

**STATE OF VERMONT
DEPARTMENT OF LABOR**

H. S.)	Opinion No. 70-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Town of Randolph Fire Dept. and)	
Liberty Mutual)	For: Patricia A. McDonald
)	Commissioner
)	
)	State File No. L-01798

RULING ON CLAIMANT'S REQUEST FOR ATTORNEY FEES AND COSTS

APPEARANCES:

Patricia K. Turley, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant

Claimant, who lost his claim for permanent total disability benefits after a 2002 hearing at this Department, prevailed on his claim at a *de novo* jury trial in superior court. The case returned to this Department on claimant's request for \$35,290.50 in attorney fees and \$4,775.84 in costs for work performed for the 2002 Department hearing, not for the superior court work.

The governing statute for fees this Department awards appears in Title 21, Chapter 9: Employer's Liability and Workers' Compensation. It states:

Necessary costs of proceedings under this chapter shall be assessed by the commissioner against the employer or its workers' compensation carrier *when the claimant prevails*. The commissioner may allow the claimant to recover reasonable attorney fees *when the claimant prevails*. Costs shall not be taxed or allowed either party except as provided in this section.

21 V.S.A. § 678(a) (emphasis added).

Fees for work on appeal in superior or supreme courts are governed by § 678(b):

In appeals to the superior or supreme courts, the claimant, if he or she prevails, shall be entitled to reasonable attorney' fees as approved by the court, and interest at the rate of 12 percent per annum on that portion of any award the payment of which is contested. Interest shall be computed from the date of the award of the commissioner.

The plain meaning of the statute places the responsibility for a fee decision on this Department when the claimant prevails at this level and with the court when the claimant prevails there. Because the claimant did not “prevail” at this level, he is not entitled to the fees incurred for the work performed here. See *Butler v. Huttig Building Products*, 35-03WC (2003); *Barber v. Bennington Area Home Health Care Agency*, Opinion No. 78F-95WC (1995).

This case underscores a reason for the § 678(a) limit of fees to those prevailing in this forum. The case tried in court was different from the one heard here, with a new theory of liability and new experts. To award fees to the claimant for the unsuccessful hearing would, as the defense argues, make a formal hearing “merely a scrimmage with the ultimate contest to be decide at the jury trial level.” The process requires more.

ORDER:

Therefore, the claim for fees is DENIED.

Dated at Montpelier, Vermont this 29th day of November 2005.

Patricia A. McDonald
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.