

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Enoch Rowell

Opinion No. 25-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Northeast Kingdom
Community Action

For: Anne M. Noonan
Commissioner

State File No. Y-58698

RULING ON CLAIMANT'S MOTION FOR ATTORNEY FEES AND COSTS

The Commissioner previously decided this claim on July 6, 2011. Among the disputed issues were (1) whether Claimant is permanently and totally disabled as a consequence of his February 2007 compensable work injury; and (2) alternatively, whether Claimant is entitled to any permanent partial disability benefits causally related to that injury.

The Commissioner ruled that although Claimant successfully established the causal relationship between his current condition and his work injury, he failed to prove that he has yet been rendered permanently and totally disabled as a result. She thus denied Claimant's claim for permanent total disability benefits. As to permanent partial disability benefits, the Commissioner ruled entirely in Claimant's favor.

The Commissioner also ruled that Claimant had at least partially prevailed on his claims and therefore was entitled to an award of costs and attorney fees commensurate with the extent of his success. In accordance with that ruling, Claimant now seeks an award of costs totaling \$3,121.23 and attorney fees totaling \$11,607.25. Defendant objects to the request on various grounds.

With the exception of the costs related to obtaining Claimant's prior income tax returns (\$171.00), I conclude that the costs he has requested are sufficiently related to the claims upon which he prevailed to merit reimbursement. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003). I therefore award Claimant costs totaling \$2,950.23.

As for attorney fees, Defendant argues that the fees requested are disproportionate to the value of the permanent partial disability benefits Claimant was awarded, particularly in light of the fact that if he had prevailed on his permanent total disability claim his award would have been much greater. I disagree.

In exercising the discretion granted by 21 V.S.A. §678 the commissioner typically 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. *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003), and cases cited therein.

Defendant mischaracterizes the issues in this case as involving only whether Claimant was entitled to permanent total or permanent partial disability benefits. The fact is, however, that a critical issue underlying both of those claims was whether Claimant's current condition is causally related to his compensable work injury. Against the testimony of Defendant's own expert witness, Claimant established that it is. His claim for attorney fees must be considered in light of his success on this important issue, not solely on the basis of his permanent partial disability award.

I do agree with Defendant that more than half of the testimony at formal hearing, including that of both vocational rehabilitation experts as well as that of Mr. Tatum and Ms. Wiseman, was relevant only to Claimant's unsuccessful claim for permanent total disability. For Claimant's attorney to allocate only fifty percent of her pre-hearing, hearing and post-hearing hours to the issue upon which Claimant failed to prevail is questionable. A sixty-forty allocation of these fees is more equitable. Of the 65.5 hours expended, therefore, I allocate 26.2 to the claims upon which Claimant prevailed. Aside from this modification, I conclude that the remaining time entries upon which Claimant's fee request is based are sufficiently substantiated to merit reimbursement.

Last, I note that Claimant's fee request is based on a billing rate of \$145.00 per hour for all services rendered since May 2008. This is incorrect. As the amendment to Workers' Compensation Rule 10.1210, which raised the billing rate from \$90.00 per hour to \$145.00, was procedural in nature, it applies only to fees incurred after its effective date, June 15, 2010. *Erickson v. Kennedy Brothers, Inc.*, Opinion No. 36A-10WC (March 25, 2011).

Claimant's fee request reflects a total of 27.7 hours expended prior to June 15, 2010, which at the \$90.00 rate in effect at the time amounts to \$2,493.00. The hours expended after June 15, 2010 total 45.8, which at \$145.00 per hour totals \$6,641.00. The total awarded, therefore, is \$9,134.00.

ORDER:

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

1. Costs totaling \$2,950.23; and
2. Attorney fees totaling \$9,134.00.

DATED at Montpelier, Vermont this 31st day of August 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.