

James Pawley v. Booska Movers/Zurich North America and York Risk Services Group (March 5, 2014)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

James Pawley

Opinion No. 02R-14WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Booska Movers/Zurich North
America and York Risk Services
Group

For: Anne M. Noonan
Commissioner

State File Nos. CC-52769 and DD-576

RULING ON CLAIMANT'S MOTION FOR RECONSIDERATION

The Commissioner's Opinion and Order in the above claim issued on February 19, 2014. In it, the Commissioner denied Claimant's claims for temporary partial disability benefits referable to either of the periods for which he sought them. Having thus failed to prevail, the Commissioner determined that Claimant was not entitled to an award of costs or attorney fees under 21 V.S.A. §678.

Because the Commissioner already had determined that the facts did not support an award of temporary partial disability benefits, it was not essential to address the legal issue the parties had disputed – whether, if proven, any such benefits would have been subject to a maximum weekly compensation cap, as is the case with temporary total disability benefits. Nevertheless, so as to clarify the Department's position in the event Claimant prevailed on appeal, the Commissioner offered additional guidance, and in effect adopted Claimant's stance on the question. Claimant now asserts that because he "prevailed" on this issue, the Commissioner should "invite" him to submit a request for an award of costs and attorney fees.

Claimant cites to the Supreme Court's ruling in *McNally v. Department of PATH*, 2011 VT 93, as support for his position. The Court in that case had reversed the commissioner's prior ruling against the claimant and remanded the claim for further proceedings. In upholding the claimant's subsequent claim for an award of costs and attorney fees even though the proceedings on remand had not yet concluded, the Court relied on the legislative intent behind §678, that is, to allow an award of attorney fees "to claimants who prevail in appellate proceedings, even in the absence of a final judgment on the underlying claim." *Id.* at ¶13.

In this case, should Claimant successfully appeal the Commissioner's denial of benefits, consistent with the Court's holding in *McNally* he will be entitled to an award of costs and attorney fees. That the Commissioner accepted as convincing his position on a broader legal issue does not change the fact that, at least for now, he has left this forum empty-handed. Unless and until that outcome changes, he has not prevailed and therefore is not entitled to attorney fees.

Claimant's Motion for Reconsideration is hereby **DENIED**.

DATED at Montpelier, Vermont this 5th day of March 2014.

Anne M. Noonan
Commissioner