

G. H. v. Ethan Allen

(July 7, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

G. H.

Opinion No. 30-06WC

v.

By: Margaret A. Mangan
Hearing Officer

Ethan Allen

For: Thomas W. Douse
Acting Commissioner

State File No. M-22405

RULING ON MOTION FOR AN ORDER OF COSTS

On May 25, 2006, Claimant, by and through its attorney, Robert Halpert, Esq., filed a motion to award full costs pursuant to 21 V.S.A. § 678(a). On May 31, 2005, Defendant's attorney, Andrew Boxer, opposed this motion. This motion follows Claimant's partial success at hearing. See *G.H. v Ethan Allen*, Op. No. 01-06WC (January 19, 2006).

The issues at hearing were: 1) whether Claimant's shoulder condition was work-related, if so what degree of permanent total disability was due; 2) whether Claimant suffered from a work-related physical-mental condition, if so what degree of permanent total disability was due? The Department found that the shoulder and physical-mental conditions were compensable, yet permanent total disability was not owed to Claimant. The Department also denied Claimant's request for fees and costs since he did not prevail on permanency, a major part of the case.

In a post judgment ruling, the Department awarded Claimant attorney's fees and necessary costs. See Op. No. 01R-06WC (April 21, 2006). Thereafter, Claimant specified his request. Defendant now disputes the necessity of those costs.

As evidenced by the language contained within 21 V.S.A. § 678(a), an award for necessary costs is mandatory, as a matter of law, if Claimant prevails in a Workers' Compensation proceeding. *Jean Ratta-Roberts v Benchmark Assisted Living*, Opinion No. 46-05WC (2005). *Pederzani v. The Putney School*, Opinion No. 57-98WC (Oct. 6, 1998); *Fredriksen v. Georgia-Pacific Corp.*, Opinion No. 28-97WC (Oct. 17, 1997).

Claimant prevailed on the compensability of his shoulder and mental conditions. Accordingly, he is entitled to receive necessary costs as a matter of law. 21 V.S.A. §678(a).

Claimant requests specific costs associated with expert opinions and testimony, including Dr. Bucksbaum's fee. Because he had to hire Dr. Bucksbaum to establish compensability of his shoulder injury, this cost was necessary. Therefore, he is awarded the cost of \$1,047.40.

Claimant also argues that he incurred necessary costs associated with the need to prove a causal link between the work-related injury and the mental condition. Thus, he was forced to hire an expert witness, Dr. Phillip Kinsler, to testify and support his claim. Arguing that this cost was necessary to Claimant's success of the physical-mental claim, he asks that costs, which total \$7,838.33, be awarded. Claimant asserts that although he did not prevail on the third issue of permanent total disability, he had to depose the defense's expert, Dr. Genarro. Claimant requests a deposition fee of \$1,208.30. He also requests interest on the costs beginning from the August 21, 2006 decision until payment by Defendant.

Defendant challenges Claimant's request for costs. First, Defendant relies on the Department's acceptance of Dr. Mann's, not Dr. Kinsler's, permanency rating for the physical-mental claim. Therefore, Defendant asks that no award be made for costs of Dr. Kinsler's work. Also, Defendant contends that Dr. Gennaro's deposition cost is not necessary since Claimant did not prevail on his permanency claim.

I conclude that Dr. Kinsler's opinion on behalf of Claimant was a necessary cost, though one entry does lack specificity. The claims for compensability and permanency share the same set of facts and required the same review. Dr. Kinsler's opinion was relevant to the whole claim, both the rating and compensability of the mental condition, and he relied on the common facts to formulate his opinion. That his permanency rating was not accepted does not negate the importance of his opinion on the issue of compensability. Dr. Kinsler's opinion was dedicated to the entire physical-mental claim. His time spent on both issues cannot be separated. Thus, Claimant's request for Dr. Kinsler's costs is granted. However, Claimant failed to specify one of the costs. The entry of "disbursement to Philip J. Kinsler" for \$2,145.00 is not sufficient. The Department has no basis on which to determine if this cost is necessary. Claimant's award, therefore, is reduced from \$7,838.33 to \$5,693.33.

In contrast, Dr. Genarro's deposition fee is not a necessary cost. Dr. Gennaro opined that Claimant should not be entitled to permanent total disability. Instead, Dr. Gennaro found that Claimant was capable of sedentary to light-duty work. The Department accepted Dr. Gennaro's opinion. Claimant is not awarded the cost of deposing Dr. Genarro since Claimant did not prevail on the issue of permanent total disability.

Finally, Claimant is awarded interest on the costs, retroactive from the April 21, 2006 decision. 21 V.S.A. § 664.

Accordingly, based on the foregoing reasons,

1. Defendant is hereby ORDERED to pay to Claimant \$1,047.40 associated with Dr. Bucksbaum's costs
2. Defendant is hereby ORDERED to pay Claimant \$5,693.33 associated with Dr. Kinsler's costs
3. Claimant's request for costs associated with Dr. Gennaro's depositions is hereby DENIED
4. Defendant is hereby ORDERED to pay Claimant interest, retroactive from April 21, 2006 until awarded costs are paid.

Dated at Montpelier, Vermont this 7th day of July 2006.

Thomas W. Douse
Acting Commissioner

G. H. v. Ethan Allen

(August 4, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Opinion No. 30A-05WC

G. H.

By: Margaret A. Mangan
Hearing Officer

v.

Ethan Allen

For: Thomas W. Douse
Acting Commissioner

State File No. M-22405

RULING ON UNOPPOSED MOTION TO AMEND JUDGMENT FOR COSTS

On July 14, 2006, Claimant, by and through his attorney, Robert Halpert, Esq., requested the Department to amend its judgment of his July 7, 2006 Order, which granted in part Claimant's reimbursement for necessary costs. See *G.H. v Ethan Allen*, Op. No. 30-06WC (July 7, 2006). Defendant's attorney, Andrew Boxer, Esq., has not opposed this motion.

In the July Order, the Department denied a portion of Claimant's necessary costs. Claimant had labeled the costs as "disbursement to Philip J. Kinsler" for \$2,145.00. This entry was insufficient given its lack of specificity. Now Claimant calls upon the Department to amend its judgment and award these additional costs.

In seeking to amend, Claimant has submitted documentation that supports the amount of \$2,145.00. Given that Claimant has provided ample support for this request, the Department awards Dr. Kinsler's necessary costs of \$2,145.00. 21 V.S.A. § 678(a).

ORDER:

Accordingly, based on the foregoing reasons,

Claimant's request for Dr. Kinsler's costs of \$2,145.00 is hereby GRANTED.

Dated at Montpelier, Vermont this 4th day of August 2006.

Thomas W. Douse
Acting Commissioner

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Opinion No. 30S-06WC

G. H.

By: Margaret A. Mangan
Hearing Officer

v.

Ethan Allen

For: Patricia Moulton Powden
Commissioner

State File No. M-22405

**RULINGS ON CLAIMANT’S MOTION TO AWARD FEES
AND
DEFENDANT’S MOTION TO STAY AWARD OF COSTS**

Claimant requests attorney’s fees associated with post-judgment work. This request follows Claimant’s partial success at hearing, where the Department first denied attorney’s fees and costs. See *G.H. v Ethan Allen*, Op. No. 01-06WC (January 19, 2006). Claimant then submitted a motion for reconsideration of the Department’s denial of fees and costs. Thereafter, the Department awarded Claimant attorney’s fees and necessary costs in part. See *G.H. v. Ethan Allen*, Op. No. 01R-06WC (April 21, 2006); *G.H. v Ethan Allen*, Op. No. 30-06WC (July 7, 2006); *G.H. v. Ethan Allen*, Op. No. 30A-05WC (August 4, 2006). Now, Claimant asks the Department to award additional attorney’s fees for filing the motion for reconsideration and subsequent work. The defense has opposed this motion for fees. Defendant has also filed a motion to stay the award of costs.

Claimant’s Motion for Attorney’s Fees

Claimant requests fees for his successful motion for reconsideration and the additional work to recover costs and fees.

A prevailing claimant is entitled to reasonable attorney’s fees as a matter of discretion when the claim is supported by a fee agreement and details of work performed. 21. V.S.A. §678(a); WC Rule 10.000. It is not necessary to prevail on all claims in order to be a prevailing claimant entitled to award of attorney’s fees; the question is whether the claimant has substantially prevailed. [*Hodgeman v. Jard Co.*, 157 Vt. 461, 465 \(1991\)](#); *Lyons v American Flatbread*, Op. No 36-03WC (2003).

Defendant argues that Claimant is not entitled to attorney’s fees. The defense relies on Rule 10.1300, which provides: “In most instances awards will only be considered in proceedings involving formal hearing resolution procedures. In limited instances an award may be made in a proceeding not requiring a formal hearing...” Thus, according to the defense, an award does not extend to post judgment filings. In the alternative, the defense contends that a fee award should be proportional to Claimant’s success.

Claimant correctly argues that he is entitled to attorney's fees for his post-judgment work. I am unconvinced by Defendant's arguments. Claimant's motion for reconsideration was directly related to the formal hearing process. The filings were integral to the main issues decided at hearing. As such, Claimant's post-judgment work was related to the hearing process.

Finally, Claimant is granted his entire fee request, even though Claimant did not prevail on one issue in the post-judgment rulings (Dr. Gennaro's deposition cost). All issues addressed by Claimant arose out of a common core of facts that cannot be reduced proportional to time spent on the successful aspects. See, *The Electric Man, Inc. v. Charos*, 2006 VT 16, ¶ 9.

Moreover, Claimant substantially prevailed on his post-judgment requests. The success was due to the efforts of his attorney who needed to spend 43.73 hours because of the issues presented. Since Claimant substantially prevailed and has submitted sufficient proof of time expended, he is entitled to reasonable attorney's fees as a matter of discretion under 21 V.S.A. §678(a).

Defendant's Motion to Stay

Pending its appeal to the Superior Court pursuant to 21 V.S.A. § 670, Defendant has moved for a stay of the Order dated July 7, 2006, awarding necessary costs in part to Claimant.

Defendant has requested a motion for stay pursuant to V.R.C.P 74(c). To prevail on a motion for stay, Defendant must demonstrate: (1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public. *In re Insurance Servs. Office, Inc.*, 148 Vt. 634, 635, (1987). The Department has the discretionary power to grant a full or partial stay of judgment. 21 V.S.A. §675(b); *Austin v Vermont Dowel and Square Co.*, Op. No. 05S-97WC (1997).

Defendant fails to meet any of the four prongs required to justify a stay for benefits and attorney fees. Defendant does not demonstrate the likelihood of success on the merits on its appeal. The awarded costs were necessary to Claimant's success on the compensability of his shoulder and mental conditions. As this department implied in *Dubuque v. Grand Union Company*, Op. No. 34S-02WC (2002), the most important of the four criteria in the workers' compensation context is the second, whether Claimant would suffer irreparable harm if the stay were granted. *Kraby v Vermont Telephone Company*, Op. No. 06S-04WC (2004). In this case, there will be irreparable injury to Claimant if the stay for attorney fees is granted. The stay of attorney fees and costs would cause substantial harm to Claimant given the number of these issues and the money spent to litigate them. Finally, it would be outside the best interests of the public if the Department further delayed costs that Claimant is legally entitled to receive.

Defendant's request for a stay is denied.

ORDER:

Accordingly, based on the foregoing reasons,

1. Claimant's request for attorney's fees associated with post-judgment motions are hereby GRANTED.
2. Defendant's request for a motion to stay is hereby DENIED.

Dated at Montpelier, Vermont this _____ day of September 2006.

Patricia Moulton Powden
Commissioner