

N. B. v. Verizon

(September 24, 2008)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

N. B.

Opinion No. 24R-08WC

v.

By: George K. Belcher  
Hearing Officer

Verizon

For: Patricia Moulton Powden  
Commissioner

State File No. J-13315

**APPEARANCES:**

Christopher McVeigh, Esq., for the Claimant  
J. Christopher Callahan, Esq., for the Defendant

**RULING ON CLAIMANT'S MOTION FOR ATTORNEY FEES**

The Claimant prevailed in a contested, expedited hearing concerning the reasonableness and necessity of a specific surgery upon his back. *Bonnano v. Verizon*, Opinion No. 24-08 WC (June 12, 2008). Thereafter the Defendant sought a stay of the decision. That motion was denied on July 30, 2008. *Bonnano v. Verizon*, Opinion No. 24S-08 WC (July 30, 2008). Thereafter, the Claimant sought attorney's fees for work in defending the Motion for Stay. The request for attorney's fees has been vigorously opposed with several rounds of arguments filed by the parties.

The Claimant sought attorney's fees in the first instance for 9.2 hours in opposing the Motion for Stay.<sup>1</sup> As authority for such an award he cited the case of *Menard v. Vermont Castings*, Opinion No. 17S-00WC (August 24, 2000). In opposing the request for attorney's fees, the Defendant has made the following arguments. First, the Defendant argues that the *Menard* case is a "singular ruling" that has not been followed and that contained no real analysis of the rules and law concerning this issue. Second, the Defendant argues that Workers' Compensation Rule 10.1300 would not justify an award of attorney's fees because the Motion for Stay was not a proceeding requiring a formal hearing, and there was no showing of misconduct, neglect or undue delay. Finally, the Defendant argues that attorney's fees at this stage of the proceedings can only be decided after the appellate court rules upon the appeal. The Defendant cites *Sargent v. Town of Randolph*, 2007 VT 56, as authority for this last proposition.

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<sup>1</sup> Claimant's counsel ultimately claimed 10.7 hours concerning the work around the issue of the stay and the attorney's fees. Thus, a portion of the bill related to attorney's fees being billed for arguing over the attorney's fees.

The *Sargent* case actually supports the Claimant's position. In that case the Vermont Supreme Court held that the Commissioner was empowered to rule upon attorney's fees for matters before her, even though her earlier ruling for the Defendant at the administrative level was superceded by a successful *de novo* appeal. The court gave wide deference to the Commissioner and stated, "Attorney's fees for the work at the administrative level, [however], should be determined in the first instance, by the Commissioner." Quoting *Jackson v. True Temper, Corp.*, 156 Vt. 247 (1991). Likewise the court pointed out that the appellate court under Vermont law could not determine a request for attorney's fees for services rendered at the Department level, citing *Coleman v. United Parcel Serv.*, 155 Vt. 646 (1990). The court stated several times in the *Sargent* decision that the Commissioner had discretion to award attorney's fees for work done at the Department level and that great deference was given to her discretion. Nothing in the *Sargent* case can reasonably be construed to prevent the Commissioner from awarding attorney's fees in this case pursuant to 21 V.S.A. §678(a), whether an appeal is taken or not.

The Defendant's second argument is that Workers' Compensation Rule 10.1300 does not authorize the award. That rule states in part:

Awards to prevailing claimants are discretionary. In most instances, awards will only be considered in proceedings involving formal hearing resolution procedures. In limited instances an award may be made in proceedings not requiring a formal hearing where the claimant is able to demonstrate [unreasonable delay, denial of a claim without reasonable basis, etc.] (emphasis added).

A motion for stay of a contested decision is part of the formal hearing resolution procedure. The granting of a stay will postpone benefits during the appeal and will deny the prevailing party the benefit of the decision. The stay is part of the formal hearing procedure also in the sense that it must be acted upon by the Commissioner. 21 V.S.A. §675(b). Thus, it logically follows that issues concerning attorney's fees arising from such a motion should be decided by the Commissioner as part of the formal hearing process.

Finally, the case of *Menard v. Vermont Castings, supra*, was not a "singular ruling." The heart of the ruling was followed in *G. H. v. Ethan Allen*, Opinion No. 30-06WC (September 21, 2006) (allowing attorney fees for post-judgment work where the work was "integral to the main issues decided at the hearing") and *Gisele Roberts v. Vermont State Hospital*, Opinion No. 36R-07WC (March 31, 2008).

I find that 9.2 hours of attorney time surrounding the issue of the stay is reasonable. The Claimant may recover from the Defendant for 9.2 hours of attorney time calculated at the rate of \$90.00 per hour. The additional time billed by the Claimant's attorney is not awarded.

**ORDER:**

The award granted to the Claimant shall include \$828.00 for attorney's fees associated with the Motion for Stay.

Dated at Montpelier, Vermont this 4<sup>th</sup> day of September 2008.

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Patricia Moulton Powden  
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.