

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-259

JANUARY TERM, 2004

	} APPEALED FROM:
	}
Essex Optical/The Hartford	} Chittenden Superior Court
	}
v.	} DOCKET NO. S1481-01Cnc
	}
Theresa Morin	} Trial Judge: Matthew I. Katz
	}
	}

In the above-entitled cause, the Clerk will enter:

Claimant Theresa Morin appeals from the trial court=s denial of her request for costs associated with an appeal of her workers= compensation claim. She argues that the trial court erred in denying her request because the Workers= Compensation Act and V.R.C.P. 54(d)(1) should be interpreted to allow her to recover all of her costs. We affirm.

Defendant Essex Optical/The Hartford challenged claimant= s award of permanent total disability benefits in superior court. A jury found in claimant= s favor, and claimant requested attorneys= fees and costs, including costs associated with witnesses who testified on her behalf. The court awarded attorneys= fees but denied claimant= s request for \$4314.78 in costs, explaining that A professional fees paid to witnesses are neither recoverable costs in court nor awarded per 21 V.S.A. ' 678.@ Claimant filed a motion to reconsider, asking the court to allow \$1559.31 in costs that defendant had not challenged in its opposition motion. Claimant included in this reconsideration motion a request for \$40.00 in witness fees for four witnesses. These were not separately itemized in the original request. The court granted claimant= s motion after concluding that most of the \$1559.31 in costs she sought were recoverable under the rubric of attorneys= fees, rather than as A taxable costs.@ Claimant appealed.

Claimant argues that the court erred in denying her request for her remaining costs because they should be recoverable under 21 V.S.A. ' 678(b) and V.R.C.P. 54. According to claimant, the Workers= Compensation Act and Rule 54 should be interpreted so that a maximum of the costs and fees that a prevailing injured worker incurs in litigating a workers= compensation claim is shifted to the more financially able employer/insurance carrier.

We find no error in the court= s refusal to award claimant her remaining costs because claimant has not identified a basis for their recovery. Claimant= s remaining costs -- that is, those that the trial court did not construe as falling under the rubric of A attorney= s fees@ -- involve fees paid to witnesses (\$2584.50), a A search fee for search of telephone records@ (\$206.00), copying costs (\$198.88), and telephone costs (\$12.04).

Pursuant to V.R.C.P. 54(d)(1), A [c]osts other than attorneys= fees shall be allowed as of course to the prevailing party, as provided by statute and by these rules, unless the court otherwise specifically directs.@ Under 32 V.S.A. ' 1471(a), a party who prevails in superior court may recover as costs A a fee equal to the entry fees, the cost of service fees incurred and the total amount of the certificate of witness fees paid.@ A prevailing party may recover costs of \$10.00 per day for the attendance of each witness, and eight cents per mile for witness travel costs, but the party must procure a certificate signed and sworn to by the witness, specifying the number of miles traveled to attend trial, and the number of days the witness attended trial. See 32 V.S.A. ' ' 1551, 1553. In this case, claimant recovered \$40.00 in witness fees as part of the \$1559.00 awarded in response to her motion for reconsideration. She has not established that she is entitled to the additional \$2584.50 in witness-related costs that she seeks. She filed no certificate and the request is not identified as

reimbursement for mileage, even in part. See Ianelli v. Standish, 156 Vt. 386, 390 (1991) (trial court abused its discretion by awarding expert witness costs that exceeded generally allowable witness fees set forth in 32 V.S.A. ' 1551). Similarly, claimant has not shown that the trial court abused its discretion in denying her request for copying costs, telephone costs, and a fee incurred for searching telephone records. The trial court did not consider these costs to fall within the A attorney= s fee@ rubric, and claimant has not identified a rule or statute that would allow her to recover these costs separately.

Claimant asserted in oral argument that V.R.C.P. 54(d)(2)(A) required the trial court to allow her request for costs because they are nontaxable costs A related@ to her attorneys= fees. In fact, the trial court specified which costs were related to the attorneys= fees and allowed them in the reconsideration decision. As the Reporter= s Notes to the 1996 amendment to V.R.C.P. 56 state, the language of Rule 56(d)(2) is intended to provide a procedure to claim attorneys= fees that are not part of the damage recovery. It is not intended to expand the recovery of costs that are not part of attorneys= fees. The trial court correctly decided that expert witness fees and the like are not attorneys= fees.

Claimant= s assertion that 21 V.S.A. ' 678(b) authorizes the recovery of her costs is equally without merit. Section 678(b) provides in relevant part: A [i]n appeals to the superior or supreme courts, the claimant, if he or she prevails, shall be entitled to reasonable attorney's fees as approved by the court, and interest at the rate of 12 percent per annum on that portion of any award the payment of which is contested.@ The statute does not provide for the recovery of costs, and we reject claimant= s assertion that Coleman v. United Parcel Service, 155 Vt. 646, 647 (1990) (mem.) stands for the proposition that costs are awardable under ' 678(b). In Coleman, we affirmed an award of A attorney= s fees and expenses@ under ' 678 to a claimant who had prevailed on appeal. Id. We did not discuss the recovery of costs, and the logical implication of the statement above is that the expenses sought were a component of the claimant= s attorney= s fees. Claimant has not identified a statute or rule that would allow her to recover the costs that she seeks, and thus we find no error in the trial court= s rejection of her request.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

John A. Dooley, Associate Justice

Paul L. Reiber, Associate Justice