STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-2095
	)	
	)	By: Margaret A. Mangan
John Murray	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Luzenac America	)	
	)	Opinion No 08A–02WC

RULING ON CLAIMANT'S REQUEST FOR ATTORNEY FEES

The claimant prevailed in this case decided on February 12, 2002 and identified as Opinion No. 08-02WC. Claimant now asks for an award of fees, an issue not addressed in the underlying decision, but one he asserted at that time.

Pursuant to 21 V.S.A.§ 678(a) and Workers' Compensation Rule 10, a prevailing claimant is entitled to reasonable attorney fees as a matter of discretion and necessary costs as a matter of law. In this case claimant requests fees based on 83.90 hours at $90.00 per hour. From the time list of hours worked, 0.6 was on legal work unrelated to this worker's compensation action and must be subtracted from the total.

Given the complexity of the legal issues and time necessary for research and writing, clear documentation of work performed and timeliness of the claim, fees based on 83.30 hours are reasonable.

THEREFORE, claimant is awarded $7,497.00 in attorney fees.

Dated at Montpelier, Vermont this 28th day of May 2002.

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R. Tasha Wallis
Commissioner

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RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Both parties move for summary judgment on the issue whether the 1999 discovery rule for occupational diseases applies to this claim. J. Christopher Callahan, Esq. represents the claimant. Keith J. Kasper, Esq. appears for the defendant.

For purposes of this motion, the parties have agreed to the following Findings of Fact:

On September 15, 1994 claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act ("Act").

On September 15, 1994 defendant was the employer of claimant within the meaning of the Act.

September 15, 1994 was claimant's last day of work for defendant and thus his last date of possible exposure to talc arising out of and in the course of his employment with defendant.

Effective July 1, 1999 the Act was amended to eliminate the Occupational Disease Act, 21 V.S.A § § 1001 to 1023.

On or about June 1, 2000 claimant was diagnosed with silicosis allegedly arising out of and in the course of his employment with defendant and other predecessors in interest at the claimant's former work site. The parties agree that the claimant's condition is an occupational disease.

DISCUSSION:

Defendant argues that this claim is barred by the Occupational Disease (OD) statute of limitations which provided that "[c]ompensation shall not be payable for disablement by reason of occupational disease unless such disablement results within five years after the last injurious exposure to such disease in the employment." 21 V.S.A. § 1006(a). Under the OD Act, disablement was "the date upon which any physician consulted by the employee and who is licensed to practice medicine in Vermont shall state in writing… that in the opinion of such physician the employee then has an occupational disease… and is disabled thereby." § 1004(a). In this case, the claimant's last possible exposure was on September 15, 1994, the diagnosis/disablement was on June 1, 2000 and the claim (Form 5) was filed on October 9, 2000. Defendant argues that the claim is barred because more than five years elapsed between exposure and disablement.

Claimant argues that the applicable statute is 21 V.S.A § 660 (b), a 1999 amendment to the Workers' Compensation Act that brought the discovery rule to occupational disease cases, which the Workers' Compensation Act now encompasses.

Claimant contends that the law in effect at the time the action accrued controls this matter, citing *Cavanaugh v. Abbott Laboratories*, 145 Vt. 516, 521-538 (1985). Furthermore, he argues that under *Hartman v. Oullette Plumbing & Heating Corp*., 146 Vt. 443, 446-47 (1985), accrual means time of discovery. Therefore, claimant argues that this action accrued at the time the silicosis diagnosis was made and the occupational disease was reasonably discoverable. Since he filed the claim within two years of that date, he maintains that it is not time-barred.

CONCLUSIONS OF LAW:

In a recent case, *Sheltra v. Vermont Asbestos Group*, 40-01WC (Nov.6, 2001) and 40R-01WC (Jan. 29, 2002) this Department accepted the claimant's argument that the action accrued at the time of discovery if discovery occurred after July 1999. The Legislature then amended the Act to provide for the discovery rule in occupational disease claims, thus removing the harsh results that would have occurred for latent injuries such as silicosis under the repealed Occupational Disease Act.

By providing that a claimant now has "two years from the date the occupational disease is reasonably discoverable and apparent" to bring the claim, 21 V.S.A. § 660(b), the Legislature determined that it would not bar a claim before the claimant could have known of its existence. Because discovery and accrual of this claim, like the claim in *Sheltra,* came since the enactment of the 1999 amendment, it is viable and not barred by the statute of limitations.

Accordingly, the claimant's motion for summary judgment is GRANTED and the defense motion DENIED.

Dated at Montpelier, Vermont this 12th day of February 2002.

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R. Tasha Wallis
Commissioner