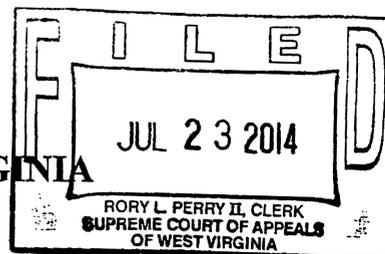


**THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA**



**SANDRA K. CASSELLA,
PETITIONER,**

AND

**MYLAN PHARMACEUTICALS, INC.,
RESPONDENT.**

**APPEAL NO: 2045678
DOCKET NO.: 11-1503
BOR NO.: 2045678
JCN: 2010119208
CLAIM NO. 2010000138
DOI: 12/29/2009**

Petitioner's Supplemental Brief

by

Sandra K. Cassella, PETITIONER/CLAIMANT BELOW

Mikel R. Kinser, Esq.
West Virginia State Bar #11693
Rollins Law Office
P.O. Box 07533
Fort Myers, FL 33919
(304) 212-4465
Mikel@Rollins-Law.com

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ISSUES BEFORE THE COURT

- I. Does W.Va. Code § 23-5-16(c) apply retroactively?
- II. What is the definition of "reasonable costs" as stated in W.Va. Code § 23-5-16(c)(1)?
- III. Is there a limit on costs that may be awarded?
- IV. What is the definition of "litigated medical issue" as stated in W.Va. Code § 23-5-16(c)(2)?
- V. What is the maximum amount of fees and costs recoverable under W.Va. Code § 23-5-16(c)?

STATEMENT OF THE CASE

On July 12, 2013, a legislative amendment to W.Va. Code § 23-5-16 became effective, which provided for the payment of fees to attorneys for claimants in certain workers' compensation medical denial cases. On October 24, 2013, the Court issued a Memorandum Decision reversing a denial of medical treatment to Ms. Cassella. The Court reversed the Board of Review's decision and reinstated the February 10, 2011 Order of the Office of Judges, which reversed the Claim Administrator's June 25, 2010 denial of medical treatment to the claimant. On November 25, 2013, the Court issued a mandate and the Court's decision became final. Thereafter, on December 2, 2013, the Court received a Petition for Award of Claimant's Attorney Fees and Costs from Claimant Counsel.

SUMMARY OF ARGUMENT

Claimant Counsel is entitled to attorney's fees and costs pursuant to W.Va. Code § 23-5-16. This statute's application to the instant case is not retroactive because neither Counsel's right to attorney's fees nor Employer's obligation to pay existed before the effective date of the statute. "Reasonable costs" under W.Va. Code § 23-5-16(c)(1) includes, but is not limited to, court filing costs, service of process costs, transcription costs, costs of preparing and obtaining medical reports, costs of testimony of expert witnesses, reasonable printing costs, evidentiary supplies

such as labels, attorney's mileage costs, costs for IMEs, and any other reasonable costs that an attorney passes onto the client pursuant to the fee agreement. Additionally, there is no limit under the statute on such reasonable costs. "Litigated medical issue" under W.Va. Code § 23-5-16(c)(2) means each medical request denied by a Claim Administrator, notwithstanding the fact that multiple issues can be denied in one denial letter, as well as each level of litigation necessary to procure a decision in favor of the claimant. The maximum fee that may be awarded under the statute is \$2,500 per claim and there is no maximum amount that can be charged for costs.

ARGUMENT

On April 13, 2013, the West Virginia Legislature passed House Bill 3069, which amended W.Va. Code § 23-5-16 to allow for the award of attorney fees for the successful recovery of denied medical benefits in certain workers' compensation cases. The newly enacted W.Va. Code § 23-5-16(c) became effective on July 12, 2013. This statute states:

Except attorney's fees and costs recoverable pursuant to subsection (c), section twenty-one, article two-c of this chapter, an attorney's fee for successful recovery of denied medical benefits may be charged or received by an attorney, and paid by the private carrier or self-insured employer, for a claimant or dependent under this section. In no event may attorney's fees and costs be awarded pursuant to both this section and subsection (c), section twenty-one, article two-c of this chapter.

(1) If a claimant successfully prevails in a proceeding relating to a denial of medical benefits brought before the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, as a result of utilization review, arbitration, mediation or other proceedings, or a combination thereof, relating to denial of medical benefits before the Office of Judges, Board of Review or court, there shall additionally be charged against the private carriers or self-insured employers, whichever is applicable, the reasonable costs and reasonable hourly attorney fees of the claimant. Following the successful resolution of the denial in favor of the claimant, a fee petition shall be submitted by the claimant's attorney to the Insurance Commissioner or his or her successors, arbitrators, mediator, the Office of Judges, the Board of Review, or court, whichever enters a final decision on the issue. An attorney representing a claimant must submit a claim for attorney fees and costs within thirty days following a decision in which the claimant prevails and the order becomes final.

(2) The Insurance Commissioner or his or her successors, arbitrators, mediator, the Office of Judges, the Board of Review, or court shall enter an order within thirty days awarding reasonable attorney fees not to exceed \$125 per hour and reasonable costs of the claimant to be paid by the private carriers or self-insured employers, whichever is applicable, which shall be paid as directed. In no event may an award of the claimant's attorney's fees under this subsection exceed \$500 per litigated medical issue, not to exceed \$2,500 in a claim.

(3) In determining the reasonableness of the attorney fees to be awarded, the Insurance Commission, arbitrator, mediator, Office of Judges, Board of Review, or court shall consider the experience of the attorney, the complexity of the issue, the hours expended, and the contingent nature of the fee.

This amendment was an attempt by the legislature, at the behest of the Access to Justice Commission, to provide a financial incentive, albeit a modest one, for attorneys to take otherwise unprofitable cases dealing with claimants' medical treatment denials. Under the previous statutory scheme, a lawyer would have absolutely no economic incentive to take these types of cases because even if completely successful in obtaining medical treatment for the claimant, the lawyer would be entitled to absolutely nothing for his or her legal work. Engaging in the representation of claimants with medical denial issues would surely bankrupt a lawyer in short order if there were no possibility of obtaining settlements or monetary benefits for claimants through the litigation of other issues. As a result, claimants would be unlikely to find a willing attorney to represent them in these matters. This amendment recognized and attempted to rectify this lack of access to justice for these types of claimants in most circumstances; although, claimants under the Old Fund still have little chance of obtaining representation because the Insurance Commission is not explicitly included in the statute as a potential payor of attorney's fees.

I. W.VA. CODE § 23-5-16(C) IS NOT BEING APPLIED RETROACTIVELY BECAUSE NEITHER CLAIMANT COUNSEL'S RIGHTS NOR THE EMPLOYER'S OBLIGATIONS EXISTED UNTIL AFTER THE EFFECTIVE DATE OF THE AMENDMENT.

It is not necessary that W.Va. Code § 23-5-16(c) be retroactively applied in order to grant Claimant Counsel's petition for attorney's fees. Claimant Counsel's right to attorney's fees under this statute is separate and distinct from the claimant's rights to workers' compensation benefits. Counsel's right to attorney's fees did not exist until this Court's decision in favor of the Claimant became final on November 25, 2013, several months after the statute became effective.

Generally, unless a statute provides explicitly for retroactive application, it should not be applied retroactively to events completed before the effective date of the statute if it diminishes substantive rights or augments substantive liabilities. *Public Citizen, Inc. v. First Nat. Bank*, 198 W.Va. 329, 334, 480 S.E.2d 538, 543 (W. Va. 1996). However, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment [...] or upsets expectations based in prior law." *Landgraf v. USI Film Products*, 511 US 244, 269 (1994). Stated another way, "[a] law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application." Syllabus Point 3, *Sizemore v. State Workmen's Comp. Com'r*, 159 W.Va. 100, 219 S.E.2d 912 (W. Va. 1975).

In *Sizemore*, an application for dependent death benefits was denied because, according to the Appeal Board, the statute in effect at the time the claimant was injured controlled the disposition of the application and not the statute in effect at the date of his death. However, this Court reversed the Appeal Board and held that the "statute in effect at the date of an injured

employee's death governs the deceased employee's dependents' claims for death benefits." *Id.* at Syl. Pt. 2. The Court explained:

This Court, then, is of the opinion that, as the dependents' rights are truly separate and distinct from the injured employee's rights, the date of death of the employee logically governs which statute is to be applied. As explained in the *Peak* case, since the rights of the dependents accrue at the time of death, the statute in effect at the time of death should control as to such rights. No vested rights are impaired by applying the statute in force at the time of death because, until death occurs, the surviving dependents have no rights and the employer has no fixed liability. Consequently, although Mr. Sizemore's death in 1970 was the result of an injury sustained in 1961, granting his dependents the benefits of the intervening 1967 and 1969 amendments is not equivalent to retroactive applications of these statutes. The contrary is true; this construction is strictly prospective, applying only to deaths occurring subsequent to the statutes' effective dates.

Id. at 915-16. In a subsequent case, the Court further clarified its holding in *Sizemore*:

Certainly, rights whose existence depend upon the happening of an event such as death, are not acquired or completed until the death occurs; nor are there fund obligations to the dependents until the happening of the event.

Charles v. State Workmen's Compensation Com'r, 161 W.Va. 285, 289-90, 241 S.E.2d 816, 819 (W. Va. 1978).

Like a dependent's right to dependent benefits, Claimant Counsel's right to attorney's fees are separate and distinct from the injured worker's rights. The United State Supreme Court found that "attorney's fees allowed under [a federal statute] are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial." *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 452 (1982), see also *Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994) ("Attorney's fee determinations, we have observed, are 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.' ") In *White*, the Court noted that:

Section 1988 provides for awards of attorney's fees only to a "prevailing party." Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on

the merits — an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from other elements.

Similar to the situation in *White*, under W.Va. Code § 23-5-16(c), an attorney is only entitled to attorney's fees if the claimant is successful in a proceeding relating to a denial of medical benefits. The successful resolution of a medical denial in favor of the claimant is a condition precedent to any award of attorney's fees; the attorney's right to any fee award does not exist until the denial is successfully resolved in favor of the claimant. The date of the final order, in which the claimant prevailed, logically governs whether the statute should apply. Since the right of the attorney to attorney's fees accrues at the time of the final order, the statute in effect at the time of the order should apply. No vested rights are impaired by applying the statute, because until a final order is entered in favor of the claimant, the attorney has no right to attorney's fees and the employer has no fixed liability.

The employer is misplaced in its reliance on *Wampler Foods v. Workers' Comp. Div.*, 216 W.Va. 129, 602 S.E.2d 805 (W. Va. 2004) for its argument that the law in effect at the time the Claim Administrator denied medical treatment to the claimant controls whether Claimant Counsel is entitled to attorney's fees. In *Wampler Foods*, only the already-vested rights of claimants' to their own workers' compensation benefits were at issue, not the separate and distinct rights of third-parties. Accordingly, the statute at issue in that case was being retroactively applied because it affected claimants' already-vested rights. That situation is distinguishable from the case at hand because Claimant Counsel's right to attorney's fees did not vest until after the amendment was effective and the Employer had no obligation to pay until after the amendment become effective.

In the instant case, Claimant Counsel's right to attorney's fees did not vest until November 25, 2013 and the Employer's obligation to pay attorney's fees did not exist until November 25, 2013, over four months after the amendment became effective. Therefore, the construction of the statute is strictly prospective, applying only to orders in favor of the claimant, which were issued after the amendment's effective date.

II. "REASONABLE COSTS" PURSUANT TO W.VA. CODE § 23-5-16(C)(1) INCLUDE ALL COSTS WHICH ARE REASONABLY NECESSARY TO LITIGATE AND PREVAIL IN A MEDICAL DENIAL PROCEEDING.

In determining the definition of "reasonable costs" under W.Va. Code § 23-5-16(c), the Court should first look to the statute. On this issue, the statute states:

[T]here shall additionally be charged against the private carriers or self-insured employers, whichever is applicable, the reasonable costs and reasonable hourly attorney fees of the claimant.

[...]

The Insurance Commissioner or his or her successors, arbitrators, mediator, the Office of Judges, the Board of Review, or court shall enter an order within thirty days awarding reasonable attorney fees not to exceed \$125 per hour and reasonable costs of the claimant to be paid by the private carriers or self-insured employers.

W.Va. Code § 23-5-16(c)(1) and (2). Since the statute is silent and does not define "reasonable costs," the Court should look to the rules promulgated by the Insurance Commission interpreting this statute. It does not seem that the Insurance Commission has promulgated a rule regarding this specific amendment yet; however, it did promulgate a rule interpreting W.Va. Code § 23-2C-21(c), which provides for attorney fee awards resulting from unreasonable denials. That statute states, in relevant part:

[R]easonable attorney's fees and *the costs actually incurred in the process of obtaining a reversal of the denial* shall be awarded to the claimant and paid by the private carrier or self-insured employer which issued the unreasonable denial.

W.Va. Code § 23-2C-21(c)(emphasis added). The wording regarding "costs" in that statute differs from the wording contained in W.Va. Code § 23-5-16(c), which more broadly covers all "reasonable costs"; however, the Court may still find the Insurance Commission's interpretation of "costs" under the unreasonable denial process helpful. The regulation promulgated by the Insurance Commission states that the costs that may be charged under W.Va. Code § 23-2C-21(c) are:

Costs actually incurred in the process of obtaining a reversal of the unreasonable denial is limited to the following items incurred after the date of the denial decision:

- a. Court filing costs;
- b. Service of process costs;
- c. Transcription costs;
- d. Costs of preparation of medical reports; and
- e. Costs of testimony of expert witnesses.

W.Va. CSR § 85-4-4.4. The Court should use this rule as a baseline in determining what constitutes "reasonable costs" under W.Va. Code § 23-5-16(c). However, due to the broader language used by the legislature in W.Va. Code § 23-5-16(c), the Court is not limited to this definition only. The Court should also award the "reasonable costs" charged by an attorney for printing; supplies necessary to present evidence properly, such as labels for evidence or appendices; mileage costs for travel related to the action; the cost of Independent Medical Evaluations ("IMEs") necessary to the successful appeal of a Claim Administrator's denial of medical treatment; and any other reasonable costs that an attorney passes onto the client pursuant to the fee agreement. Additionally, a court should have discretion in deciding whether a cost is "reasonable" under the circumstances according to the prudent person standard. Consequently, what constitutes a "reasonable" cost in one case may not be reasonable in another.

Therefore, the Court should hold that "reasonable costs" include, but are not limited to, in the discretion of the court: court filing costs; service of process costs; transcription costs; costs of preparing and obtaining medical reports; costs of testimony of expert witnesses; reasonable printing costs; evidentiary supplies such as labels; attorney's mileage costs; costs for IMEs; and any other reasonable costs that an attorney passes onto the client pursuant to the fee agreement.

III. THERE IS NO LIMIT ON COSTS THAT MAY BE AWARDED.

According to the plain language of the statute, there is no limit on costs that may be awarded, so long as they are "reasonable." W.Va. Code § 23-5-16(c) states, in relevant part:

[T]here shall additionally be charged ... the reasonable costs and reasonable hourly attorney fees of the claimant. [...] [The tribunal] shall enter an order within thirty days awarding reasonable attorney fees not to exceed \$125 per hour and reasonable costs of the claimant [...] In no event may an award of the claimant's attorney's fees under this subsection exceed \$500 per litigated medical issue, not to exceed \$2,500 in a claim.

The legislature was explicit in limiting the amount that could be charged by an attorney as a "fee" but was silent in limiting costs. In accordance with the rule of statutory interpretation, *Expressio unius est exclusio alterius*¹, the explicit limitation on attorney's "fees" without the inclusion of a limitation on "costs" implies legislative intent to not limit the amount of costs that may be awarded. Therefore, there is no limit on costs that may be awarded, as long as the costs are reasonable.

IV. "LITIGATED MEDICAL ISSUE" AS STATED IN W.VA. CODE § 23-5-16(C)(2) MEANS EACH MEDICAL REQUEST DENIED BY THE CLAIM ADMINISTRATOR AT EACH LEVEL OF LITIGATION.

In determining the definition of "litigated medical issue" as contemplated by W.Va. Code § 23-5-16(c), the Court should first look to the statute. The statute states, in relevant part:

The Insurance Commissioner or his or her successors, arbitrators, mediator, the Office of Judges, the Board of Review, or court shall enter an order within thirty

¹ Expression of one is the exclusion of the other.

days awarding reasonable attorney fees not to exceed \$125 per hour and reasonable costs of the claimant to be paid by the private carriers or self-insured employers, whichever is applicable, which shall be paid as directed. In no event may an award of the claimant's attorney's fees under this subsection exceed \$500 per litigated medical issue, not to exceed \$2,500 in a claim.

W.Va. Code § 23-5-16(c)(2). Since the statute does not define "litigated medical issue", it may be helpful for the Court to look at the statute relating to attorney fee awards in unreasonable denial cases, W.Va. Code § 23-2C-21(c). That statute states:

Upon a determination by the Office of Judges that a denial of compensability, a denial of an award of temporary total disability or a denial of an authorization for medical benefits was unreasonable, reasonable attorney's fees and the costs actually incurred in the process of obtaining a reversal of the denial shall be awarded to the claimant and paid by the private carrier or self-insured employer which issued the unreasonable denial. A denial is unreasonable if, after submission by or on behalf of the claimant, of evidence of the compensability of the claim, the entitlement to temporary total disability benefits or medical benefits, the private carrier or self-insured employer is unable to demonstrate that it had evidence or a legal basis supported by legal authority at the time of the denial which is relevant and probative and supports the denial of the award or authorization. Payment of attorney's fees and costs awarded under this subsection will be made to the claimant at the conclusion of litigation, including all appeals, of the claimant's protest of the denial.

W.Va. Code § 23-2C-21(c). This statute does not include the phrase "litigated medical issue", but only references certain "denials." The Insurance Commission interpreted in its rule contained at W.Va. CSR § 85-4-4.3 that reasonable attorney's fees in unreasonable denial cases included a maximum fee of \$1,500 for successful litigation at the Office of Judges, as well as an additional maximum fee of \$1,500 for successful appellate work, resulting in a maximum total attorney's fee of \$3,000 per litigated denial.

However, in W.Va. Code § 23-5-16(c)(2), "denial" has been replaced with the phrase "litigated medical issue"; therefore, the Insurance Commission's rule is not entirely on-point. One can imagine a scenario where one "denial" denies several medical treatments, such as multiple prescription medication requests. In that case, the denial of each medication request would

constitute a "litigated medical issue" even though they may all be included in one "denial" made by the Claim Administrator. It is entirely possible that a claimant would be successful in obtaining a reversal of two medication denials, while a court affirms the denial of the third medication. In that scenario, under the unreasonable denial statute, attorney's fees might be denied by the Court because the Claim Administrator was not unreasonable in denying one of the medications, even though the other two were unreasonable.

However, W.Va. Code § 23-5-16(c) resolves this problem. Under the same fact pattern as above, an attorney would be entitled to a \$500 maximum fee for the first medication that was denied and reversed, as well as an additional \$500 maximum fee for the second medication that was denied and reversed.

Additionally, upon the claimant's success at the Office of Judges, the Employer may appeal that tribunal's reversal. If, in the example above, the claimant also prevails at the next appellate level, the attorney should also receive a \$500 fee per issue at that appellate level, which would equate to an additional \$1,000 fee for the appellate work before the Board of Review. This is due to the fact that additional work at the appellate level will be necessary and clearly cannot be completed without significant additional time. Additionally, at the appellate level, the "issue" transforms from being whether the claimant proves by a preponderance of the evidence that he or she is entitled to treatment to whether the Office of Judges erred in its decision. Under this fact pattern, the attorney would be entitled to a total of \$2,000 in attorney's fees under the statute for the attorney's work before the Office of Judges and the Board of Review. Of course, if this case were then appealed to the West Virginia Supreme Court, the claimant's attorney would be limited to charging only \$500 for his or her work before the Court, because the statute limits a total attorney's fee in a claim to \$2,500.

Public policy supports this interpretation of "litigated medical issue." If an attorney is not entitled to an additional \$500 fee per issue for appellate work, attorneys would still have little economic incentive to represent claimants in these matters. At a maximum hourly rate of \$125, an attorney would be limited to spending a mere four hours on each issue in order to be adequately compensated by a maximum fee of \$500. Obviously, a lawyer cannot, under any circumstances, effectively and ethically represent a claimant before both the Office of Judges and the Board of Review, not to mention the West Virginia Supreme Court, by spending a mere four hours total working on the case. Therefore, this Court should hold that an additional "litigated medical issue" is presented when a case is appealed to the next appellate level.

In conclusion, a "litigated medical issue" is each medical request denied by the Claim Administrator at each level of litigation in which the claimant participated when the claimant is ultimately successful according to the final tribunal's final order.

V. THE MAXIMUM AMOUNT OF FEES RECOVERABLE UNDER W.VA. CODE § 23-5-16(C) IS \$2,500 AND THERE IS NO MAXIMUM AMOUNT OF RECOVERABLE COSTS.

In accordance with the above sections, the maximum amount of fees recoverable by a claimant's attorney under W.Va. Code § 23-5-16(c) is \$2,500 per claim and there is no maximum limitation on costs recoverable under W.Va. Code § 23-5-16(c).

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Award of Claimant's Attorney Fees and Costs and any other such relief as the Court deems just and appropriate under the circumstances.

Respectfully submitted,
Sandra K. Cassella
Petitioner, By Counsel



Mikel R. Kinser, Esq. WWSB #11693
Rollins Law Office
P.O. Box 07533
Fort Myers, FL 33919
(304) 212-4465

7/21/2014
Date

**THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA**

SANDRA K. CASSELLA,

Petitioner,

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Respondent.

Appeal No: 2045678

Docket No.: 11-1503

BOR No.: 2045678

JCN: 2010119208

Claim No. 2010000138

DOI: 12/29/2009

CERTIFICATE OF SERVICE

I, Mikel R. Kinser, counsel for Petitioner Sandra Cassella, do hereby certify that service of the foregoing Petitioner's Supplemental Brief has been made upon the following parties by depositing the same in the regular course of the United States mail, first class, postage prepaid, on this 21st day of July 2014:

BrickStreet Mutual Insurance
P.O. Box 3151
Charleston, WV 25332

Spilman Thomas & Battle (attorney for Employer)
Attn: H.D. Battle, III
P.O. Box 273
Charleston, WV 25321



Mikel R. Kinser
WVSB# 11693
P.O. Box 07533
Fort Myers, FL 33919
(304) 212-4465
Mikel@Rollins-Law.com