

J. H. v. State of Vermont, Agency of Transportation (May 19, 2008)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

J. H. Opinion No. 14R-08WC

v.

By: Phyllis Phillips, Esq.  
Contract Hearing Officer

State of Vermont, Agency  
of Transportation

For: Patricia Moulton Powden  
Commissioner

State File No. T-15331

**RULING ON DEFENDANT'S MOTION TO RECONSIDER AWARD OF FEES AND COSTS**

By motion dated April 22, 2008 Defendant moves to reconsider the Commissioner's award of fees and costs against it. Defendant argues that the Commissioner's conclusion that the Claimant "substantially prevailed" is not a sufficient basis for awarding fees and costs given the language of 21 V.S.A. §678(a), which requires that a claimant "prevail" before costs or fees can be awarded. Defendant also argues that an award of fees and costs against it is inappropriate given the specific facts of this claim.

In her initial decision on this claim, the Commissioner determined that Claimant had suffered a non-work-related flare-up resulting in temporarily increased symptoms. Because the flare-up was not work-related, Defendant was determined not to be responsible for the resulting medical treatment. However, because the flare-up was only temporary, the Commissioner determined that Defendant remained responsible for ongoing medical treatment once Claimant's symptoms returned to their pre-flare-up level.

The Commissioner awarded 100% of Claimant's costs and attorney's fees. She determined that although Claimant did not succeed in proving his right to medical benefits for the flare-up, he did establish Defendant's responsibility for ongoing medical benefits once the flare-up subsided. The Commissioner found that the latter benefits were of far greater import to Claimant than the former. On those grounds she concluded that Claimant had "substantially prevailed" and that an award of fees and costs was justified under 21 V.S.A. §678(a).

The Vermont Supreme Court specifically considered the language of 21 V.S.A. §678(a) in *Hodgeman v. Jard*, 157, Vt. 461 (1991). It concluded that it is not necessary for a claimant to prevail on all claims in order to be a "prevailing party" as those words are used in the statute. *Id.* at 465. The Court's analysis and conclusions apply equally well here. Claimant was a "prevailing party" and therefore the award of costs and fees was proper.

As for Defendant's argument that the specific facts of this claim warrant reconsideration of the Commissioner's award of fees and costs against it, I find this argument to be unavailing as well. I note in this context that Defendant took the position that it would not pay for any future medical treatment notwithstanding its own medical expert's opinion that once Claimant's symptoms returned to baseline ongoing treatment would be causally related to the original compensable injury. With that in mind, Defendant is in no position to argue that Claimant brought this litigation on himself.

Defendant's Motion to Reconsider Award of Fees and Costs is **DENIED**.

Dated at Montpelier, Vermont this 19<sup>th</sup> day of May 2008.

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Patricia Moulton Powden  
Commissioner