

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Nicholas Mallow

Opinion No. 11-22WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Bullrock Solar, LLC

For: Michael A. Harrington
Commissioner

State File No. LL-63248

**RULING ON DEFENDANT'S MOTION FOR RECONSIDERATION
OF COST AWARD**

BACKGROUND:

1. The parties disagreed on Claimant's permanent impairment rating. They mediated their dispute on May 18, 2021 but did not resolve it. The Department's specialist declined to issue an interim order, and on September 2, 2021, she referred the dispute to the formal hearing docket for resolution. The case was scheduled for a formal hearing on January 19, 2022. Before the hearing took place, on December 13, 2021, Defendant accepted the ten percent permanent impairment rating that Claimant advocated for, and the formal hearing was cancelled. *See generally Mallow v. Bullrock Solar, LLC*, Opinion No. 09A-22WC (March 23, 2022).
2. On January 10, 2022, Claimant filed a petition seeking \$2,102.50 in costs and \$3,748.00 in attorney fees. Defendant opposed the petition on February 8, 2022. On March 23, 2022, the Department awarded Claimant the costs he was seeking but denied an award of attorney fees.¹
3. On March 31, 2022, Defendant filed a Motion for Reconsideration of the Department's award of costs, contending that the Department lacked authority for the cost award to Claimant under either the Vermont Workers' Compensation Act or the Department's administrative rules. Claimant opposed the motion on April 14, 2022.

¹ On April 25, 2022, Claimant appealed the denial of an attorney fee award to Superior Court.

DISCUSSION:

Statutory Authority for Awarding Costs

1. Defendant contends that 21 V.S.A. § 678 does not provide statutory authority for an award of costs in any case where the claimant did not prevail after formal hearing. Section 678(a) provides as follows:

Necessary costs of proceedings under this chapter, including deposition expenses, subpoena fees, and expert witness fees, shall be assessed by the Commissioner against the employer or its workers' compensation carrier when the claimant prevails. The Commissioner may allow the claimant to recover reasonable attorney's fees when the claimant prevails. Costs shall not be taxed or allowed either party except as provided in this section.

2. Accordingly, the statute provides that costs of "proceedings under this chapter" shall be assessed when the claimant prevails. Notably, § 678(a) does not refer to formal proceedings, nor does it state that costs will be awarded only when a claimant prevails at formal hearing. Rather, the statute uses the broad language "proceedings under this chapter."
3. From this broad language, I conclude that "proceedings under this chapter" refers to all proceedings, both formal and informal. As the Commissioner has previously held, § 678(a) "does not differentiate between the informal dispute resolution process and the formal hearing process. Both constitute 'proceedings under this chapter.'" *Yustin v. State of Vermont, Department of Public Safety*, Opinion No. 08-12WC (March 20, 2012), citing *Taft v. Central Vermont Public Service Corp.*, Opinion No. 03-11WC (January 25, 2011).
4. Section 678(a) further provides that cost awards shall be made "when the claimant prevails." In order to be eligible for a cost award, therefore, a claimant must have "prevailed" at either the formal or informal level.² If a claimant prevails at the informal level but the dispute is subsequently referred to the formal level, then the dispute is not yet resolved, and consideration of an award of costs or attorney fees would be premature. *See, e.g., Leffler v. The Oryza Group, LLC*, Opinion No. 12-20WC (July 8, 2020) (dispute must be resolved before an award of costs and fees may be made).
5. Section 678(a) also sets forth examples of necessary costs, including "deposition expenses, subpoena fees, and expert witness fees." Such costs are more frequently incurred in cases that go to formal hearing. Nevertheless, a claimant may incur

² When a claimant prevails on some, but not all, of the disputed issues, the cost award is generally tailored to cover only those costs that relate directly to the successful claims. *Lydy v. Trustaff, Inc.*, Opinion No. 05A-12WC (April 27, 2012), citing *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003); *Hatin v. Our Lady of Providence*, Opinion No. 21S-03WC (October 22, 2003).

subpoena fees or other costs prior to hearing, including at the informal level, and nothing in the language of § 678(a) is inconsistent with awarding such costs prior to hearing, if a claimant prevails. Indeed, if a claimant must incur necessary deposition expenses or expert witness fees to prevail at the informal level, then an award of such costs would be appropriate. Otherwise, the claimant would not get the full advantage of his statutory benefits. *See Hodgeman v. Jard Co.*, 157 Vt. 461, 465 (1991) (award of attorney fees under the workers' compensation statute consistent with statute's underlying purpose to make claimants whole).

6. Finally, § 678(d) of the workers' compensation statute provides as follows:

In cases for which a formal hearing is requested and the case is resolved prior to formal hearing, the Commissioner may award reasonable attorney's fees if the claimant retained an attorney in response to an actual or effective denial of a claim and thereafter payments were made to the claimant as a result of the attorney's efforts.

7. In interpreting § 678(d), I note that § 678(a) provides that awards of costs are mandatory, while awards of attorney fees are discretionary. Section 678(d) then provides the conditions under which the Commissioner may consider a discretionary attorney fee award. Section 678(d) does not address costs, as cost awards are mandatory, not discretionary. The absence of a cost provision in § 678(d) therefore does not serve to preclude costs in cases resolved prior to formal hearing. *Cf. McNally v. Department of PATH*, 2011 VT 93, ¶ 5 (interpreting § 678(a) as allowing costs on appeal, even though § 678(b) concerning attorney fees on appeal is silent as to costs: "although § 678(b) does not address costs, neither does it preclude them").
8. Accordingly, I find that the Department has authority under the workers' compensation statute to award costs to prevailing claimants whether they prevail at the informal level, the formal level, or at hearing.

Workers' Compensation Rules

9. Defendant also contends that the Workers' Compensation Rules provide no authority for an award of costs when a party prevails at the informal level. *Defendant's Memorandum*, at 2. Claimant here did not prevail at the informal level. His case was on the formal docket, and he prevailed about a month prior to the scheduled formal hearing.
10. In any event, Defendant cites Workers' Compensation Rule 20.1400,³ which outlines a party's potential entitlement to attorney fees "absent formal hearing." Defendant points out that Rule 20.1400 does not mention cost awards absent formal hearing and contends that the failure to mention costs precludes them prior to formal hearing. I find this argument unpersuasive. For the same reasons set forth in Discussion Section No. 7 *supra*, the absence of any mention of costs in Rule 20.1400 does not preclude

³ Rule 20.1400 cites 21 V.S.A. § 678(d) and sets forth the same three criteria for consideration of a discretionary award of attorney fees.

the award of costs prior to formal hearing. Rather, as the award of attorney fees is discretionary, Rule 20.1400 enumerates the elements governing the exercise of that discretion. Since cost awards are not discretionary, the rules do not need to address the conditions for exercising discretion to award them.

11. Accordingly, I conclude that Rule 20.1400 does not limit the Department's authority to award costs to prevailing claimants pursuant to 21 V.S.A. § 678(a).

The Department's Historical Practice

12. Defendant also contends that allowing cost awards prior to formal hearing would be inconsistent with the Department's historical practice. It is true that claimants who prevail after formal hearing are more likely to seek an award of costs than those who prevail prior to hearing. However, there is certainly precedent for the Department awarding costs in cases resolved both at the informal level and at the formal level prior to hearing. *See, e.g., Combs v. Broe's Masonry*, Opinion No. 27-15WC (November 12, 2015) (claimant prevailed on the formal docket prior to hearing); *Pawley v. Booska Movers/Zurich North American and Vanliner Ins. Co.*, Opinion No. 04-13WC (February 5, 2013) (carrier withdrew its opposition a few weeks prior to the scheduled hearing); *Williams v. State of Vermont*, Opinion No. 03-19WC (February 25, 2019) (claimant prevailed at the informal dispute resolution level); *Herring v. State of Vermont, Department of Liquor Control*, Opinion No. 06-15WC (March 24, 2015) (same); *Wolff v. Johnson State College*, Opinion No. 16-15WC (July 13, 2015) (same); *Hoyt v. Chittenden South Supervisory Union*, Opinion No. 09-14WC (May 13, 2014) (same).
13. On the other hand, there are also cases where the Department denied both costs and attorney fees to a prevailing claimant prior to formal hearing, with no separate analysis of whether necessary costs should be awarded. *See, e.g., Hoyt v. Chittenden South Supervisory Union*, Opinion No. 09-15WC (April 28, 2015); *Ploof v. Franklin County Sheriff's Department and Trident/Massamont*, Opinion No. 13-14WC (August 8, 2014). Given the inconsistency in past practice, I find that past practice cannot determine the outcome in this case.

Vermont Rule of Civil Procedure 54(d)

14. Vermont Rule of Civil Procedure 54 governs judgments and costs in civil matters. Defendant contends that an award of costs prior to formal hearing in a workers' compensation claim before the Department would stand in "stark contradiction" with V.R.Civ.P. 54(d), which provides that costs "shall be allowed as of course to the prevailing party, as provided by statute and by these rules unless the court otherwise specifically directs." Defendant argues that, since costs are available only after judgment under V.R.Civ.P. 54(d), costs should be allowed in proceedings before the Department only after a claimant prevails at formal hearing.
15. This contention overlooks a key difference between V.R.Civ.P. 54(d) and 21 V.S.A. § 678(a). Costs are awarded to a *prevailing party* under V.R.Civ.P. 54(d) "as provided

by statute.” However, the workers’ compensation statute does not provide for an award of costs to the prevailing party. It provides for an award of costs *to the claimant* when the claimant prevails in “proceedings” before the Department. The workers’ compensation statute does not provide for any award of costs to a prevailing *defendant*. Thus, I find that the framework for an award of costs in a workers’ compensation claim is not governed by V.R.Civ.P. 54(d).

16. For all of these reasons, I conclude that the Department has authority to award costs to a claimant who prevails in proceedings before the Department prior to formal hearing.

Costs Sought by Claimant

17. Claimant prevailed at the formal dispute resolution level, about one month prior to the scheduled formal hearing, when Defendant withdrew its opposition to the ten percent impairment rating advocated by Claimant. Based on Claimant’s having prevailed, on March 23, 2022, the Department awarded him \$1,250.00 for his physician’s impairment rating and \$852.50 for his mediation costs.
18. Upon review, I find that the cost of Claimant’s physician’s impairment rating was a necessary cost of this proceeding and therefore recoverable under § 678(a). *See Sanz v. Douglas Collins*, Opinion No. 25-05WC (April 26, 2005) (cost of physician’s impairment rating awarded under § 678(a) when case settled on the formal docket prior to hearing). Accordingly, I award Claimant \$1,250.00 for this cost.
19. I also find that the cost of mediation was a necessary cost of this proceeding under 21 V.S.A. § 678(a), and I award Claimant \$852.50 for this cost.

ORDER:

Defendant is hereby **ORDERED** to pay the cost of Claimant’s physician’s impairment rating in the amount of \$1,250.00 and the cost of his share of mediation in the amount of \$852.50, for a total cost award of \$2,102.50.

DATED at Montpelier, Vermont this 12th day of May 2022.

Michael A. Harrington
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.