

Christine Erickson v. Kennedy Brothers Inc (March 25, 2011)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Christine Erickson

Opinion No. 36A-10WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Kennedy Brothers, Inc.

For: Anne M. Noonan
Commissioner

State File No. S-09163

**RULING ON CLAIMANT'S REQUEST FOR AWARD OF ATTORNEY FEES AND
COSTS**

The Commissioner previously decided this claim on December 14, 2010. The disputed issues were (1) whether Claimant's L4-5 disc herniation was causally related to her November 2001 compensable work injury; and (2) if yes, to what workers' compensation benefits was Claimant entitled.

The Commissioner ruled in Claimant's favor on the first issue. As to the second issue, the Commissioner ruled that Claimant was entitled to medical benefits causally related to her injury, but denied her claim for temporary disability and/or mileage benefits. The Commissioner also ruled that as Claimant had "substantially prevailed," she was entitled to an award of costs and attorney fees "commensurate with the extent of her success." 21 V.S.A. §678; *Hatin v. Our Lady of Providence*, Opinion No. 21S-03WC (October 22, 2003).

Claimant now has submitted a request for an award of costs totaling \$7,212.64 and attorney fees totaling \$21,648.00. Defendant has raised various objections, each of which is considered below.

Fees Commensurate with the Extent of Claimant's Success

Defendant argues that any award of fees and costs should be reduced substantially in recognition of the fact that the claims on which Claimant failed to prevail – temporary total disability and mileage reimbursement – are the ones that would have netted her an immediate monetary recovery. In contrast, the claims upon which she prevailed – compensability and medical benefits – resulted primarily in reimbursement to her medical providers, with no immediate monetary recovery to her.

Defendant's argument misses the mark. Although they would have resulted in a small, albeit immediate, monetary award, the claims upon which Claimant failed to prevail were relatively minor. Of far greater import in the long run was the determination that her disc herniation is compensable. With that determination, Claimant may well become entitled to additional benefits in the future. This possibility alone is enough to justify awarding a significant portion of the attorney fees incurred.

Updated Attorney Fee Reimbursement Rate

Defendant next argues that whatever attorney fees are awarded must be based on the reimbursement rate in effect as of the date of her injury, November 23, 2001. Workers' Compensation Rule 10.1210 provided for a rate of \$90.00 per hour at that time. Effective June 15, 2010 the rule was amended, and the rate increased to \$145.00 per hour. Claimant incorporated the change into her fee request, and seeks an award at the updated rate for all legal services provided after June 15, 2010. Defendant argues that because the rule change was substantive rather than procedural, it cannot be applied retroactively, and therefore the old rate must apply throughout.

Workers' Compensation Rule 46.1000 provides: "Procedures under these rules, not affecting the substantive rights of a party, shall apply to pending and future claims and cases." Had the amendment at issue here created a new right to attorney fees where one had not existed before, this might indeed constitute a substantive change. But where the change merely alters the rate at which such fees are to be awarded, the amendment is properly categorized as procedural. *Estabrook v. New England Precision*, Opinion No. 10-00WC (May 16, 2000). It is appropriate, therefore, to apply the amended rate to new charges incurred after its effective date.

Recoverable Costs

Last, Defendant argues that various fax and copying charges should not be allowed as costs because Claimant has not established that they were "actually incurred." I am satisfied that the costs are legitimate, reasonable and well within the spirit of Rule 10.3000.

Conclusion

I conclude that Claimant is entitled to an award of her costs as submitted, totaling \$7,212.64.

As for attorney fees, as noted above the Commissioner typically exercises the discretion granted by 21 V.S.A. §678 to award only those attorney fees that are commensurate with the extent of the claimant's success. *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003). In addition, the Commissioner also considers such factors as 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. *Id.*, and cases cited therein. Considering those factors in the context of the current claim, I conclude that it is appropriate to award Claimant 90% of the fees requested, or \$19,483.20.

ORDER:

Based on the foregoing, Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$7,212.64; and
2. Attorney fees totaling \$19,483.20.

DATED at Montpelier, Vermont this 25th day of March 2011.

Anne M. Noonan
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.