STATE OF VERMONT
DEPARTMENT OF LABOR

William Cushing

v.

Control Technologies, Inc.

Opinion No. 14-15WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. FF-51848

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Ronald Fox, Esq., for Claimant
Jennifer Moore, Esq., for Defendant

ISSUE PRESENTED:

As a matter of law, can a penalty be imposed upon an injured worker who fails to attend an independent medical examination scheduled by the employer pursuant to 21 V.S.A. §655 absent evidence that the employer complied fully with the notice requirements of Workers' Compensation Rule 13.1000?

EXHIBITS:

Claimant's Exhibit 1:	Claimant's affidavit, March 26, 2015
Defendant's Exhibit A:	Letter from Attorney Moore, June 26, 2014
Defendant's Exhibit B:	Email from Department's Workers' Compensation Specialist, September 5, 2014
Defendant's Exhibit C:	Dr. Binter's "no show" time sheet, August 22, 2014
Defendant's Exhibit D:	Employer's Notice of Intention to Discontinue Benefits (Form 27) with attachments, August 27, 2014

FINDINGS OF FACT:

For the purposes of these motions, the following facts are not disputed:

1. Defendant scheduled Claimant to undergo an independent medical examination with Dr. Binter on August 22, 2014.

2. On June 26, 2014 Defendant's counsel sent notice of the independent medical examination to Claimant's counsel. Defendant's counsel specifically requested Claimant's counsel to notify Claimant of the appointment. Defendant's counsel also added, "Please note that I am not sending a copy of this notice directly to your client. I trust you will advise him of this appointment."

3. Claimant's counsel sent Claimant notice of the independent medical examination. However, in his affidavit Claimant stated, "I understand that my attorney mailed me a notice of an independent medical examination scheduled by the workers' compensation insurer with Nancy Binter, M.D. on 8/22/2014. I never received the notice of the examination. I did not attend the examination."

4. For Claimant's failure to attend the independent medical examination, Dr. Binter charged a $750.00 "no show" fee.

5. On August 27, 2014 Defendant filed an Employer's Notice of Intention to Discontinue Benefits (Form 27), in which it sought to discontinue Claimant's temporary total disability benefits on the grounds that he had failed to attend the independent medical examination.

6. Claimant objected to the proposed discontinuance Form 27 on two grounds. First, he asserted that the discontinuance was procedurally deficient, because Defendant had not sent notice of the independent medical examination directly to him, as required by Workers' Compensation Rule 13.1000. Second, he asserted that he had not received the notice that his attorney had sent him, and therefore had been unaware that the examination had been scheduled.

7. The Department's workers' compensation specialist rejected Defendant's proposed discontinuance. She indicated that as a policy matter the Department typically considers it sufficient for an employer to give notice of a scheduled independent medical examination to the injured worker's attorney. However, she also noted that "if a dispute arises whether the injured worker received the notice via their attorney or directly from the insurer, the burden is on the insurer to show the injured worker received the notice."

8. Claimant attended a rescheduled independent medical examination with Dr. Binter on October 28, 2014.

9. The pending cross motions for summary judgment followed. In its motion, Defendant seeks a credit against any permanent disability benefits owed Claimant for the amount of temporary disability benefits paid between August 22, 2014, when the independent medical examination was first scheduled, and October 28, 2014, when he attended the rescheduled exam. Defendant also seeks to hold Claimant liable for Dr. Binter's $750.00 no-show fee. In his motion, Claimant disputes Defendant's entitlement to either credit or payment.

DISCUSSION:

1. The parties present a purely legal issue for determination – whether as a matter of law, a penalty can be imposed upon an injured worker who fails to attend an independent medical examination scheduled by the employer pursuant to 21 V.S.A. §655 absent evidence that the employer complied fully with the notice requirements of Workers' Compensation Rule 13.1000. As the material facts are not disputed, summary judgment is an appropriate vehicle for resolving this issue. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).

2. Vermont's workers' compensation statute, 21 V.S.A. §655, provides in pertinent part:

> After an injury and during the period of disability, if so requested by his or her employer, or ordered by the Commissioner, the employee shall submit to examination, at reasonable times and within a two-hour driving radius of the residence of the injured employee, by a duly licensed physician or surgeon designated and paid for by the employer . . . *If an employee refuses to submit to or in any way obstructs the examination, the employee's right to prosecute any proceeding under the provisions of this chapter shall be suspended until the refusal or obstruction ceases, and compensation shall not be payable for the period which the refusal or obstruction continues*. (Emphasis added).

3. Workers' Compensation Rule 13.1000 provides further guidance:

> Medical exams which are requested by the employer or workers' compensation insurer shall be scheduled with due regard for the injured worker's schedule and ability to travel. Except in exigent circumstances, notice of medical exams shall be given to the injured worker in writing, at least 7 days prior to the scheduled examination date. *If the injured worker is represented by counsel, written notice of the medical exam shall be sent both to the injured worker and to his/her attorney*. (Emphasis added).

4. Although Rule 13.1000 does not provide for a penalty if an injured worker fails to appear for an independent medical examination, §655 specifically addresses the possibility that a claimant might forfeit his or her right to ongoing indemnity benefits for the period during which he or she "refuses to submit to or in any way obstructs" a properly scheduled exam. The question, therefore, is whether the undisputed facts justify imposing a penalty here.

5. I conclude as a matter of law that they do not. Claimant having established by affidavit that he never received notice of the August 22, 2014 examination (and Defendant having failed to proffer any contradictory evidence), the undisputed facts establish not that he either *refused* to attend or otherwise *obstructed* the examination's occurrence, but only that he *failed* to attend. The two concepts are qualitatively different – one connotes some degree of purposeful resistance, while the other might connote entirely innocent behavior, though still leading to the same unsuccessful result. Particularly in the current context, the former might justify punishment, but certainly not the latter.

6. Defendant argues that Workers' Compensation Rule 14.5500 provides an alternative basis for imposing the penalties it seeks. That rule specifically authorizes either an assessment of costs and/or a suspension of benefits against a claimant who "fails or refuses to undergo an independent medical examination without good cause."

7. I conclude as a matter of law that Rule 14.5500 is similarly unavailing to Defendant here. By its specific terms, that rule applies only to independent medical examinations scheduled by the Commissioner under 21 V.S.A. §667, *see* Workers' Compensation Rule 14.1000, and not to those scheduled by an employer or insurance carrier under §655. Perhaps more important, the rule's "without good cause" requirement again connotes behavior of a type that suggests intentional, or at least negligent, conduct. The undisputed facts here do not suggest anything of the sort.

8. The fact is, Defendant acted at its peril by electing to send notice of the August 22, 2014 examination solely to Claimant's attorney and not to Claimant as well, as Rule 13.1000 clearly requires. The dual notice requirement is intended to avoid exactly the situation that arose here. It is the injured worker whose schedule will likely need to be adjusted to accommodate a new medical appointment, not the attorney's. And to the extent that schedule adjustments are by nature time-sensitive, it is the injured worker who likely needs the most notice, not the attorney.

9. I conclude as a matter of law that no penalty can be imposed upon an injured worker for failing to attend a scheduled independent medical examination unless the employer can establish first, that it complied fully with the notice requirements of Workers' Compensation Rule 13.0000, and second, that the injured worker's conduct was purposeful, negligent or otherwise inexcusable. Defendant here having failed to do so, it is not entitled either to a credit for temporary disability benefits paid between August 22, 2014 and October 28, 2014 or to reimbursement for Dr. Binter's no-show fee.

ORDER:

Defendant's Motion for Summary Judgment is hereby **DENIED**. Claimant's cross motion for summary judgment is hereby **GRANTED**. Defendant is not entitled either to a credit for temporary disability benefits paid between August 22, 2014 and October 28, 2014 or to reimbursement for Dr. Binter's $750.00 no-show fee.

DATED at Montpelier, Vermont this 9th day of June 2015.

_____
Anne M. Noonan
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.