

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Stephane Moreau

Opinion No. 13-24WC

v.

By: Stephen W. Brown  
Administrative Law Judge

Optimum Building Systems, Inc.

For: Michael A. Harrington  
Commissioner

State File No. PP-61137

**ORDER AWARDING COSTS AND ATTORNEYS' FEES FOR CLAIMANT'S PURSUIT  
OF A SECOND SUBPOENA**

**APPEARANCES:**

Christopher McVeigh, Esq. for Claimant  
James O'Sullivan, Esq., for Defendant

**ISSUES PRESENTED:**

1. Does Workers' Compensation Rule 17.1100's incorporation of the Vermont Rules of Civil Procedure (V.R.Civ.P.) generally, and V.R.Civ.P. 37(a) in particular, violate the Workers' Compensation Act?
2. What, if any, remedy is appropriate for Defendant's shortcomings in producing undisputedly relevant discovery?

**DISCUSSION:**

1. This case arises out of an injury that Claimant sustained to his right shoulder on or about December 28, 2020, while working for Defendant. It is pending on the formal hearing docket on multiple issues including Claimant's entitlement to temporary disability benefits.
2. During discovery, questions arose concerning the computation of Claimant's average weekly wage, which forms the basis of calculating any temporary disability benefits to which he may be entitled. *See* 21 V.S.A. §§ 642, 650.
3. On May 23, 2024, Claimant sought a subpoena directed to Defendant for records relating to the cost of housing that Defendant provided to Claimant, including electricity, internet, and maintenance costs, since such costs may be counted toward his average weekly wage. Defendant did not oppose that request, and Administrative Law Judge Stephen

Brown granted the subpoena request on May 29, 2024. That subpoena imposed a production deadline of June 14, 2024.

4. On July 22, 2024, Claimant's counsel wrote the Department and alleged that despite Defendant's multiple requests for an extension to comply with the May 29 subpoena, Defendant had not produced the requested utility payment information.
5. Claimant asserts that this case has involved ongoing difficulties obtaining documents and procuring witnesses for depositions. I take judicial notice of the fact that I have issued at least eight subpoenas for what appear to be routine discovery requests in this case, all at Claimant's request. This constitutes considerably more departmental involvement in discovery than is typical in a case with a similar scope of disputed issues.
6. Because Defendant has not produced the requested utility cost information in response to the May 29 subpoena, Claimant sought an additional subpoena for the deposition of a witness, Rene Theroux. Claimant believes that Mr. Theroux has knowledge relevant to the requested utility cost information and Defendant's efforts to comply with the May 29 subpoena. Claimant requests that Mr. Theroux's deposition occur at Defendant's expense, including payment for Claimant's attorney's time preparing for and attending the deposition.
7. The Department treated Claimant's request for fees and costs as a request for discovery sanctions pursuant to Rule 37(a)(4) of the Vermont Rules of Civil Procedure and held a hearing on that request on August 9, 2024.

*Relevant Statutory Provisions and Rules*

8. This discovery dispute raises questions concerning an alleged conflict between the Department's statutory mandate to provide a simple and summary process for the resolution of workers' compensation cases and its incorporation by reference of the Vermont Rules of Civil Procedure to its formal hearing process via Workers' Compensation Rule 17.1100, which incorporates the civil rules only to the extent that they do not defeat the informal nature of the proceedings.
9. The following provisions of the Workers' Compensation Act are relevant to the instant dispute:
  - a. All process and procedure under the provisions of this chapter shall be as summary and simple as reasonably may be. The Commissioner may make rules not inconsistent with such provisions for carrying out the same and shall cause to

be printed and furnished, free of charge, to any employer or employee such forms as he or she deems necessary to facilitate or promote the efficient administration of such provisions.

21 V.S.A. § 602(a).

- b. The Commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure except as provided in this chapter, but he or she may make such investigation or inquiry or conduct such hearing or trial in such manner as to ascertain the substantial rights of the parties.

21 V.S.A. § 604.

- c. Questions arising under the provisions of this chapter, if not settled by agreement of the interested parties with the approval of the Commissioner, shall be determined, except as otherwise provided, by the Commissioner.

21 V.S.A. § 606.

- 10. In implementing the Act's statutory mandates, the Department has promulgated administrative rules to codify its processes. Specifically relevant here is Workers' Compensation Rule 17.1100, which provides as follows:

17.1100 **Purpose.** The purpose of the formal hearing is to determine the rights of the parties by a speedy and inexpensive procedure. To that end, in general hearings shall be conducted in accordance with the Vermont Rules of Civil Procedure and the Vermont Rules of Evidence, but only insofar as they do not defeat the informal nature of the hearing.

- 11. V.R.Civ.P. 37(a)(4), in turn, provides in relevant part as follows with respect to motions and orders compelling the production of discovery:

**Award of Expenses of Motion.** If the motion [for an order compelling discovery] is granted, the judge shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the judge finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the judge shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the

party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the judge finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the judge may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

*The Parties' Legal Positions*

12. During a hearing on Claimant's motion, Defendant's counsel noted that V.R.Civ.P. 37 does not apply of its own force to workers' compensation proceedings before the Department of Labor, and he took issue with Workers' Compensation Rule 17.1100's incorporation of the Vermont Rules of Civil Procedure into the Department's formal hearing process. Specifically, he contended that this incorporation by reference is inherently inconsistent with the informal nature of workers' compensation proceedings and that the complexity of the rules applicable to civil cases, such as the provisions of Rule 37 quoted above, renders the process far from simple or summary and thus is inconsistent with 21 V.S.A. §§ 602 and 604.
13. Additionally, Defendant contends that Workers' Compensation Rule 17.1100 only purports to apply the Rules of Civil Procedure to the hearing itself, and not to the entire formal hearing process. As such, Defendant contends that Rule 37 does not apply to this case, and that to the extent that it does, it remains subject to Sections 602 and 604's provisions relating to the simple and summary nature of workers' compensation proceedings.
14. As to the merits of the instant discovery dispute, Defendant asserts that it has not ignored Claimant's request for utility bills for the twenty-six weeks preceding his injury and that it continues to look for the requested documents. However, it claims that these records are "apparently" not the kind of documentation that it routinely keeps. Defendant did, however, keep records relating to the rent payments for Claimant's lodging and has produced those records to Claimant.
15. Defendant submits further that, to the extent Rule 37 does apply, the actual sanction for any discovery violation should be limited to the costs and fees incurred in obtaining the subpoena, and that a penalty requiring Defendant to pay for Claimant's attorney to take Mr. Theroux's deposition would be "beyond the pale."

16. Claimant argues that V.R.Civ.P. 37 offers a tool for the Department to use in enforcing the parties' discovery obligations and that it does not defeat the informal nature of the proceedings. Indeed, Claimant argues, this civil rule enhances the informal nature of workers' compensation proceedings because the alternative would be for the parties to have to resort to enforcement of subpoenas and discovery orders in Superior Court, which would be significantly *more* expensive and time-consuming. As such, Claimant argues that the Department issuing sanctions pursuant to V.R.Civ.P. 37 would help ensure timely production of basic discovery in a cost-effective and expedient manner.

*The Department's Broad Authority and Longstanding Practice*

17. Section 606, *supra*, provides the Department with a broad mandate to resolve questions arising under the Workers' Compensation Act that the parties have not resolved themselves. The Vermont Supreme Court has interpreted this provision as conferring broad authority to interpret the Workers' Compensation Act and to determine parties' rights thereunder "as a necessary incident to [the Department's] obligation to administer that law." *Letourneau v. A.N. Deringer/Wausau Ins. Co.*, 2008 VT 106, ¶ 2 (citing 21 V.S.A. § 606). The Department, in turn, has promulgated Workers' Compensation Rule 17.1100 as an exercise of that authority and mandate to provide a modicum of predictability and structure to its formal adjudication process.

18. While Defendant is correct in noting that the Department is not strictly "bound" by formal rules of procedure, *see* 21 V.S.A. § 604, the Department has long relied upon procedural features of the Vermont Rules of Civil Procedure such as summary judgment,<sup>1</sup> declaratory judgment,<sup>2</sup> and dismissal for failure to prosecute.<sup>3</sup> The Vermont Supreme Court has affirmed the Department's grants of summary judgment under V.R.Civ.P. 56 on multiple occasions.<sup>4</sup> While any specific exercise of the procedural devices under the civil

---

<sup>1</sup> *E.g., LaBrie v. LBJ's Grocery and Peerless Insurance Co.*, Opinion No. 29-02WC (July 10, 2002) (considering but denying the parties' cross-motions for summary judgment pursuant to the standards set forth in V.R.Civ.P. 56); *Faery v. Washington County Mental Health*, Opinion No. 19-23WC (December 6, 2023) (granting in part and denying in part claimant's motion for partial summary judgment under the same standard).

<sup>2</sup> *See White v. Town of Hartford and Town of Hartland*, Opinion No. 14-19WC (July 25, 2019) (holding that Department's incorporation by reference of V.R.Civ.P. 57's provisions concerning declaratory judgment through Workers' Compensation Rule 17.1100 satisfied the Administrative Procedure Act's mandate in 3 V.S.A. § 808 that the Department provide a process for obtaining declaratory judgments).

<sup>3</sup> *E.g., Hannan v. Westminster Cracker Co.*, Opinion No. 07-23WC (March 10, 2023) (dismissing claim without prejudice for claimant's failure to prosecute, citing V.R.Civ.P. 41).

<sup>4</sup> *E.g., Burnett v. Home Improvement Co. of Vermont*, 2024 VT 41 (2024) (affirming Department's grant of defendant's motion for summary judgment and denial of claimant's motion for summary judgment on question of jurisdiction); *Perrault v. Chittenden County Transportation Auth.*, 2018 VT 58 (affirming Department's grant of summary judgment in favor of defendant on the grounds that claimant was not an employee as defined by the Workers' Compensation Act); *Morisseau v. Hannaford Bros.*, 2016 VT 17 (affirming Department's grant of

rules may, depending on the context, potentially defeat the informal nature of workers' compensation proceedings,<sup>5</sup> that is no reason to discard the entire edifice of those rules.

19. When asked how the Department would enforce discovery orders and subpoenas without reference to the Rules of Civil Procedure, Defendant's counsel argued that the Department could simply order production and potentially order minor sanctions, such as in the amount of approximately \$50.00, or that defenses related to information sought but not produced may be stricken, but that there need not be any formal rules or authority governing this discovery.
20. Although a broad reading of Section 606's text may support the Department's exercise of the sweeping authority to grant discovery relief unbound by any formal parameters in the way Defendant envisions, I am not convinced that the arguable existence of such authority is a good reason to exercise it. There is value in the predictability of outcomes or at least the analytic framework for resolving future disputes, and the parameters that V.R.Civ.P. 37(a) provides around discovery sanctions provide this predictability. Predictability of outcomes should, in turn, result in fewer discovery disputes rising to the stage where the Department must intervene, because the parties should be able to review its past decisions and arrive at a reasonably informed expectation of how it will exercise its authority.
21. Moreover, while the text of Rule 37(a) may be lengthy, it is not conceptually complex. It simply provides finite but adverse consequences for allowing discovery disputes that ought to be resolved informally between counsel to rise to the level where motions practice becomes necessary. I find that it provides a well-reasoned framework for addressing Claimant's complaint about the lack of discovery production and the need for an additional discovery order in this case. Even if application of V.R.Civ.P. 37(a) to the instant discovery dispute is not mandatory, it provides the most pertinent source of persuasive authority as to the fashioning of appropriate discovery relief pursuant Section

---

summary judgment in defendant's favor on question of whether defendant was obligated to pay for voice recognition software either as vocational benefit or medical benefit where claimant had successfully returned to work); *see also Huang v. Progressive Plastics, Inc.*, Sup. Ct. Docket No. 2019-042, 2019 WL 3544070 (Vt. July 12, 2019) (unpublished entry order, affirming summary judgment in favor of employer due to lack of evidence on medical causation).

<sup>5</sup> With respect to the Department's practice of resolving cases on summary judgment, Defendant contends that any summary judgment practice before the Department occurs only by agreement of the parties or pursuant to common law concepts, and not by operation of the Rules of Civil Procedure, because once the civil rules apply, the proceedings are no longer summary and simple. Although there may be instances where summary judgment practice is inappropriate or merits procedural simplification, I am unconvinced that it is inconsistent with the statutory framework of workers' compensation cases, and I am unaware of any common law framework for assessing motions for summary judgment outside of the process outlined in V.R.Civ.P. 56.

606's broad grant of authority to resolve questions arising under the Workers' Compensation Act.

Limited Relief in the Form Contemplated by V.R.Civ.P. 37(a) is Appropriate

22. Irrespective of whether the ultimate source of authority flows from Section 606 or Workers' Compensation Rule 17.1100's incorporation of V.R.Civ.P. 37(a), I would reach the same result in this case. The Department issued a subpoena to Defendant, which Defendant did not oppose, and Defendant has not produced the required documents by the production deadline set forth in that subpoena. Defendant does not object to producing them but has asserted that it has looked for those documents and cannot find them.
23. Defendant has not convincingly explained why it cannot find utility bills for a dwelling place that Defendant provided Claimant during his employment; such records would appear to be business records that any rational business would keep if accounting for them as business expenses. However, discovery is ongoing, and Mr. Theroux's deposition may provide insight into Defendant's recordkeeping practices, the thoroughness of its efforts to comply with the Department's subpoena, and/or the full cost of Claimant's housing.
24. While Claimant should not have needed to take the additional step of subpoenaing a witness to investigate a relatively straightforward factual question, there is no evidence of bad faith or willfulness on Defendant's part as might justify a more severe sanction. Therefore, Claimant may recover his costs and attorneys' fees incurred in procuring the subpoena for Mr. Theroux and for obtaining this order from the Department.
25. With respect to the cost and attorneys' fees incurred in the actual attendance at Mr. Theroux's deposition, V.R.Civ.P. 37(a) does not go so far as to provide the recoupment of this expense, and I do not find it justified at this point in the litigation. Should Claimant ultimately prevail in this case, he may recoup that cost pursuant to 21 V.S.A. § 678. Additionally, should Mr. Theroux's deposition or other discovery gathered in this case establish a sufficient factual foundation to support more severe sanctions such as an order establishing certain disputed facts as true or striking any of Defendant's defenses—a remedy that Defendant here mentioned as a possibility and which V.R.Civ.P. 37(b) contemplates—Claimant may request such relief at that time. Any such request, however, should only come as a last resort and should be made with the expectation that an unsuccessful effort to seek such sanctions may result in adverse consequences to Claimant in accord with the second paragraph of V.R.Civ.P. 37(a).

**ORDER:**

For the reasons stated herein, within thirty days, Claimant shall supply Defendant with an invoice of all fees and costs in seeking a subpoena for the deposition of Rene Theroux and in obtaining the present Order from the Department. Within thirty days after receiving such invoice, Defendant shall pay any undisputed amounts and shall alert the Department to any disputes concerning the reasonableness, relatedness, or amount of the invoiced amounts. If such a dispute arises concerning the invoiced amounts, the Department will set a subsequent conference to resolve any such dispute.

**DATED** at Montpelier, Vermont this 26 day of August 2024.

---

Michael A. Harrington  
Commissioner