

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Donna Pratt)	Opinion No. 08-06WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Fletcher Allen Health Care)	For: Patricia A. McDonald
)	Commissioner
)	
)	State File No. U-08019

**RULING ON CLAIMANT’S MOTION FOR REHEARING AND DEFENDANT’S
REQUEST FOR ATTORNEY’S FEES**

Claimant moves for rehearing of the ruling finding that Claimant did not sustain a compensable injury arising out of and in the course of employment with Fletcher Allen Health Care in August or November of 2003.

Defendant argues the motion for rehearing, almost 30 days after the order was mailed from this Department, is untimely. The response cites *Thayer v. Alpine Construction*, Opinion No. 51S-05WC (2005) for the proposition that the 10-day rule shall apply to Rule 59 motions filed following a workers’ compensation decision. The Defendant also argues for an award for its attorney’s fees calculated in responding to Claimant’s motion for rehearing.

I. Motion for Rehearing

Under Workers’ Compensation Rule 7.1000 the “Vermont Rules of Civil Procedure and Rules of Evidence as applied in Superior Court shall, in general, apply to all hearings ... except as provided in these Rules, and only insofar as they do not defeat the informal nature of the hearing.” Part of the nature of a workers’ compensation hearing is a speedy and expeditious process, a goal facilitated by the 10-day time limitation of V.R.C.P.59. Therefore, that 10-day rule shall apply to all motions for reconsideration filed in this Department following a workers’ compensation decision. The decision was mailed on November 30, 2005. The motion for rehearing was filed on December 30, 2005. Thus, Claimant’s motion for rehearing is untimely.

However, the substantive merits of Claimant's motion ought to be addressed. First, Claimant asserts that witness, Cindy Colvin, intended to voluntarily testify at the formal hearing in September, but failed to appear due to a fear of losing her job, thereby denying Claimant her "most important" witness. Vermont courts hold parties, even criminal defendants, responsible for their own failure to subpoena witnesses. *See State v. Stevens*, 139 Vt. 184, 185 (1980). Assuming for the moment that Cindy Colvin's testimony would have been compelling evidence, the failure of the Claimant to subpoena an alleged material witness is inexcusable. Further, the record was held open until October 5, 2005 and Claimant failed to remedy the witness issue during this time. In sum, the Claimant effectively denied herself the "most important" witness in her case.

Second, the testimony by Cindy Colvin would not materially alter the Department's decision mailed November 30, 2005. The Claimant submitted an affidavit from the witness dated November 10, 2004. The Department has twice considered the information attested to in the affidavit; first, in ruling on Defendant's summary judgment motion mailed August 17, 2005 and at the formal hearing on September 2, 2005. The affidavit offered with Claimant's motion for rehearing dated December 29, 2005 does not contain any new information relevant to this case. Moreover, the rationale supporting the Department's decision entailed far more than a lack of corroborating evidence by witnesses. The decision also cites a lack of corroborating evidence by contemporaneous medical records, convincing proof that Claimant had transported a large dog around the time she alleges a work related injury and her failure to report a work related incident in the required manner, even though she had experience reporting a work related injury.

To conclude, Claimant's motion for rehearing is denied because it is untimely and the testimony of Cindy Colvin would not materially alter the Department's decision mailed November 30, 2005.

II. Attorney's Fees

At the discretion of the Commissioner, a prevailing claimant may be awarded attorney's fees and costs. 21 V.S.A. § 678(a); WC Rule 10.1000. The costs must be necessary and fees must be reasonable. However, the Commissioner does not have equal authority to award the prevailing defendant attorney's fees and costs. Until the legislature provides such authority, the Department is unable to grant the Defendant's request for attorney's fee calculated in response to Claimant's motion for rehearing.

ORDER:

Therefore, Claimant's motion for rehearing is DENIED

Defendant's request for attorney's fees is DENIED.

Dated at Montpelier, Vermont this 28th day of February 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.