

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Kenneth King

Opinion No. 13F-23WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Century Arms, Inc.

For: Michael A. Harrington
Commissioner

State File No. JJ-59855

RULING ON CLAIMANT'S PETITION FOR COSTS AND ATTORNEY FEES

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Oliver A. Abbott, Esq., for Defendant

Claimant's Petition

On August 7, 2023, the Department issued a formal ruling on the parties' cross motions for summary judgment, granting judgment in Claimant's favor on two of four issues. *See King v. Century Arms, Inc.*, Opinion No. 13-23WC (August 7, 2023) ("*King I*"). On August 11, 2023, Claimant submitted a timely petition seeking costs and attorney fees. Defendant filed a response on August 16, 2023, and Claimant filed a reply on August 18, 2023.

Background

Claimant sustained a compensable upper extremity injury in 2017. In June 2020, his treating physician recommended an EMG study. Claimant's counsel conveyed that recommendation to Defendant's counsel and requested that Defendant pay for the study on multiple occasions, but Defendant did not agree to pay. Claimant sought a signed preauthorization from the treating physician but was unable to obtain one.

On February 12, 2021, Claimant's counsel notified Defendant's counsel that, in order to move the case towards resolution, he was scheduling an IME and an EMG study with Dr. Haig. Dr. Haig performed the IME and the EMG study in May 2021. His report included some recommendations for medical treatment. In November 2021, Claimant presented Defendant with invoices for Dr. Haig's IME and EMG study. Defendant denied payment for them.

In August 2022, Claimant requested a hearing on the payment of Dr. Haig's invoices, as well as on the reasonableness of his treatment recommendations. The Department's specialist referred the IME and EMG study issues to the formal docket, but she did not refer the issue of the reasonableness of the recommended medical treatments. When Claimant filed his summary

judgment motion in March 2023, he included the reasonableness of the medical treatments as an issue for summary judgment. *See generally King I, Background*, ¶¶ 1-19.

On August 7, 2023, the Department ruled in Claimant's favor on the issues of payment for the IME and the EMG study. The Department denied Claimant's request for summary judgment on the reasonableness of the recommended medical treatments because that issue was not on the formal docket. *See King I, Conclusion of Law Nos. 27-29*.

Claimant also requested a ten percent penalty plus interest on Dr. Haig's invoices in his summary judgment motion. However, he did not cite to any law to support this request, nor did he brief the issue in his motion. Rather, in the last sentence of his motion, where he requested an order for payment of Dr. Haig's invoices, Claimant included the words "plus a 10% penalty and interest since December 29, 2021, which is 30 days after the bill was presented to [Defendant] for payment." *Claimant's Summary Judgment Motion*, at 8. The Department denied Claimant's request for a penalty and interest. *See King I, Conclusion of Law Nos. 30-34*.

Having prevailed on the issues of payment of the IME and EMG study, Claimant now seeks an award of attorney fees and costs under 21 V.S.A. § 678.

Recent Amendments to 21 V.S.A. § 678

Effective July 1, 2023, the Vermont Legislature has amended the statutory provision for awards of costs and attorney fees for proceedings under the workers' compensation chapter. Accordingly, before considering Claimant's request for such an award, I must consider which version of the statute applies to Claimant's petition, the one in effect prior to July 1, 2023 or the one that took effect on that date.

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). 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; therefore, they can be applied to claims that are already pending at the time the new statute becomes effective. *Myott, supra*, at 576.

The Vermont Supreme Court has applied this well-established rule specifically in the workers' compensation context. In *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983), the Court ruled that "[t]he 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." Later, in *Sanz v. Douglas Collins Construction*, 2006 VT 102, the Court clarified what constitutes the "right to compensation" in the *Montgomery* context. A post-injury amendment that "fundamentally changes the right to benefits or the obligation to pay those benefits," 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. *Sanz, supra*, at ¶ 12.

Analysis of the Recent Amendments to 21 V.S.A. § 678

One of the recent amendments to 21 V.S.A. § 678 concerns the availability of a cost award. The prior version of the statute provided for a cost award in “proceedings under this chapter.” 21 V.S.A. § 678(a) (prior to amendment). The current version provides for a cost award “in either a formal or informal proceeding under this chapter.” 21 V.S.A. § 678(b)(1) (current version). Although the wording is different, the phrase “proceedings under this chapter” as used in the prior version of the statute included formal and informal proceedings. *See, e.g., Mallow v. Bullrock Solar, LLC*, Opinion No. 11-22WC (May 12, 2022). Accordingly, this change to the statutory language does not affect any substantive rights or responsibilities.

The other amendments to § 678 are minor stylistic changes that reorder certain provisions and break other provisions down into subsections. The Legislature has also renumbered some subsections. Having reviewed all these changes, I conclude that none of the amendments fundamentally change the right to benefits or the obligation to pay them, as contemplated in *Sanz v. Douglas Collins Construction, supra*. Accordingly, I conclude that the amendments are not substantive, and I apply the version of § 678 that took effect on July 1, 2023 to Claimant’s petition for costs and attorney fees.

Statutory Basis for Awarding Attorney Fees

Under the workers’ compensation statute, the Commissioner may award reasonable attorney fees “when the claimant prevails.” 21 V.S.A. § 678(b)(2). Claimant here prevailed on two out of four issues, and I find that he is entitled to an appropriate award of attorney fees.

A claimant does not forfeit entitlement to attorney fees under § 678(b)(2) merely because he or she did not prevail on every issue upon which the Commissioner ruled. *Hodgeman v. Jard Co.*, 157 Vt. 461, 465 (1991). Rather, the Commissioner may consider the extent of the claimant’s success in making an appropriate award. *Hathaway v. Engineers Construction, Inc.*, Opinion No. 03F-17WC (April 11, 2017) (apportioning fees when an injured worker partially prevails).

Claimant’s Entitlement to an Award of Attorney Fees

In this case, Claimant prevailed on both issues that were pending on the formal docket: payment for Dr. Haig’s IME and payment for his EMG study. Although the combined amount at issue was only \$2,541.48, Defendant disputed liability for both items for a substantial period of time. Accordingly, Claimant had to devote significant efforts to establishing his entitlement to payment for these items.

Although Claimant also sought a ruling on the reasonableness of the medical treatments recommended by Dr. Haig, Claimant’s counsel’s work on this issue was minimal. He listed the reasonableness of the treatments as an issue when he filed Form 6, and he referenced the Form 6 in his Statement of Undisputed Material Facts, ¶ 16. In the body of his motion, he included one sentence on this issue: “The Department should also find that Dr. Haig’s medical and psychological recommendations are reasonable and related and order them too.” *Claimant’s Summary Judgment Motion*, at 8.

Similarly, Claimant's summary judgment motion included a request for a ten percent penalty and interest on Dr. Haig's invoices; however, he did not devote any portion of his summary judgment motion to this issue. He simply included the request for a penalty and interest in the last sentence of his motion. *See Background, supra*, at 2.

When a claimant prevails on some but not all issues, the Department typically engages in a proportionality analysis to determine what percentage of the attorney's time to include in the fee award. That determination does not necessarily require a straight ratio of "claims won" to "claims lost." In *Hathaway v. Engineers Construction, Inc., supra*, for example, the Commissioner noted that the single claim on which the claimant prevailed represented a far less significant investment of skill, time and effort and resulted in a relatively minimal award. Accordingly, the Commissioner apportioned ten percent of the claimant's attorney's time to the single claim upon which he prevailed.

In this case, Claimant's counsel made a significant investment of skill, time and effort on the IME and EMG study issues and prevailed on both. In contrast, he devoted almost no effort to the reasonableness of Dr. Haig's treatment recommendations and literally no effort to the request for penalties and interest beyond including those words in his motion. Accordingly, I apportion 95 percent of Claimant's attorney's time dealing with the summary judgment issues to the issues upon which he prevailed.

Finally, the time spent preparing a petition for costs and attorney fees is also includable in a fee award. *See Human Rights Commission v. LaBrie, Inc.*, 164 Vt. 237, 252 (1995).

Calculation of Attorney Fees

Claimant has submitted an itemized statement with his attorney's time entries from March 23, 2018 through August 10, 2023. Defendant takes issue with some of the entries as not related to the issues upon which Claimant prevailed.

First, I must determine the starting date on the invoice for the relevant entries. Claimant contends that February 23, 2020, is the applicable starting date because that is when he began to pursue Dr Haig's IME and EMG study. Defendant contends that the relevant starting date is July 28, 2022, because that is when Claimant first tried to recoup the cost of Dr. Haig's services from Defendant. After review, I find the relevant starting date to be June 12, 2020, the first entry after Dr. Lisle's June 4, 2020 recommendation for an EMG study. This is the date on which the relevant chronology set forth in *King I* begins. Further, the parties attached relevant exhibits to their motions that date back to June 2020. *See King I, List of Exhibits*.

Second, I add the additional time reported by Claimant for replying to Defendant's response to the fee petition on August 18, 2023 in the amount of 2.1 hours.

Having determined the starting and ending dates, I reviewed all entries within that time range, as well as Defendant's Exhibit A, which identified those time entries that Defendant characterized as unrelated. After that review, I removed the following entries from the invoice as unrelated to the issues considered on summary judgment:

DATE	DESCRIPTION	HOURS
12/9/22	DOL Form	0.30
12/19/22	Form 25	0.30
12/21/22	Form 25	0.20
12/30/22	Production	0.30
3/16/23	Correspondence w/ counsel	1.70
6/1/23	Form 7	0.40
6/8/23	Correspondence to provider	0.20
6/19/23	Backus IME	0.60
6/30/23	Conv w/ Claimant	0.20
7/3/23	Conv w/ Claimant re: IME	0.30
7/21/23	Conv w/ Claimant re: IME	0.20
7/29/23	Dr. Backus IME report	0.30
8/3/23	Correspondence w/ Dept	0.30
8/4/23	Dr. Backus IME	0.30
8/7/23	Dr. Backus IME report	0.10
TOTAL		5.7 hours removed

Other than the entries listed above, I find that the itemized time from June 12, 2020 through August 18, 2023 is reasonable and related to the issues presented on summary judgment. Accordingly, I find the following attorney hours reasonable, related to the motion, and includable in the fee award:

June 12, 2020 through June 30, 2020	0.70 Hours
July 1, 2020 through June 30, 2021	1.40 Hours
July 1, 2021 through June 30, 2022	1.10 Hours
July 1, 2022 through June 30, 2023	26.70 Hours
July 1, 2023 through August 18, 2023	5.90 Hours

The workers' compensation statute and rules set a maximum hourly rate for fee awards; such maximums are subject to increase on July 1 of each year. *See* 21 V.S.A. § 678(d) and Workers' Compensation Rule 20.1340. Accordingly, I calculate the fee award as follows:

6/12/20 through 6/30/20	0.70 hours x \$215 = \$150.50
7/1/20 through 6/30/21	1.40 hours x \$215 = \$301.00
7/1/21 through 6/30/22	1.10 hours x \$225 = \$247.50

7/1/22 through 6/30/23	26.70 hours x \$235 = \$6,274.50
7/1/23 through 8/18/23	5.90 hours x \$245 = \$1,445.50
TOTAL:	\$8,419.00

After calculating that figure, I reduce the amount of the fee award by five percent, as Claimant did not prevail on all issues raised on summary judgment. *See Claimant’s Entitlement to an Award of Attorney Fees, supra*, at 4. Accordingly, I award attorney fees in the amount of \$7,998.05.¹

Statutory Basis for Cost Awards

Pursuant to 21 V.S.A. § 678(b)(1), when a claimant prevails in either formal or informal proceedings under this chapter, the Commissioner “shall” award necessary costs to the claimant. Where the claimant prevails on some, but not all, of the disputed issues, the award of costs is generally tailored to cover only those costs that relate directly to the successful claims. *Lydy v. Trustaff, Inc.*, Opinion No. 05A-12WC (April 27, 2012), citing *Lyons v. American Flatbread*, Opinion No. 36A-03WC (October 24, 2003); *Hatin v. Our Lady of Providence*, Opinion No. 21S-03WC (October 22, 2003). With this guidance in mind, I consider Claimant’s request for costs.

Claimant’s Entitlement to a Cost Award

The only costs for which Claimant seeks an award are \$1,800.00 paid to Dr. Haig for his IME and \$39.52 for medical records.²

First, on August 7, 2023, I ordered Defendant to pay \$1,800.00 for the cost of Dr. Haig’s IME. As Claimant’s counsel has paid this amount to Dr. Haig already, Defendant shall reimburse Claimant’s counsel for this amount. This payment was ordered in the previous ruling, and no additional cost award is necessary.

Second, I find the expense of obtaining medical records to be a necessary cost of this litigation and the amount of \$39.52 to be reasonable.³ Accordingly, I find that Defendant shall pay this cost.

¹ \$8,419.00 minus 5 percent = \$7,998.05.

² In his original petition, Claimant sought \$2,581.00 in costs. This figure included \$1,800.00 for Dr. Haig’s IME, \$741.48 for the EMG study, and \$39.52 for medical records. On August 18, 2023, Claimant withdrew his request for a cost award for Dr. Haig’s EMG study, as that study constituted medical treatment under 21 V.S.A. § 640(a), rather than a litigation cost.

³ Claimant’s itemized statement includes more than \$39.52 for the cost of medical records. Claimant is not seeking reimbursement for all such costs.

Order:

Defendant is hereby **ORDERED** to pay attorney fees totaling \$7,998.05 and costs totaling \$39.52.

DATED at Montpelier, Vermont this 8th day of September 2023.

Michael A. Harrington
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.