

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Arnold Griggs

Opinion No. 30A-10WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

New Generation Communication

For: Valerie Rickert
Acting Commissioner

State File No. P-15250

RULING ON CLAIMANT'S PETITION FOR ATTORNEY FEES AND COSTS

The Commissioner previously decided this claim on October 1, 2010. Among the issues presented were Claimant's entitlement to temporary total disability benefits for a three-month period following his February 2006 fusion surgery, the extent of the workers' compensation "holiday" Defendant enjoyed following Claimant's settlement of two third-party actions, and Claimant's entitlement to penalties and interest.

The Commissioner ruled in Claimant's favor on the issues relating to the extent of Defendant's workers' compensation "holiday." She awarded him temporary disability benefits for one-half of the period he had sought, and declined to award either penalties or interest.

In accordance with 21 V.S.A. §678(e), Claimant now has submitted his petition for costs totaling \$3,112.01 and attorney fees totaling \$20,481.50.¹

According to 21 V.S.A. §678(a), when a claimant prevails after formal hearing necessary litigation costs "shall be assessed" against the employer. The commissioner has discretion to award attorney fees to a prevailing claimant as well.

The Supreme Court has held that a claimant does not automatically forfeit entitlement to costs and fees under §678(a) merely because he or she did not prevail as to every issue litigated at formal hearing. *Hodgeman v. Jard*, 157 Vt. 461, 465 (1991). With that in mind, where the claimant only partially prevails, the Commissioner typically endeavors to award only those costs that relate directly to the successful claims. *See, e.g., Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003).

It is not always possible to separate out the costs that are attributable to a successful claim as opposed to an unsuccessful one, however. Here, for example, the costs incurred in pursuing Claimant's claim for three months' worth of temporary disability benefits were no more or less than they would have been had he only sought the six weeks' worth that he was awarded. The same is true of Claimant's unsuccessful claim for penalties and interest. Under these

¹ Since filing his original petition, Claimant has acknowledged that certain costs and fees relate to matters other than those litigated at the formal hearing, and therefore should not have been included. The amounts stated above incorporate those deductions.

circumstances, it is appropriate to award Claimant all of the costs he has requested, totaling \$3,112.01.

As for attorney fees, the Commissioner typically exercises the discretion granted by the statute 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.

Here, the issue upon which both parties concentrated most of their efforts, and the one on which Claimant prevailed, was the extent of Defendant's workers' compensation "holiday." The issues upon which Claimant failed to prevail represented a far less significant investment of skill, time and effort. Under these circumstances, I find it appropriate to award Claimant ninety percent of the fees he has requested, or \$18,433.35.

I acknowledge Claimant's argument that because all of the issues he litigated involved a "common core of facts," there should be no reduction of his fees at all. Claimant cites to the Supreme Court's ruling in *The Electric Man v. Charos*, 2006 VT 16, as support. In that case, the Supreme Court admonished the trial court against viewing a lawsuit between a contractor and a homeowner as "a series of discrete claims" in fashioning an award of attorney fees to the "substantially prevailing party" under 9 V.S.A. §4007(c), the so-called "prompt payment act." *Id.* at ¶10, citing *L'Esperance v. Benware*, 2003 VT 43. Given that in such lawsuits "virtually all of the evidence is relevant to all of the claims," the court reasoned that it was too difficult to allocate or apportion the attorney hours expended on a claim-by-claim basis. *Id.*

Litigation in the workers' compensation arena, however, typically does involve exactly the type of separate and distinct claims, for separate and distinct statutory benefits, that the Court could not discern in *The Electric Man*. Thus, for example, although the determination of an injured worker's entitlement to one benefit may share the same "common core of facts" relevant to the initial work-related accident as his or her claim for another benefit, each is likely nevertheless to stand or fall based on its own distinct factual and/or legal analysis.

I find that to be the case here. Here, Claimant's claim for temporary total disability benefits was determined based on factual evidence as to when he first returned to work following his February 2003 fusion surgery. His claim as to how Defendant's workers' compensation "holiday" should have been calculated was determined based on an entirely separate and distinguishable set of facts relating to the manner in which his various third-party actions were settled. Yet a third set of facts, relating in large part to events that occurred after the current litigation commenced, determined his entitlement to penalties and interest.

With that in mind, and given the particular circumstances of this case, I conclude that it is a proper exercise of the discretion granted by §678(a) to apportion Claimant's entitlement to attorney fees with reference to the extent of his success on the various claims he litigated.

ORDER:

Defendant is hereby **ORDERED** to pay:

1. Costs totaling \$3,112.01; and
2. Attorney fees totaling \$18,433.35.

DATED at Montpelier, Vermont this 29th day of December 2010.

Valerie Rickert
Acting 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.