

**STATE OF VERMONT
DEPARTMENT OF LABOR**

T. B.

Opinion No. 14A-06WC

v.

By: Margaret A. Mangan
Hearing Officer

DataTrac Information
Systems

For: Patricia A. McDonald
Commissioner

State File No. S-15942

RULING ON CLAIMANT'S REQUEST FOR ATTORNEY FEES AND COSTS

APPEARANCES:

Vincent Illuzzi, Esq. for the Claimant
Eric Columber, Esq. for the Defendant

Claimant, who lost her claim for temporary total disability benefits after a 2005 hearing at this Department, prevailed on her claim at a *de novo* jury trial in superior court. The case returned to this Department on claimant's request for attorney fees and costs for work performed for the 2005 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 and cost 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, she is not entitled to the fees or costs 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 may be 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 could make a formal hearing "merely a scrimmage with the ultimate contest to be decide at the jury trial level." The process requires more. *H. S. v. Town of Randolph Fire Dept.* Opinion No. 70-05WC, (2005).

ORDER:

Therefore, the claim for fees is DENIED.

Dated at Montpelier, Vermont this ____ day of April 2006.

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.

T. B. v. Datatrac Information Services

(March 23, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

T. B.)	
)	
v.)	State File No. S-15942
)	
Datatrac Information Services)	
)	

ORDER

The denial of the claim brought by Tammy Backus, as reported in Opinion No. 14-05WC of February 8, 2005, was reversed on appeal to the Franklin County Superior Court. On March 8, 2006, the court certified a copy of Judge Joseph’s Judgment for the Claimant Tammy Backus.

I hereby “make a new order” in accordance with the court’s judgment as required by 21 V.S.A. § 671:

Claimant became temporarily totally disabled on September 16, 2002 because of a February 22, 2002 work-related physical-mental injury and she remains temporarily and totally disabled.

Pursuant to 21 V.S.A. § 678(b) Claimant is awarded reasonable attorney fees in the amount claimed by Claimant.

Pursuant to 21 V.S.A. § 678(b) Claimant is awarded interest at the statutory rate of 12 per cent on the portion of the award contested, e.g. temporary total disability benefits, medical bills, out of pocket expenses, attorney fees and costs, with interest commencing on and accruing from February 10, 2005.

Dated at Montpelier this 23rd day of March 2006.

Patricia A. McDonald
Commissioner

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Tammy Bockus)	Opinion No. 14-06WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Datatrac Information Services)	For: Patricia A. McDonald
)	Commissioner
)	
)	State File No. S-15942

RULING ON DEFENSE MOTION FOR STAY

After failing to prevail on her claim at this Department, Opinion No. 14-05WC of February 8, 2005, Claimant succeeded in her claim before the Franklin County Superior Court. The Opinion and Order by Hon. Ben W. Joseph dated December 27, 2005 is a thorough, detailed recitation of facts and well reasoned conclusions of law. Judge Joseph’s order became an order from the Commissioner pursuant to 21 V.S.A. § 671 in a ruling dated today.

The defense moves to stay the order pending its appeal to the Vermont Supreme Court on the issue of the applicable burden of proof.

Any award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, any appeal notwithstanding. 21 V.S.A. § 675. To prevail on its request in the instant matter, Defendant must demonstrate: (1) it is likely to succeed on the merits; (2) it would suffer irreparable harm if the stay were not granted; (3) a stay would not substantially harm the other party; and (4) the best interests of the public would be served by the issuance of the stay. *In re Insurance Services Offices, Inc.*, 148 Vt. 634, 635 (1987). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A. § 675(b); *Austin v. Vermont Dowell & Square Co.*, Opinion No. 05S-97WC (May 29, 1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (Sept. 20, 1988)). The granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation*, Opinion No. 62S-96WC (Dec. 10, 1996).

Given the well-reasoned opinion from the Superior Court firmly supported by applicable law, it is unlikely that the employer will prevail on its appeal. The court's findings would allow the Claimant to prevail even if she had the burden of proof. Substantial harm will not flow to Defendant because it is paying the ordered benefits to a single Claimant. In fact, it is the Claimant who will likely suffer harm if payment is further delayed. Finally, a stay at this juncture would delay benefits Claimant has been seeking since March of 2004 in contravention of the purposes of the Workers' Compensation Act and public policy.

Dated at Montpelier, Vermont this 23rd day of March 2006.

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.