STATE OF VERMONT
DEPARTMENT OF LABOR

William Jalbert	Opinion No. 04-17WC
v.	By: Phyllis Phillips, Esq. Administrative Law Judge
Springfield School District	For: Lindsay H. Kurrle Commissioner
	State File No. JJ-51154

RULING ON CLAIMANT'S MOTION FOR ATTORNEY FEES

By Motion dated December 23, 2016 Claimant seeks an award of attorney fees for legal services rendered up to the date when the Department's workers' compensation specialist issued an interim order of benefits in his favor. Defendant raises various issues in opposition.

By way of background, Claimant suffered a work-related low back injury on or about July 25, 2016. Initially he complained of stabbing pain in his lower back, with no radiating symptoms. Within days, however, he began complaining as well of numbness in his groin area. A first MRI study (without contrast) demonstrated equivocal findings. However, a second study (with contrast) revealed a left-sided L1-2 disc herniation, which likely was impinging on the L1 nerve root, thus accounting for the radicular symptoms in his groin. As treatment, in October 2016 his treating orthopedic surgeon sought preauthorization for minimally invasive disc surgery. Pending surgery, the surgeon determined that Claimant was totally disabled from working.

Defendant initially accepted Claimant's injury as compensable, and paid both medical and indemnity benefits accordingly. However, following a medical records review by its retained independent medical examiner, in October and November 2016 it filed denials of both (1) the requested surgical preauthorization; and (2) any benefits referable to Claimant's groin pain. Defendant also sought to discontinue Claimant's temporary total disability benefits, based on its independent medical examiner's opinion that he was capable of returning to work without restrictions.

By letter dated November 14, 2016 Claimant appealed both the denials and the proposed discontinuance, and sought an interim order preauthorizing the surgery. Upon review, on November 28, 2016 the Department's workers' compensation specialist rejected all three of Defendant's filings and issued an interim order requiring Defendant to (1) preauthorize the requested surgery; (2) reinstate temporary disability benefits retroactive to the date of discontinuance; and (3) pay benefits referable to Claimant's groin pain as causally related to his compensable low back injury.

Claimantôs motion for attorney fees followed. In all, he seeks reimbursement of costs totaling $3.45 and attorney fees totaling $2,127.50 (10.6 attorney hours[1] billed at the rate of $200.00 per hour, plus 0.1 paralegal hours billed at the rate of $75.00 per hour).

DISCUSSION

Claimantôs fee request is grounded in both statute, 21 V.S.A. §678(d), and rule, Workersô Compensation Rule 20.1400. Both grant the Commissioner discretion to award attorney fees in cases that are resolved short of formal hearing, provided that three requirements are met: (1) that a formal hearing was requested; (2) that the claimant retained an attorney in response to an actual or effective denial of all or part of a claim; and (3) that thereafter payments were made to the claimant as a result of the attorneyôs efforts.

Defendant asserts five objections to Claimantôs fee request, as follows:

(1) Alleged Failure to Request Formal Hearing

Workersô Compensation Rule 14.1110 allows the Commissioner to treat ñany written communication from a partyò as a Notice and Application for Hearing (Form 6). Defendant does not dispute that Claimantôs November 14th, 2016 letter thus qualifies as a hearing request. Its objection centers around the workersô compensation specialistôs subsequent failure (1) to ñacknowledgeò the letter as such; (2) to serve a copy of it on Defendant; and (3) to afford Defendant adequate time to respond.

As to (1), the rule does not specifically require the ñacknowledgementò Defendant seeks, though I agree doing so may often be helpful. As to (2), I further agree that for the Commissioner to take responsibility for serving a hearing request on the opposing party is advisable.

Neither of these omissions is of any consequence in this case, however. Defense counsel here is a seasoned, experienced workersô compensation attorney. He was copied personally on Claimantôs November 14th letter and was quite capable of understanding its meaning and intent. Absent a showing of prejudice, I will not automatically disqualify Claimant from requesting attorney fees on either of these grounds.

As for the specialistôs failure to afford Defendant adequate time to respond, I agree that in many, if not most, circumstances it is appropriate to refrain from issuing an interim order until the 21-day response time contemplated by Rule 14.1300 has passed. By the same token, however, nothing in Rule 14.1300 negates the Commissionerôs power, under Rule 16.1400, to issue an interim order ñ[A]t any time before, during or following an informal conference.ò

[1] To his original fee petition, Claimantôs attorney has added a charge of $200.00, representing one hour for time spent responding to Defendantôs Opposition to his Motion for Attorney Fees. *See Human Rights Commissioner v. LaBrie*, 164 Vt. 237, 252 (1995) (citation omitted).

Defendant argues prejudice because it had no time to respond to ñnew evidenceò or to make use of the medical authorization Claimant had only recently executed and returned. Its own filings belie this argument, however. Attached to its November 9, 2016 discontinuance were copies of Claimantôs medical records from the date of injury forward, including both MRI studies. These records were date-stamped well before Defendantôs independent medical examiner conducted his records review, and presumably were fully available to him had he sought to undertake a more comprehensive analysis to support his opinion. Thus, although it would have been advisable for Claimant to have executed a medical authorization in a timelier manner, again, there is no evidence that Defendant was prejudiced by the omission.

Under the particular circumstances of this case, I conclude that the specialistôs actions following receipt of Claimantôs November 14th, 2016 letter did not prejudice Defendant in such a way as to disqualify Claimantôs attorney fee request under either §678(d) or Rule 20.1400.

(2) Alleged Failure to Establish Attorney's Efforts as Basis for Claimant's Success

Defendant next argues that Claimantôs request for attorney fees must be denied because his success at the informal dispute resolution level resulted not from his attorneyôs efforts, but rather from the workersô compensation specialistôs analysis.

In his November 14, 2016 letter, Claimantôs attorney used the existing medical records to explain the treating surgeonôs viewpoint and clarify the deficiencies in the independent medical examinerôs review. He also submitted an addendum report from Claimantôs treating surgeon, which specifically addressed the independent medical examinerôs concerns and clarified the basis for his diagnosis and surgical recommendation.

It is, of course, impossible to know how the specialist would have analyzed Defendantôs filings had Claimantôs attorney not been involved. It is enough to acknowledge that she found the evidence in Claimantôs favor so persuasive as to eliminate the need for an informal conference prior to issuing her order, as was her right under Rule 16.1400. It is reasonable to assume that Claimantôs attorneyôs efforts were helpful in this regard. Indeed, for Defendant to argue otherwise is tantamount to admitting that its filings were so weak that the specialist would have rejected them on her own.

I conclude that Claimant has adequately established that his attorneyôs efforts led to his success at the informal dispute resolution level.

(3) Defendant's Allegedly "Frivolous" Filings

Defendant next objects to Claimantôs characterization of its filings as ñfrivolous.ò Though I will not go so far as to accept Claimantôs terminology, to the extent that Defendantôs filings were based primarily on its independent medical examinerôs opinion, I find his criticism entirely justified.

On its face, the examinerôs records review was woefully incomplete. It referenced only one medical record ï the first MRI, which Claimantôs treating surgeon himself had found inconclusive. It declared that neither Claimantôs subjective symptoms nor the objective evidence warranted surgery, but failed to discuss or even mention the results of the second, more conclusive MRI. And it concluded, without referencing a single medical record, that Claimant was not disabled and could return to work without restrictions. Notwithstanding the time constraints that the statute imposes on an employer who is faced with a preauthorization request, *see* 21 V.S.A. §640b, it seems Defendant had adequate time within which to seek further clarification from its examiner prior to filing its denial. I am dismayed that it did not do so.

Defendant correctly asserts that its denials were based not only on its independent medical examinerôs review, but also on Claimantôs failure to sign and return the medical authorization it had requested. In fact, however, Claimant proffered a signed authorization well before the specialistôs interim order issued. In any event, as noted above, Defendant was not prejudiced by the delay, as demonstrated by the fact that it already had copies of the pertinent medical records in its possession at the time of its filings.

Though I will not characterize Defendantôs filings as ñfrivolous,ò I conclude that its conduct was of a type to be discouraged rather than promoted. To the extent that an award of attorney fees accomplishes that goal, *see* WorkersôCompensation Rule 20.1500, it is appropriate here.

(4) Allegedly Unreasonable Fees

Upon review of Claimantôs attorney fee request, I conclude that the entries are sufficiently described and reasonable in amount. I thus reject Defendantôs assertions to the contrary.

I agree that postage constitutes ordinary office overhead, at least as it relates to small, first-class mailings. Under WorkersôCompensation Rule 20.1600, this expense, totaling $3.45, is disallowed.

(5) Applicable Hourly Rate

Defendant argues that the recent amendment to WorkersôCompensation Rule 20.1310, which raised the rate at which attorney fees are to be reimbursed from $145.00 to $200.00 per hour, is substantive, not procedural. Therefore, it asserts, the higher rate can only be applied in cases involving work-related injuries that occurred after its effective date, November 1, 2016.

Vermont law provides that the amendment of a statutory provision ñshall not affect any right, privilege, obligation or liability acquired, accrued or incurredò prior to the amendmentôs effective date. 1 V.S.A. §214(b)(2); *Myott v. Myott*, 149 Vt. 573, 575-76 (1988). This general rule of statutory construction prohibits legislative amendments that affect substantive rights and responsibilities from being applied retroactively. In contrast, amendments that are solely procedural can be given retroactive effect, and therefore can be applied to claims that already are pending at the time the new statute becomes effective. *Id.*

The Supreme Court has applied this well-established rule specifically to workersô compensation claims. Citing to 1 V.S.A. §214, in *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983), the court ruled that ñ[t]he right to compensation for an injury under the Workmenôs Compensation Act is governed by the law in force at the time of occurrence of such injury.ò Later, in *Sanz v. Douglas Collins Construction*, 2006 VT 102, the court clarified what constitutes the ñright to compensationò in the *Montgomery* context. A post-injury amendment that ñfundamentally changes the right to benefits or the obligation to pay them,ò it declared, is substantive, and cannot be applied retroactively. An amendment that does not fundamentally change pre-existing rights and responsibilities is procedural, and can be applied in a pending action.[2] *Id* at ¶12.

Defendant cites to the courtôs holding in *Sanz* to support its argument that the November 2016 amendment to WorkersôCompensation Rule 20.1310 was substantive, because it increased the amount of attorney fees an employer is now obligated to pay when a claimant prevails in a disputed claim. Although the court declined to address this issue in *Sanz*, *id.* at ¶13, n.2, I agree that when the effect of an amendment is to require an employer to pay more in compensation benefits than previously, the amendment is likely substantive in nature. *See id.* at ¶21 (Dooley, J., dissenting) (noting that because the amendment at issue affected only the manner of disbursing benefits to the injured worker, not the amount, its effect was procedural); *Special Indemnity Fund v. Dailey*, 272 P.2d 395 (Okla. 1954) (same).

I thus agree that the amendment at issue here, which significantly increased the rate at which attorney fees are awarded to a prevailing claimantôs attorney, is substantive, not procedural. However, I disagree that attorney fees are ñcompensation benefitsò as described in either *Montgomery* or *Sanz*. For that reason, I disagree that the controlling date for determining when the amendment can be applied is the date of injury. Instead, I consider it to be the date on which the legal services underlying a fee request were performed.

In upholding the *Montgomery* courtôs determination that an injured workerôs ñright to compensationò is governed by the law in effect at the time the injury occurs, the court in *Sanz* described the claimantôs right to ñstatutorily-defined benefitsò as encompassing all types of indemnity benefits, ñwhether temporary or permanent, partial or total.ò *Id.* at ¶10. Such benefits are paid directly to the injured worker, in amounts and for periods that are strictly governed by statute, based on events that are closely tied to the work injury itself, such as end medical result and ability to work. *See generally* 21 V.S.A. §601(a)(1) (establishing the employerôs general obligation to ñpay compensation in the amounts and to the person hereinafter specifiedò); *see also* 21 V.S.A. §§632, 642, 644, 646 and 648 (establishing obligation to pay specific indemnity benefits).

Attorney fees occupy a different position in the statutory scheme. They are payable only at the Commissionerôs discretion, and only insofar as they are deemed ñreasonableò in amount, 21 V.S.A. §678(a). If awarded, they are paid not to the injured worker, but directly to his or her attorney, WorkersôCompensation Rule 20.1700.

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[2] This substantive-versus-procedural analysis applies equally to both statutory amendments and to amendments to administrative rules. *Smiley v. State of Vermont*, 2015 VT 42, ¶16.

Attorney fees are thus distinguishable in important respects from the benefits at issue in either *Montgomery* or *Sanz*, and for this reason alone they merit different treatment. Given the legislative intent underlying attorney fee awards, important public policy considerations also justify a different result. It is not uncommon for a dispute to arise in a workersô compensation claim years after the underlying injury occurred. An attorney who agrees to take on such a case is of course free to charge for his or her services at the current market rate. *Miller v. IBM*, 163 Vt. 396, 400 (1995). If subsequently the claimant prevails, but the employerôs obligation to pay attorney fees is limited to a long-outdated rate, it is the claimant who will be left to pay the balance. This result runs directly counter to the statuteôs intent, which is ñto place the burden of . . . attorney fees on the side better able to bear them.ò *Fleury v. Kessel/Duff Construction Co.*, 149 Vt. 360, 363 (1988).

Both the statute and the rule contemplate periodic adjustments to the hourly rate so as to maintain it at a level that allows injured workers continued accessibility to legal services and accounts for appropriate inflation factors, furthermore. 21 V.S.A. §678(c); Workersô Compensation Rule 20.1340. Were attorney fee awards forever tied to the rate in effect as of the date of injury, this goal would be thwarted. If the controlling date is the date on which the charges were incurred, the intended result naturally follows.

With these considerations in mind, I conclude that the controlling date for determining whether the amended version of Rule 20.1310 should apply to an attorney fee award is the date when the underlying legal services were performed. Charges incurred prior to November 1, 2016, the amendmentôs effective date, are reimbursable at the rate in effect at the time, $145.00 per hour. Those incurred thereafter are reimbursable at the current rate, $200.00 per hour.

Claimantôs attorney in this case was retained on November 3, 2016, and all of the charges for which he now seeks reimbursement were incurred after the amended ruleôs effective date. I conclude that all were appropriately billed at the rate of $200.00 per hour.

ORDER:

Based on the foregoing, Defendant is hereby **ORDERED** to pay:

> Attorney fees totaling $2,127.50, representing 10.6 attorney hours billed at the rate of $200.00 per hour, plus 0.1 paralegal hours billed at the rate of $75.00 per hour.

DATED at Montpelier, Vermont this 16th day of February 2017.

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Lindsay H. Kurrle
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.