STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

The Estate of Declan Lyons	)	State File No. S-18824
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
American Flatbread/Peerless Ins. Co.	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 36R-03WC

RULING ON CLAIMANT'S NARROW MOTION TO RECONSIDER

Claimant, through Christopher J. McVeigh, Esq., asks the Commissioner to reconsider his ruling denying the inclusion of the fair market value of weekly restaurant breads in the computation of Declan Lyons's average weekly wage. Defense counsel, Harold E. Eaton, Jr., Esq., opposes the motion.

At the hearing, Jodi Leslie testified that Declan Lyons brought home six restaurant breads, one every other week, during the twelve weeks prior to his death. As the defense argues, Robin Morris, chief financial officer at American Flatbread, testified that the weeks prior to Lyons's death were the busiest time of year in the restaurant, there were a finite number of pizzas available during that period and that he himself had been denied breads due to the limited supply. In less busy times, workers would have been more likely to receive the breads. Mr. Morris also testified that 95% of the time an employee request for bread would generate a ticket system in the restaurant showing receipt of the bread. There was no ticket for any restaurant bread for Lyons in the twelve weeks prior to his death.

When all the evidence was considered, it was insufficient concerning receipt of the breads because Leslie's memory on this issue was not reliable, receipt of the breads was discretionary, and there was no receipt documenting that Lyons received the bread. Accordingly, there was inadequate evidence on which an award based on the receipt of the breads could have been made.

Therefore, the Claimant's limited motion to reconsider is DENIED.

Dated at Montpelier, Vermont this 3rd day of November 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.

Lyons (estate of) v. American Flatbread (10/24/03)

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RULING ON CLAIMANT'S REQUEST FOR ATTORNEY FEES

This matter came before the Department on the claimant's request for attorney fees. Christopher McVeigh, Esq. represents the claimant. Harold Eaton, Esq., represents the defendant in opposition to the request.

Specifically, claimant requests $15,162.3 in fees based on 168.47 hours at $90.00 per hour and costs totaling $1,747.36. Although claimant did not prevail on a claim for spousal benefits for a domestic partner, the estate proved entitlement to benefits for the child of the deceased claimant.

Pursuant to 21 V.S.A. § 678 (a) and Workers' Compensation Rule 10.000, an award of reasonable attorney fees is discretionary and an award of necessary costs mandatory when supported by the fee agreement and evidence establishing the amount and reasonableness of the request.

An early purpose of § 678 was to discourage unreasonable delay and unnecessary expense in the enforcement of a claim under the Workers' Compensation Act. *Morrisseau v. Legac*, 123 Vt. 70 (1962); *Grassette v, Beecher Falls Division of Ethan Allen*, Op. No. 68-95WC (1995). In addition, as the Court later explained, the right to recover fees for a workers' compensation claimant is often an access to justice. See *Fleury v. Kessel/Duff Constr. Co.*, 149 Vt. 360, 364 (1988).

Mindful of the purposes underlying the Act, this Department has considered one or more of several factors when exercising the discretion necessary for an award of fees. Those factors include: whether the efforts of the claimant's attorney were integral to the establishment of the claimant's right to compensation, *Marotta v. Ascutney Mountain Resort*, Op. No. 12-03WC (2003); *Jacobs v. Beibel Builders*, Op. No. 17-03 (2003); *Deforge v. Wayside Restaurant*, Op. No. 35-96WC (1996); the difficulty of the issues raised, skill of the attorneys and time and effort expended, *Dickenson v. T.J. Maxx*, Op. No. 13-03 WC (2003); and whether the claim for fees is proportional to the efforts of the attorney, *Vitagliano v. Kaiser Permanante*, Op. No. 39-03 WC (2003*); Fitzgerald v. Concord General Mutual*, Op. No. 6A-94WC (1995). When a claimant has partially prevailed, a fee will be based on the degree of success. *Brown v. Whiting*, Op. No. 07-97WC (1997).

In this case, it is clear that claimant's attorney's involvement was essential to the establishment of the child's right to compensation, which was denied by the insurer even though the positional risk doctrine is well established in Vermont. A defense that rested in part on statements made by a criminal defendant created complex factual issues, necessary discovery and attorney time. On the other hand, attorney time for both claimant and defendant was expended on cumulative evidence and on the unsuccessful claim for spousal benefits.

Defendant characterizes the total number of hours, 168.47, as unreasonable given the nature of the conflict and urges the Department to subtract time spent on the unsuccessful spousal claim, the average weekly wage aspects of the claim, on preparation for cumulative witness testimony and for the time when tasks were "bunched." Furthermore, the defense points out that this Department made an exception to the general rule that a claim for attorney fees should be filed with proposed findings of fact and conclusions of law because of operational problems in claimant's counsel's office.

On this record, it is clear that an attorney fee award is a proper exercise of discretion and that such an award must take into consideration the unusual posture of the request, hours spent on cumulative evidence and on the unsuccessful aspects of the claim. Those considerations lead me to conclude that a fair percentage chargeable to the defense is 60% of what has been requested, 101.08 hours at $90.00 per hour for a total fee of $9,097.38.

Next is the issue of costs when, if necessary, must be awarded pursuant to 21 V.S.A. § 678(a). Such costs shall include, but are not limited to deposition fees, subpoena fees and expert witness fees. Rule 10.3000. Included in the request in this case are charges for postage, photocopying, attorney mileage and telephone charges. Because those charges were necessary to the claim, they are awarded.

Accordingly, defendant is ordered to pay claimant $9,097.38 in attorney fees and $1,747.36 in costs.

Dated at Montpelier, Vermont this 24th day of October 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.

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	)	Commissioner
	)	
	)	Opinion No. 36-03WC

Hearing Held in Montpelier on June 4-5, 2003.
Record Closed on July 3, 2003.

APPEARANCES:

Christopher J. McVeigh, Esq., for the Claimant
Harold E. Eaton, Esq., for the Defendant

ISSUES:

1. Did Declan Lyons's death on April 12, 2002 arise out of and in the course of his employment at American Flatbread?

2. If so, will Lyons's average weekly wage be calculated to include the additional benefits of food, massage, and vacation pay?

3. Is Jodi Leslie, partner of Lyons and mother of his child, entitled to spousal benefits under 21 V.S.A. § 634?

EXHIBITS:

Joint Exhibits:

I. Washington District Court Investigatory file re: Co-worker/criminal defendant
II. Autopsy Report
III. Behn Deposition transcript with 12 exhibits (photographs)

Claimant's Exhibits:

1. Statement of Matthew Holland
2. Letter from Thomas Lyons
3. Statement of Erin Royster
4. Statement of Joe Hulsizer
5. VOSHA file
6. CVH Records
7. Mad River Valley Ambulance Records
8. DNA Parentage Report
9. American Flatbread Employee Document
10. American Flatbread Menu
11. Funeral and transportation bill
12. CVH statement of bill
13. Letter from Quayl Rewinski
14. Letter from Beea Benedict
15. Lease agreement
16. Schedule of birthing classes
17. Two photographs from VOSHA file
18. Photograph of Declan Lyons (in Attorney McVeigh's custody)
19. Photograph of Saleh Leslie-Lyons (in Attorney McVeigh's custody)

Defendant's Exhibits:

A. Robin Morris's deposition transcript
B. George Schenk's deposition transcript

CLAIM:

1. Death benefits for dependant child under 21 V.S.A. § 634, plus interest under 21 V.S.A. § 664;
2. Death benefits for domestic partner under 21 V.S.A. § 634, plus interest under 21 V.S.A. § 664;
3. Burial and funeral expenses under 21 V.S.A. § 632;
4. Medical expenses under 21 V.S.A. § 640; and
5. Attorney fees and costs under 21 V.S.A. § 678.

STIPULATED FACTS:

1. At all times relevant to this case, Declan Lyons (Lyons) was an employee of American Flatbread (Flatbread).

2. At all times relevant to this case, Flatbread was an employer within the meaning of the Vermont Workers' Compensation Act (Act). Flatbread operates both a factory during the week and a restaurant on the weekend in Waitsfield, Vermont.

3. Lyons began work at Flatbread in January 2001. He worked primarily in the factory, but filled in occasionally at the restaurant. On Fridays, he was in charge of making the pizza sauce, which was done in a cauldron, over an open fire, in an outdoor area known as the medicine wheel.

4. On April 12, 2002 at 2:15 PM, Lyons was shot in the head while cooking pizza sauce during his work shift at Flatbread. He was pronounced dead upon arrival at the hospital.

5. A co-worker of Lyons has been charged in the killing. His criminal trial is pending. He worked primarily in the restaurant.

6. On June 24, 2002, Saleh Leslie-Lyons, daughter of Lyons and his partner Jodi Leslie (Leslie), was born.

FINDINGS OF FACT:

1. Lyons had been designated as "sauce boss" by owner George Schenk, in the fall of 2001. Lyons made the sauce on Fridays at the medicine wheel, as was commonly known to Flatbread employees.

2. No assaults or crimes had ever occurred at the medicine wheel prior to the killing.

3. The bullet that killed Lyons on April 12, 2002 at 2:15 PM, while he was standing in the medicine wheel making sauce, was fired from a high velocity rifle, from a distance of greater than five to ten feet.

4. Four other employees were present at Flatbread at the time of the killing: Camilla Behn, Jennifer Moffriod, Jessica Tompkins, and Mark Reny. As soon as they heard the shot, they ran out of their respective locations and found Lyons lying in the center of the medicine wheel. Behn called the ambulance, and attempted CPR. Although it was apparent that Lyons had suffered a serious head injury, the employees did not know Lyons had been shot until the police told them so.

5. Lyons had worked with the man charged with his killing several times, and knew him through their employment at Flatbread. They did not have a personal or social relationship outside of their employment at Flatbread. Their only relationship was that of co-employees.

6. Lyons had no known disputes with anyone at Flatbread, or with anyone outside of Flatbread.

7. Flatbread chose to make the sauce outdoors, in part because of the flavor added by the open fire. After Lyons's death, Flatbread began to make the sauce indoors at another location. This change occurred because of an order from the health department, not because of the death. Employees did become fearful for their own safety however, after the killing.

8. The Estate of Declan Lyons incurred hospital expenses in the amount of $1,643.00, for services provided by Central Vermont Hospital in attempting to save Lyons. The Estate also incurred a bill for $5,295.59 for the transportation of Lyons's body to Wisconsin.

9. Lyons's average weekly base wage was $414.37 during the 12 weeks preceding his death.

10. Flatbread employees were entitled to one restaurant bread per week, although they did not always receive that many. During the twelve weeks preceding his death, Leslie testified that Lyons took home about six breads, or one every other week. Flavors generally brought home by Lyons had a retail value of $13.75 and $14.75. These breads were valued at $10.00 – 17.00 each by Robin Morris, Chief Financial Officer of Flatbread, although the cost to the restaurant was less.

11. When an employee orders restaurant bread, a ticket with the employee's name on it is usually written and kept on file. No such written record was submitted however, to indicate that Lyons received breads in the 12 weeks preceding his death. Managers say most employee requests were denied during that time because the restaurant was busy.

12. Employees were also entitled to take home factory seconds when available, which could not be sold to the public. At the time of Lyons's death, he had a freezer full of these seconds.

13. Flatbread hired a massage therapist to give one 15-minute massage every two weeks, to employees who have been employed for at least three months and have worked at least 20 hours per week. Flatbread's intent in providing the massage benefit was to keep its employees healthy, and to substitute for a lack of preventative health care coverage. Flatbread intended this service to be provided while the employee was being paid for work, and made the service available only during work.

14. Lyons received six massages in the twelve weeks preceding his death. These massages were valued by Morris at $10.00 each, or $5.00 per week.

15. Flatbread employees who have been employees for at least six months earn vacation pay at the rate of .02 hours for each hour worked. This number of hours is multiplied by the employee's wage, and paid to an employee after he leaves. After Lyons died, Flatbread paid his estate for vacation pay that had accrued, but had not been used. The amount paid for the 12 weeks prior to the death was $95.26, for a weekly average of $7.94. This amount was earned before Lyons's death, but unpaid until after Lyons's death.

16. Lyons and Leslie met in 1997 in Wisconsin, began dating, and had been a committed couple from 1997 until Lyons's death. They began living together in the summer of 1999 when they moved to Vermont. They both moved back to Wisconsin later that year, where they lived separately while studying at different colleges. The following summer, they moved back to Vermont together, where they lived together at various locations until Lyon's death.

17. Lyons and Leslie began to talk about marriage in 2000. When Leslie became pregnant in 2001, they began to make wedding plans. At the time of Lyons's death however, they were not nor had they ever been legally married.

18. Lyons is Saleh's biological father.

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, Morse Co.*, 123 Vt. 161 (1963). The claimant must prove that the injury, in this case Lyons's death, arose out of and in the course of his employment. 21 V.S.A. § 618(a); *Miller v. IBM*, 161 Vt. 213, 214 (1993); *Clodgo v. Rentavision, Inc.*, 166 Vt. 548, 550 (1997).

2. An accident occurs in the course of employment when it was within the period of time the employee was on duty at a place where the employee was reasonably expected to be while fulfilling the duties of the employment contract. *Clodgo*, 166 Vt. at 552, citing *Miller*, 161 Vt. at 215. Lyons was shot while on duty, at the medicine wheel, where he was reasonably expected to be while making sauce. Without doubt, the killing occurred in the course of Lyons's employment.

3. The question therefore is whether the killing arose out of his employment. This inquiry involves an assessment of risks, which fall into one of three categories: risks distinctly associated with employment, which are clearly compensable; risks personal to the claimant, which are not compensable, and "neutral" risks "having no particular employment or personal character." 1 A. Larson & L.K. Larson, Larson's Workers' Compensation Law, ch. 4 at 4-1 (1999).

4. In Vermont, a neutral risk is evaluated under the positional risk doctrine which means that an injury arises out of employment "if it would not have occurred but for the fact that the conditions and obligations of the employment placed the claimant in the position where he was injured." *Clodgo*, 166 Vt. at 551, citing *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993); *Miller*, 161 Vt. at 214. As Professor Larson explains:

> This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligation placed the employee in the particular place at the particular time when he or she was injured by some neutral force, meaning by "neutral" neither personal to the Claimant nor distinctly associated with the employment.

1 Larson's § 3.05 at 3-5.

5. In fact, most jurisdictions recognize a presumption with unexplained assaults that the death arose out of the employment. 1 Larson's § 7.04[2] at 7-13. This is done out of fairness to the dependents, because the best witness to testify on whether the attack was personal is deceased. Id. The purest form of unexplained death cases is where the claimant is found dead from an assault, for which there were no witnesses, no evidence to indicate whether the assault was personal or work-related, and no one can figure out why the assault occurred. Id; 1 Larson's, §8.03(3). In such cases, an award should not be denied merely because the claimant cannot positively show that the assault was motivated by something connected with work." *Estate of Moore v. Moore Construction Co.*, Op. No. 37-95WC (1995), citing 1 Larson's, §7.04[3][d]at 7-24 (2002). Even in states that do not follow the majority view, a claimant retains the burden of showing a lack of personal animus only where the circumstances strongly suggest a personal attack. Id. citing *California State Polytechnic University v. Workers' Compensation Appeals Board*, 127 Cal. App. 3d 514, 520 (Cal. App. 1982).

6. The assault need not be completely related to the employment, as long as it is not purely personal. *Shaw*, 160 Vt. at 599; *Dinis v. Handy's Texaco*, Op. No. 12-01 WC (2001), citing 1 Larson's § 4.03. Risks that are purely personal to the claimant and are not compensable include assaults by "a mortal personal enemy who has sworn to seek the claimant out wherever he may be." 1 Larson's § 4.02. In *Dinis*, the assault was not compensable, even though it occurred while the victim was at work, because the assailant and the victim had a purely personal relationship, the assailant sought out the victim regarding a personal dispute, and the victim just happened to be at work. In *Dinis*, the identity of the assailant, his involvement in the assault, his personal motive, and his relationship to the victim, were all well known and unrelated to work. In this case however, no such personal relationship or dispute outside of work has been shown.

7. If someone other than the charged co-worker killed Lyons, then the but-for test has also been met. If a stranger killed Lyons, he or she would clearly be an unknown person, and the killing would fall under neutral risk. If the killer was someone Lyons knew, the motive would still be unknown, and the killing would still be unexplained. Regardless of whether the person was known to Lyons or was a total stranger, it is more likely that the killing would not have happened outside of his employment, because Lyons had no known enemies or disputes with anyone outside of work. All three of the possible scenarios in this case are neutral risks, and are compensable.

8. Declan Lyons's death occurred at work, while doing his job. The exposure to the risk of a gunshot occurred because his work station was outdoors, and their only real established relationship between decedent and the alleged assailant was as co-employees. Therefore, the but-for test of the positional risk doctrine has been met.

9. Because this state has adopted the positional risk doctrine, it is unnecessary to address the increased risk doctrine. It is unnecessary to show that Claimant's employment conditions increased the risk of death. 1 Larson's § 7.01(2); 1 Larson's § 3.05. Therefore, in the absence of any evidence showing personal animus, this death is unexplained, and arose out of and in the course of Lyons's employment.

Calculation of Wages

10. Average weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding an injury. 21 V.S.A. § 650(a).

11. Claimant argues that the value of the weekly restaurant breads Lyons was entitled to receive should be added to his average weekly wage. "Wages" includes bonuses and the market value of board, lodging, fuel and other advantages which can be estimated in money and which the employee receives from the employer as a part of his remuneration…." 21 V.S.A. § 601(13). Under this definition, the restaurant breads qualify as "board", and are included as a part of wages. The definition also indicates however, that the board must actually be received as part of remuneration.

12. There is no written record indicating that Lyons actually received restaurant breads in the 12 weeks preceding his death. The only evidence is Jodi Leslie's testimony that Lyons brought home about one restaurant bread every other week during this time. Although Leslie's credibility has not been questioned, there is no way to verify the accuracy of her recollection. Furthermore, the restaurant breads were not guaranteed to employees, and were less likely to be received when the restaurant was busy. Robin Morris testified that the restaurant was very busy during the 12 weeks preceding Lyons' death, and that breads were not likely to have been received during that time. Morris also testified that employee orders for restaurant breads are written down with the employee's name on them "95% of the time". However, no orders for Lyons were introduced as evidence. Therefore, in the absence of a written record to the contrary, it is more likely that Lyons did not receive any restaurant breads during the 12 weeks preceding his death, and the value of these breads will not be added to his average weekly wage.

13. Employees were also entitled to factory seconds, or restaurant breads that could not be sold to the general public. Leslie testified that Lyons had a freezer full of these seconds. Wages shall include the fair market value of any board. Workers' Compensation (WC) Rule 15.4130. Although the restaurant breads mentioned above had a fair market value, the factory seconds did not, because they could not be sold to the public. Therefore, the value of these breads will not be added to Lyons's average weekly wage.

Massage

14. Contributions similar to board, rent, housing, include benefits with a present value that can be readily converted to cash equivalent on the basis of their market value. *Pickens v. NSA Industries*, Op. No. 36-98WC (1998), citing *Morrison-Knudsen Constr. Co. v. Director*, OWCP, 461 U.S. 624, 630 (1983). The massages Flatbread provided to its employees were valued at $10.00 per massage by Robin Morris.

15. The legislature did not intend to include health insurance as "wages." *Pickens*, citing *Antilla v. Edlund Co. Inc.*, Op. No. 7-90WC (1990). Benefits are dependent on what the worker actually earned. Defendant's health benefit program was made available to employees because of their status as employees, independent of their wages or actual work performed. *Pickens*. Health insurance premiums are not generally included in wages, and Flatbread intended its massage benefit to take the place of preventative health care coverage.

16. The massage benefit provided by Flatbread, however, is quite different from health insurance for the purposes of this analysis. "Wage" means the wages that the worker lives on, and not miscellaneous values that may or may not someday have a value to him depending on a number of uncontrollable contingencies. *Pickens*, citing 5 Larson's § 60.12(b). Health insurance premiums are uncontrollable contingencies, which may or may not have an actual value someday. The massages on the other hand, were actually received, had actual monetary value, and the employee actually benefited from that value.

17. Defendant argues that the massages should not be included because they were received while employees were being paid for work. Owner George Schenk states however, that Flatbread intended the service to be provided while employees were on the clock, and that this was in fact the only time the service was available. Therefore, $5.00 will be added to Lyons's average weekly wage for the value of massages received in the 12 weeks preceding his death.

Vacation Pay

18. Claimant argues that the value of Lyons's unused vacation pay, which was paid to his estate after his death, should be included in his average weekly wage. Jurisdictions have disagreed on whether to include vacation pay as part of a claimant's average weekly wages. 5 Larson's § 93.01(2)(e). Some jurisdictions have held that vacation pay is included if it is earned in conjunction with actual work performed. *Universal Maritime Serv. Corp. v. Wright*, 155 F.3d 311, 314 (4th Cir. 1998).

19. In Vermont however, bonuses and extras are appraised in terms of their date of receipt, and can only be included in the calculation of wages if they were *received* in the twelve weeks prior to the work related injury. *Martyn v. Visiting Alliance of VT & NH*, Op. No. 59-98WC (1998), citing *Zielinski v. OMYA, Inc.*, Op. No. 24-96WC (1996). The rule in this jurisdiction is clear, and Lyons's vacation pay was not received in the 12 weeks prior to his death.

20. Wages shall include any bonuses paid, due, or received in the 12 weeks preceding the injury. WC Rule 15.4120. Lyons's vacation pay may have been earned in the 12 weeks preceding his death, but it did not become due until after he left his employment at Flatbread. Because Lyons's vacation pay was contingent upon his departure it will not be added to his average weekly wage.

Death and Dependency Benefits

21. Defendant does not dispute that Saleh Leslie-Lyons is a dependent child entitled to death benefits if this claim is compensable. The term "child" under the Workers' Compensation Act includes a stepchild, as well as an adopted child, posthumous child and an acknowledged illegitimate child. 21 V.S.A. § 601(2); *Truax v. Pelletier Lumber*, Op. No. 21R-99WC (1999). Therefore, Saleh is entitled to benefits under the Act, even though her birth was after Lyons's death.

22. Defendant argued, however, that Saleh is only entitled to benefits until the age of eighteen. A child shall be a dependent entitled to compensation "if under eighteen years of age, or incapable of self-support and unmarried, whether or not ever actually dependent upon the deceased; *or* if regularly enrolled in an approved educational or vocational training institution, who was at the time of the employee's injury or death partially or wholly dependent on the employee, regardless of age…" 21 V.S.A. § 634(1). Even though not yet born, Saleh was dependent on Lyons at the time of his death. Therefore, Saleh will remain a dependent as long as she is "under eighteen…*or* incapable of self-support and unmarried …or regularly enrolled in an approved educational or vocational training institution…." Id.

23. Spouses and civil union partners are also dependents entitled to compensation under the Act. 21 V.S.A. § 634(2); 15 V.S.A. § 1204 (b), (e) (9). When the language of a statute is clear and unambiguous, this Department must interpret the rule in accordance with the plain language chosen by the Legislature. *Barrett/Canfield, LLC v. City of Rutland*, 171 Vt. 196, 200 (2000). The word "spouse" in 21 V.S.A. § 634 clearly and unambiguously refers to those who have been legally married or civilly united. It is therefore unnecessary to inquire into the Legislature's intent.

24. In states that recognize common law marriages, unmarried domestic partners may be entitled to workers' compensation death benefits. *Turnbull v. Cyr*, 188 F.2d 455, 457 (9th Cir. 1951). Vermont however, is not one of those states. Questions about the marriage relationship must be decided according to the domestic relations law of the state. 5 Larson's § 96.02(2). Therefore, Jodi Leslie is not a spouse entitled to death benefits under the Act.

25. If death results from the injury, the employer shall pay for the benefits "1) [t]o the spouse, if there are no dependent children, sixty-six and two-thirds percent; (2) to the spouse, if there is one dependent child, a weekly compensation equal to seventy-one and two-thirds percent of the deceased employee's average weekly wages; (3) If there is no spouse, but a dependent child or children, then to the child or children, the amount or amounts payable to a spouse with the same number of dependent children." 21 V.S.A. § 632. Therefore, Saleh Leslie-Lyons is entitled to a weekly compensation equal to seventy-one and two-thirds percent of the Lyons's average weekly wage, for the period authorized by 21 V.S.A. § 634.

Burial and Funeral Expenses

26. If death results from the injury, the employer shall pay to the persons entitled to compensation or, if none, then to the personal representative of the deceased, burial and funeral expenses in the amount of $5,500.00 and expenses for out-of-state transportation of the decedent to the place of burial not to exceed $1,000.00. 21 V.S.A. § 632. According to Claimant's Exhibit 11, the total costs were $5,295.59, with a breakdown of $4,784.15 for burial and funeral expenses, and $511.44 for transportation to the place of burial. Since both subtotals fall within the statutory limits established, the total amount requested is awarded.

Medical Expenses

27. An employer subject to the provisions of this chapter shall furnish reasonable surgical, medical and nursing services and supplies to an injured employee. 21 V.S.A. §640(a). Attempts to save the Lyons's life were certainly reasonable and necessary. Medical expenses subject to the limitations of Workers' Compensation Rule 40, the Fee Schedule, are awarded.

Attorney Fees

28. The commissioner may allow the claimant to recover reasonable attorney fees when the claimant prevails. 21 V.S.A. § 678(a). It is not necessary to prevail on all claims in order to be a prevailing claimant entitled to award of attorney's fees; the question is whether the claimant has substantially prevailed. *Hodgeman v. Jard Co.*, 157 Vt. 461, 465 (1991). The defense argues that Claimant should not be entitled to attorney fees unless Leslie prevails on the spousal issue because spousal benefits, if granted, would be the largest aspect of the total claim. But the argument suggests an overly narrow interpretation of the term "prevail" in § 678(a). The compensability of this claim has been challenged from the outset. It was due to the efforts of the Claimant's counsel that Declan Lyons's child will receive benefits. Accordingly, her attorney is entitled to reasonable attorney fees, which will be determined once the request is reviewed. Unless the parties can resolve this informally, Claimant's counsel has 30 days from the date of this order to submit the claim for fees; the defense then has 15 days to respond.

29. Although a request for attorney fees should be filed with proposed findings of fact and conclusions[1] under Workers' Compensation Rule 10.4000, discretion for an exception is allowed. In this case, Claimant's counsel's explanation that the submission was delayed due to operational problems in his office serves as a valid basis for such an exception and is hereby granted.

30. In accordance with 21 V.S.A. § 664, the date upon which defendant's obligation to pay funeral and medical benefits compensation began on the dates when those obligations were incurred. The date upon which defendant's obligation to pay past due dependency benefits began on the date of Saleh Leslie-Lyons's birth.

ORDER:

THEREFORE, based on the foregoing findings of fact and conclusions of law, the defendant is ordered to pay the Claimant:

1. Death benefits for dependent child under 21 V.S.A. § 634, § 635 plus interest under 21 V.S.A. § 664;

2. Medical expenses and interest under 21 V.S.A. § 632 and § 644;

3. Funeral and burial expenses in the amount of $5,295.59 plus interest under 21 V.S.A. § 640 and § 644;

4. Attorney's fees and costs under 21 V.S.A. § 678(a), to be determined.

Dated at Montpelier, Vermont this 22nd day of August 2003.

_____

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.

[1] The parties have raised some question about the practice of filing proposed findings and whether supplemental requests will be permitted. Typically, at the end of each hearing the attorneys and hearing officer agree on a postmark date for submission of proposed findings of fact and conclusions and decide whether responsive requests will be permitted. No agreement for responsive requests was made in this case. However, in cases such as this when a determination on fees is not made until after the hearing, the defense should be granted a reasonable time to respond.