STATE OF VERMONT
DEPARTMENT OF LABOR

David Yustin

v.

State of Vermont,
Department of Public Safety

Opinion No. 08-12WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Y-03486

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Keith Kasper, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to an award of costs and attorney fees for legal representation provided in securing the Department's March 2008 interim order?

2. Was Claimant's request for an award of costs and attorney fees timely filed?

FINDINGS OF FACT:

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

1. Claimant was an employee and Defendant was his employer within the meaning of Vermont's Workers' Compensation Act.

2. On June 12, 2006 Claimant, a Vermont State trooper, injured his left shoulder. The injury occurred while he was working out at the Rutland County Sheriff's Department gym in preparation for a physical fitness exam. Claimant was off duty at the time.

3. Initially Defendant denied that Claimant's injury was compensable, on the grounds that it did not arise out of and in the course of his employment with Defendant.

4. While Claimant contested Defendant's denial, he used accumulated sick leave to pay for his time out of work, and employer-provided health care benefits to cover his medical costs.

5. On March 24, 2008 the Department issued an interim order requiring Defendant to pay both temporary total disability and medical benefits causally related to Claimant's shoulder injury.

6. Defendant did not challenge the Department's March 2008 interim order. However, rather than paying temporary disability benefits outright, instead it reinstated the sick leave Claimant had used to cover his time out of work.

7. Claimant objected to this reimbursement procedure. He argued that Defendant should have paid him the temporary disability benefits it owed in a lump sum rather than reimbursing his sick leave bank. If it had done so, then Claimant would have had funds available from the benefit award with which to pay his attorney fees.

8. Claimant pursued this issue to formal hearing. On July 17, 2009 the Commissioner ruled in Defendant's favor, thus denying Claimant's challenge to its sick leave reimbursement process. Claimant then appealed to the Vermont Supreme Court. On February 23, 2011 the Court issued its decision upholding the Commissioner's determination. *Yustin v. Department of Public Safety*, 2011 VT 20.

9. In affirming Defendant's right to offset Claimant's sick leave wages against the temporary disability benefits the Department had ordered it to pay, the majority opinion in *Yustin* addressed the question whether the process was in fact "cost-neutral" to Claimant. *Id.*, ¶14. Responding to the argument raised in the dissenting opinion – that the process was not cost-neutral because it deprived Claimant of a lump-sum award from which to pay his attorney fees – the majority stated:

> Claimant's argument overlooks his clear statutory right to seek from the Commissioner a reimbursement of reasonable attorney fees incurred in pursuing his claim, a right that applies even where – as here – the attorney fees are incurred prior to final hearing. See 21 V.S.A. §678(d) (authorizing an award of attorney fees incurred to secure payment of benefits in settlement after denial but before formal hearing).

Id.

10. In a footnote, the majority addressed in greater detail the dissent's charge that Claimant's right to seek attorney fees was "illusory," because it was restricted by certain workers' compensation rules limiting the circumstances under which fees could be awarded at the informal dispute resolution level. With specific reference to what is now Workers' Compensation Rule 10.1320 – where a claim is denied "without reasonable basis" – the majority noted that there had been ample evidence in the record to support a request for attorney fees on those grounds. It concluded:

> Thus, Claimant was afforded a reasonable opportunity, had he applied, to secure his attorney fees. Recovery of fees may not be guaranteed, but it is not illusory. Of course, Claimant cannot recover what he does not seek.

Id., ¶14, n.2.

11. Claimant first sought an award of costs and attorney fees incurred in securing the Department's March 24, 2008 interim order on April 14, 2009; however, his filing was not accompanied by a fee agreement and itemization of costs, as required by Workers' Compensation Rule 10.7000. Although duly notified of these deficiencies, Claimant did not immediately supplement his filing, and therefore it was never ruled upon.

12. On May 9, 2011 Claimant again filed a request for an award of the costs and attorney fees associated with securing the Department's interim order. In support of his request, Claimant asserted that in its February 23, 2011 decision the Supreme Court had enunciated a "newly discovered legal principle" – that the discretion granted by 21 V.S.A. §678(d) to award fees at the informal level could be applied to work injuries that had occurred prior to the statute's effective date, June 11, 2008. Analogizing to the long-standing principle by which the date of a work-related injury is deemed to be the point when it becomes "reasonably discoverable and apparent," *Hartman v. Ouellette Plumbing*, 146 Vt. 443, 447 (1985), Claimant argued that his right to request an award of fees and costs had only accrued as of the date when the Supreme Court's decision was issued.

13. On November 4, 2011 the Department issued a preliminary ruling denying Claimant's request for costs and attorney fees. It is in the context of Claimant's appeal of this ruling that the parties have filed the pending cross motions for summary judgment.

14. Claimant has appended to his summary judgment motion a fee agreement that he executed on December 19, 2011. The agreement appears to cover his attorney's representation for all aspects of his claim for benefits causally related to his left shoulder injury.

15. Claimant seeks an award of costs totaling $199.23 and attorney fees totaling $2,591.00. The latter amount represents 24.6 hours incurred to secure the Department's March 24, 2008 interim order, and 2.6 hours incurred in preparing his fee request. In addition, Claimant seeks interest at the rate of 12 percent per annum from June 11, 2008 until the requested costs and fees are paid.

DISCUSSION:

1. The issue presented by these cross motions is fairly simple: whether Claimant is entitled to an award of costs and attorney fees for representation provided to secure the Department's March 24, 2008 interim order. Resolving this question requires consideration of the statute, both as it existed at the time of Claimant's injury and as amended in June 2008, and of Workers' Compensation Rule 10.

2. Vermont's workers' compensation statute has long provided for an award of costs and attorney fees as follows:

> Necessary costs of proceedings under this chapter 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 fees when the claimant prevails. Costs shall not be taxed or allowed either party except as provided in this section.

21 V.S.A. §678(a).

3. Notably, in authorizing the award of costs and fees to a prevailing claimant §678(a) does not differentiate between the informal dispute resolution process and the formal hearing process. Both constitute "proceedings under this chapter." *Taft v. Central Vermont Public Service Corp.*, Opinion No. 03-11WC (January 25, 2011). In appropriate circumstances, therefore, the commissioner has long considered the discretion granted by §678(a) to extend to attorney fee awards at either level. *Id.; see, e.g., Reed v. Leblanc*, Opinion No. 08-05WC (January 19, 2005).

4. Indeed, it was under the authority granted by §678(a) that Workers' Compensation Rule 10.1300 was promulgated. That rule deals specifically with attorney fee awards at the informal level, as follows:

> Awards to prevailing claimants are discretionary. In most instances awards will only be considered in proceedings involving formal hearing resolution procedures. In limited instances an award may be made in a proceeding not requiring a formal hearing where the claimant is able to demonstrate:
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> | 10.1310 | that the employer or insurance carrier is responsible for undue delay in adjusting the claim, or |
> | 10.1320 | that the claim was denied without reasonable basis, or |
> | 10.1330 | that the employer or insurance carrier engaged in misconduct or neglect, and |
> | 10.1340 | that legal representation to resolve the issues was necessary, and |
> | 10.1350 | that the representation provided was reasonable, and |
> | 10.1360 | that neither the claimant nor the claimant's attorney has been responsible for any unreasonable delay in resolving the issues. |

5. Effective June 11, 2008 two additional subsections were added to §678, as follows:

> (d) In cases for which a formal hearing is requested and the case is resolved prior to formal hearing, the commissioner may award reasonable attorney 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.
>
> (e) An attorney representing a claimant shall submit a claim for attorney fees and costs within 30 days following a decision in which the claimant prevails.

6. As noted above, Finding of Fact No. 9 *supra*, in its decision denying Claimant's challenge to Defendant's sick leave reimbursement process the Supreme Court specifically referenced §678(d) as an avenue Claimant could have pursued in order to recoup the costs and attorney fees he had incurred at the informal dispute resolution level. *Yustin, supra* at ¶14. Given that §678(d) had not yet been enacted at the time of Claimant's 2006 injury, the reference is somewhat confusing. To decipher the Court's intention, it is necessary to review how statutory amendments, whether substantive or procedural, are applied to pending workers' compensation claims.

7. Vermont law provides that the amendment of a statutory provision "shall not affect any right, privilege, obligation or liability acquired, accrued or incurred" prior to the amendment's effective date. 1 V.S.A. §214(b)(2); *Myott v. Myott*, 149 Vt. 573, 575-76 (1988). Phrased alternatively, this general rule of statutory construction prohibits legislative amendments that affect substantive rights 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.*

8. The Supreme Court has applied these well-established rules specifically to workers' compensation claims. Citing to 1 V.S.A. §214, in *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983), the Court declared, "The right to compensation for an injury under the Workmen's Compensation Act is governed by the law in force at the time of occurrence of such injury." The date of an employee's work-related injury is thus the controlling date for determining whether a substantive amendment to the statute will apply.

9. In *Sanz v. Douglas Collins Construction*, 2006 VT 106, the Court clarified what constitutes the "right to compensation" for the purposes of determining whether a statutory amendment is substantive or procedural. A post-injury amendment that "fundamentally changes the right to benefits or the obligation to pay them" is substantive, and cannot be applied retroactively. An amendment that does not fundamentally change pre-existing rights is procedural, and can be applied in a pending action. *Id.*

10. With this background, I now consider whether the statutory amendment to 21 V.S.A. §678, in which subsection (d) was added, was substantive or procedural in nature. I conclude that it was procedural.

11. As noted above, the commissioner has long exercised the discretion granted by §678(a) to award costs and fees at the informal dispute resolution level. Workers' Compensation Rule 10.1300 provided further clarification as to the circumstances under which this discretion would be exercised in such cases. *Taft, supra.* By adding subsection (d), the statute neither expanded nor contracted the commissioner's discretion in any respect. It merely provided a more specific statutory base upon which to rest the requirements of the rule. *See, Zahirovic v. Super Thin Saws, Inc.*, Opinion No. 38-11WC (November 18, 2011).

12. The Supreme Court's prior ruling in this claim provides explicit support for this interpretation. As noted above, Finding of Fact Nos. 9-10 *supra*, at the same time that the Court referenced §678(d), it referred as well to Workers' Compensation Rule 10. Considering both together, the Court concluded that even though the circumstances under which Claimant might qualify for an award of fees was limited by the rule, his right to attorney fees under the statute was not illusory. *Yustin, supra* at ¶14 and n.2.

13. Claimant argues that the addition of subsection (d) to §678 created a right to attorney fees at the informal dispute resolution level that is broader than that allowed by Workers' Compensation Rule 10.1300. In his view, therefore, the amendment was substantive in nature. With that in mind, he asserts that when the Supreme Court in *Yustin* applied subsection (d) to his claim notwithstanding that his date of injury predated its enactment, in effect it signaled its intention to overrule long-standing precedent, enunciated in *Montgomery* and reaffirmed in *Sanz*, prohibiting substantive amendments from being given retroactive effect in the workers' compensation context.

14. I will not infer from the Court's brief reference to §678(d) its intent either to overrule prior precedent or to nullify the plain language of 1 V.S.A. §214(b)(2). It is far more plausible simply to infer from the Court's reference that the addition of subsection (d) was procedural, not substantive.[1]

15. Having concluded that subsection (d) did not create any new substantive rights applicable to Claimant's claim, I next consider whether his request for fees was timely filed.

16. Prior to the enactment of §678(e), neither the statute nor the rules imposed a specific time limit within which a prevailing claimant was to request an award of costs and attorney fees at the informal level.[2] Absent any mandate, the commissioner's discretion to award fees necessarily must be deemed to include an element of reasonableness as regards the timeliness of the request.

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[1] Defendant suggests that the Court may have overlooked the fact that §678(d) was not enacted until after Claimant's injury occurred, and mistakenly referenced it without considering whether it was substantive or procedural. It is not for me to guess at the Court's thought process in this regard.

[2] Rule 10.4000 requires that evidence establishing the amount and reasonableness of a claimant's request for an award of costs and attorney fees "shall be offered no later than the date upon which the proposed findings of fact and conclusions of law are filed with the Department." Such filings are neither made nor required at the informal level; therefore that time limitation has no application here.

17. That discretion since has been limited, and §678(e) now mandates that a prevailing claimant's request for an award of fees and costs must be filed within 30 days after the favorable decision is rendered. Subsection (e) thus is analogous to a statute of limitation or repose. As such it cannot be applied retroactively to bar an action that would not yet have been barred under prior law. *Sanz, supra* at ¶9. In considering the timeliness of Claimant's request in the current claim, therefore, I evaluate it not against the 30-day limit mandated by subsection (e) but rather against the more general reasonableness standard implicit in §678 and Rule 10.1300.

18. Even against this standard, however, Claimant's request is untimely. The favorable decision upon which it was based – the Department's March 2008 interim order – was issued more than three years ago. Without specifying a particular time frame beyond which a fee request should not be considered, In this matter I find that three years is too long.

19. As for Claimant's argument that the delay is to be excused on the grounds that his request for attorney fees arose from a "newly discovered legal principle," Claimant's own actions belie this assertion. That he was well aware of his right to seek attorney fees at the informal level long before the Supreme Court reminded him of that remedy in *Yustin* is documented by the fact that he first requested them in 2009, two years before that decision issued.

20. Claimant's analogy to the discovery doctrine in support of his timeliness argument is equally unavailing. It is one thing to allow that an injured worker's obligation to seek redress for a work-related injury does not arise until the facts establishing its compensability become "reasonably discoverable and apparent," *Hartman, supra*. I do not discern any basis for extending that rule to the discovery of legal remedies or principles, however, nor has Claimant cited to any legal precedent encouraging me to do so.

21. Having concluded that Claimant's request was not timely, I need not consider whether he satisfied the criteria for an award under Rule 10.1300. Nevertheless, it is instructive to note that I do not necessarily equate the requisite finding for issuing an interim order under 21 V.S.A. §662(b) – that the employer's denial lacks "reasonable support" – with the finding required for an award of attorney fees under Rule 10.1320 – that the employer had no "reasonable basis" for denying the claim.

22. For example, the circumstances of this case, involving as it did an off-premises, off-duty injury, justified both a complete factual inquiry and a considered legal analysis. That in the end the Department deemed Claimant's claim to be compensable does not mean that Defendant acted unreasonably in denying it.

23. Were I to accept the position Claimant advocates, the result would be to award attorney fees in virtually every case in which an interim order issues. This would directly contradict the language of Rule 10.1300, which authorizes an award of fees short of formal hearing only in "limited instances." More importantly, it would unduly penalize an employer for exercising its right to thoroughly investigate the factual and legal circumstances surrounding an employee's claim for benefits at the very stage of the proceedings when such investigation is most warranted. For these reasons, I find Claimant's interpretation of Rule 10.1320 untenable, and I decline to adopt it.

ORDER:

Claimant's Motion for Summary Judgment is hereby **DENIED**. Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's request for an award of costs and attorney fees associated with securing the Department's March 24, 2008 interim order is **DENIED**.

DATED at Montpelier, Vermont this 20th day of March 2012.

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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.