

**STATE OF VERMONT
DEPARTMENT OF LABOR**

George Plante

Opinion No. 26A-10WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Vermont Agency of Transportation

For: Anne M. Noonan
Commissioner

State File Nos. X-04039 and BB-00900

AMENDED ORDER

Claimant successfully appealed the Commissioner's August 5, 2010 Opinion and Order to the Franklin Superior Court Civil Division. Under 21 V.S.A. §671, the commissioner is obligated to enter a new order consistent with the Court's certified findings. Because he now has prevailed on his claim, Claimant also requests an award of costs and attorney fees referable to the prior proceedings before the commissioner. 21 V.S.A. §678(a); *Sargent v. Town of Randolph*, 2007 VT 56.

Claimant seeks reimbursement of \$1,715.11 in costs referable to the formal hearing before the commissioner. Included in these charges is Dr. Barnham's deposition fee of \$750.00, which exceeds the amount allowable under Workers' Compensation Rule 40.111 by \$450.00. Deducting this amount, the remaining \$1,265.11 in costs are recoverable under §678(a) and therefore are awarded.

Claimant also seeks reimbursement of an additional \$2,500.00 in costs referable to his superior court appeal. Fees and costs incurred in this context are governed by §678(b). That section allows the court to award reasonable attorney fees related to the proceedings before it, but unlike §678(a), it does not make specific provision for an award of costs.

Claimant asserts that the commissioner retains the power to award such costs under §678(a). The Supreme Court addressed this issue in *Perez v. Travelers Insurance*, 2006 VT 123, and determined otherwise:

There is no basis in the statutory language for awarding costs in superior courts or in the Supreme Court beyond those normally allowed under V.R.C.P. 54(d). While §678(a), which applies to the administrative level of workers' compensation proceedings, provides that "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," there is no similar statement in §678(b), the provision applicable to proceedings before the superior court.

Applying the Supreme Court's analysis to the current claim, I conclude that Claimant is not entitled to an award of the costs incurred in the context of his superior court appeal.

As for attorney fees, Claimant seeks an award of \$7,146.00. Defendant argues that because Claimant's success on appeal was based on evidence that differed from what had been offered at formal hearing, it would be unfair to award him his fees. Specifically, Defendant asserts that the reason Claimant prevailed in the Superior Court proceeding was because he underwent further diagnostic testing after the formal hearing, the results of which strengthened his expert medical witnesses' opinions.

This may be true, but the substance of the witnesses' opinions did not change significantly from one forum to the next. Even if it did, I question whether that fact alone would justify denying a request for attorney fees. The Supreme Court has determined that a claimant's success on appeal translates to success at formal hearing. *Sargent, supra* at ¶13. Given the *de novo* nature of a superior court appeal, *Pitts v. Howe Scale Co.*, 110 Vt. 27, 35 (1938), it is to be expected that the evidence produced in that forum might diverge somewhat from what was presented to the commissioner. I can find no basis in §678(a) for penalizing a claimant on those grounds.

I conclude that it is appropriate to award Claimant the attorney fees he incurred in the prior proceedings before me, totaling \$7,146.00.

AMENDED ORDER:

Claimant having sustained his burden of proving that his cervical condition was caused and/or aggravated by his employment for Defendant, Defendant is hereby **ORDERED** to pay:

1. All workers' compensation benefits to which Claimant establishes his entitlement as a consequence of his compensable cervical condition; and
2. Costs totaling \$1,265.11 and attorney fees totaling \$7,146.00.

DATED at Montpelier, Vermont this 18th day of January 2012.

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.