

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

Judith Peabody	)	State File No. G-6060
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Comprehensive Rehabilitation	)	
and Home Insurance Company	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 15-01WC

**RULING ON THE CLAIMANT’S MOTION TO AMEND JUDGMENT**

Claimant by and through her attorney, Patrick L. Biggam, Esquire moves the Commissioner to amend the judgment of her November 9, 2000 Order, which granted claimant reimbursement for vocational rehabilitation and attorney’s fees and costs. Specifically, the claimant moves to include appellate attorney fees and costs, legal interest, and expert witness fees. In response, defendants by and through their attorney, John W. Valente, Esquire oppose the Motion.

I. Appellate Attorney Fees and Costs:

In seeking to amend, claimant challenges the Commissioner’s refusal to grant appellate attorney fees and costs. Specifically, claimant argues that the limitations of a Supreme Court appeal are prohibitive to the fact-finding nature of establishing reasonable attorney fees. Thus, the claimant argues that the department should ignore the plain language of 21 V.S.A. §678(b), giving power to award appellate attorney fees and costs solely to the courts, and implement a more practical position, namely through the department.

The defendants acknowledge the allowance of appellate attorney fees under §678(b) and argue for intervention by the department. However, the defendants emphasize the need for an opportunity to contest or fact-find the claimant’s fees and costs rather than their arbitrary adoption.

The defendants are correct in asserting that an arbitrary award would be contrary to the intent of requirement of reasonableness. Any award of appellate attorney fees and costs by the Commissioner would be arbitrary because they did not originate within the department. Therefore, any determination as to their reasonableness would be baseless and speculative. As the claimant acknowledges the plain language of §678(b) states that any such appellate fees or costs must be “*approved by the court.*” The Vermont Supreme Court has been clear in its separation of power between §678(a), empowering the department and §678(b) giving sole power of discretion to the court. See *Hodgeman v.*

*Jard Co.*, 157 Vt. 461, 464 (1991). Furthermore, the premise that the Supreme Court is unable to determine reasonable attorney fees and costs is contradicted in *Wood v. Fletcher Allen Health Care*, 169 Vt. 419, 426 (1999) and *Fleury v. Kessel/Duff Construction*, 149 Vt. 360 (1998). Thus, based on clear holdings by the Court and the plain language of §678(b) the department lacks the power to award appellate attorney fees and costs.

Accordingly, claimant's motion to amend for appellate attorney fees and costs is DENIED.

## II. Legal Interest:

Claimant's current argument for legal interest concerns an appeal for discretion based on the vast amount of time between the claimant's final reckoning with Johnson State in 1996 and the November, 2000 decision. In the alternative, claimant argues that, as a matter of law, she is entitled to interest from the original judgment pursuant to 21 V.S.A. §678(b), which allows interest to be compiled on the portion of any award where the payment is contested.

The defendants' response to the claimant's plea for discretion is twofold. First, they point out that the proper standard for prejudgment interest under 21 V.S.A. §664, prior to the 1997 amendment, requires a clear default of a duty to pay. Minus any evidence to the contrary, the defendants' standard is accepted, and the claimant's argument is rejected.

Secondly, the defendants argue that §678(b) does not create a right of interest. They point out that the appeal did not result in a direct award and further findings were required before the claimant received any awards.

According to the statute the tolling date for interest begins, "from the date of the award of the Commissioner." 21 V.S.A. §678(b). Notwithstanding the Supreme Court's decision, which awarded a right not a settlement, the claimant received no award prior to the November 9<sup>th</sup>, 2000 decision. That decision was the first and only award in this case.

Accordingly, the motion to amend for legal interest is DENIED.

## III. Expert Witness Fees at Department Hearing:

The final and most persuasive argument presented by the Claimant is the request for expert witness fees. Claimant argues that under 21 V.S.A. §678(a) in conjunction with Workers' Compensation Rule 10(c), the prevailing claimant shall receive the necessary costs including expert witness fees. Furthermore, the claimant has submitted the request prior to the current motion.

The defendants argue that the expert witness was not a deciding factor and was, in fact, incompetent. Defendants' argument, however, fails to acknowledge that the claimant's expert witness provided persuasive testimony used on remand. Furthermore, the defendants fail to provide any substantial objection to the fee amount requested.

Accordingly, the motion to amend for Expert Witness Fees is GRANTED.

THEREFORE, the Claimant's Motion to Amend is GRANTED and the prior order is modified as follows:

Defendants are ordered to pay \$1694.88 in Expert Witness Fees pursuant to 21 V.S.A. §678(a) and Workers' Compensation Rule 10(c).

DATED in Montpelier, Vermont, this 11<sup>th</sup> day of June 2001.

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R. Tasha Wallis  
Commissioner