

**STATE OF VERMONT
DEPARTMENT OF LABOR**

William Belville

Opinion No. 29A-09WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

RHC, Inc. d/b/a
Times Argus

For: Patricia Moulton Powden
Commissioner

State File No. X-63007

RULING ON MOTION TO RECONSIDER AWARD OF ATTORNEY FEES

The Commissioner previously decided this claim on July 29, 2009. The issues presented involved both permanency and apportionment. The Commissioner concluded that the appropriate permanency rating for the impairment referable to Claimant's lower back was 26% whole person. However, under the circumstances of this claim, the Commissioner also ruled that 20% of the impairment properly was apportioned to Claimant's prior injuries. Claimant's total permanency award, therefore, was 6%.

The Commissioner next exercised the discretion granted under 21 V.S.A. §678 to fashion an award of attorney fees. Consistent with longstanding precedent, the Commissioner awarded attorney fees commensurate with the extent to which Claimant had prevailed. Claimant having received approximately 25% of the total permanency benefits he had sought, the Commissioner awarded 25% of his claimed attorney fees.

Claimant now seeks reconsideration of the attorney fee award. He argues that his original intent was only to claim entitlement to permanency benefits for a 6% impairment, and that it was only in response to Defendant's position that he was not entitled to any permanency benefits at all that he asserted a claim for an unapportioned 26% impairment. Claimant further asserts that whether his claim was for 6% permanency or 26% permanency the same core set of facts were involved. Therefore, he argues, his attorney fee award should not have been apportioned even though he only prevailed at the lesser amount. *See Electric Man v. Charos*, 179 Vt. 351 (2006).

Discussion

Whatever Claimant's original intent may have been, the issue as presented at the formal hearing and briefed thereafter included a claim for permanency benefits in accordance with a 26% impairment rating. Perhaps in hindsight he should have foregone this claim. He did not.

Having pursued the claim and failed to prevail, I cannot ignore the result. The Department's longstanding practice is to award attorney fees commensurate with the extent to which the claimant has successfully presented the various aspects of his or her claim. *Hill v. CV Oil Co.*, Opinion No. 15-09WC (May 26, 2009); *L.G. v. Chittenden County Transportation Authority*, Opinion No. 48-08WC (November 25, 2008). This is an appropriate exercise of the Commissioner's discretion under 21 V.S.A. §678(a). I see no reason to reconsider its application here.

Claimant's Motion to Reconsider Award of Attorney Fees is hereby **DENIED**.

DATED at Montpelier, Vermont this 26th day of October 2009.

Patricia Moulton Powden
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.