms to psychological issues, not a work-related injury. Yet, his own notes document objective signs of injury.
20. In Ms. Johndrow's opinion, claimant's left sided pain was caused by overcompensation for more than a year after the right-sided injury. Her opinion was based on 25 visits with the claimant, and review of other relevant records.

Pre-Injury History

21. Claimant has a history of left shoulder problem that predate her employment with The Homestead. About 15 years ago, she injured her left shoulder when she tripped over some laundry and hit her shoulder on a washing machine. She was out of work for a year. As a result of that injury, every once in awhile, she felt "catching" in the left shoulder.

Attorney Fees and Costs

22. Claimant submitted evidence that her attorney worked 76.4 hours pursuing this claim and incurred \$278.22 in necessary costs.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. All the natural consequences that flow from a work-related injury are compensable. A. Larson and L.K. Larson, *Larson's Workers' Compensation Law*, § 10.01 at 10-01. This includes an aggravation of the original injury by medical or surgical treatment. *Id.* § 10.09 at 10-24.
4. This case is compensable if it is proven that claimant's left sided injury was caused by overuse or by treatment for her work-related right-sided injury.
5. From the outset, I note that claimant's left shoulder injury 15 years ago is irrelevant to this claim. Even if minor symptoms persisted after that incident, there is nothing in the record to suggest that it interfered with her work or in any way was problematic before the incidents at issue here.
6. I find unconvincing the defense reliance on inconsistencies in the record. The medical records clearly document left sided symptoms early in the ODCM program, as well as during pool therapy. In both cases, causation is clear-from overuse of from treatment on the other side.
7. The records as a whole, therefore, support the claimant's position that claimant suffered a left sided injury as overcompensation for the right sided injury and as a result of treatment. That there may be a psychological aspect of the claim does not bar compensability.
8. Treatment has been on hold because claimant's left sided symptoms must be treated before she can undergo the necessary strengthening on the right. In her current state, she cannot work.
9. Therefore, defendant is to resume payment for medical treatment. 21 V.S.A. § 640(a). Further, it is to pay temporary total disability benefits until claimant successfully returns to work or reaches medical end result. § 643a; WC Rule 18.1100.
10. Finally, as a prevailing claimant, Ms. Tassie is entitled to a mandatory award of necessary costs and discretionary award of reasonable attorney fees, 21 V.S.A. § 678(a) when supported with necessary documentation. WC Rule 10.4000. Necessary documentation includes a copy of the fee agreement and itemization of time and specific costs. Claimant has 30 days from the date of this order to provide that documentation.

ORDER:

Based on the foregoing findings of fact and conclusions of law, defendant is ordered to accept this claim for an injury to left shoulder and to pay medical benefits and temporary total disability benefits as outlined above.

Dated at Montpelier, Vermont this 9th day of December 2004.

Laura Kilmer Collins
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.