P. Q. v. Banknorth/MEMIC (November 4, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR

Patricia Quilty	)	Opinion No. 65-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Banknorth/MEMIC	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. T-20222

RULING ON MEMIC'S MOTION FOR SUMMARY JUDGMENT

Defendant MEMIC urges this Department to grant its Motion for Summary Judgment and dismiss this claim.

Claimant Patricia Quilty began working for Banknorth in 1981. She claims to have suffered a work related injury on June 2, 2003 with shooting pain in her right hand up through her neck. Banknorth filed a First Report of Injury on June 3, 2003. A hand specialist saw claimant on July 3, 2003. Next, on August 3, 2003 MEMIC filed a denial on the basis that the claimed injury was a recurrence for which another carrier was liable. The previous carrier, Travelers, was then put on notice of the claim. On April 28, 2004 Janine Bard from MEMIC agreed that MEMIC would voluntarily pick up the claim until the aggravation-recurrence issue could be resolved. She also suggested that claimant's response to the denial had taken more than six months and asked for application of WC Rule 3.0550, which gives an employee six months from the date of a denial to appeal.

Claimant, unrepresented by counsel, maintains that she had several contacts with a Specialist in this Department between the date of the denial and a letter from this Department dated March 26, 2004, although there is not a written record of those contacts.

The Workers' Compensation Act provides:

> A proceeding under the provisions of this chapter for compensation shall not be maintained unless a notice of the injury has been given to the employer as soon as practicable after the injury occurred, and unless a claim for compensation with respect to an injury has been made within six months after the date of the injury; or, in case of death, within six months after death, unless the claimant had made a claim for compensation prior to death.

21 V.S.A. § 656(a)

However, the six-month rule is modified by another provision:

> Want of or delay in giving notice, or in making a claim, shall not be a bar to proceedings under the provisions of this chapter, if it is shown that the employer, the employer's agent, or representative had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice. Proceedings to initiate a claim for a work-related injury pursuant to this chapter may not be commenced after three years from the date of injury

21 V.S.A. § 660(a) (emphasis added).

Defendant and claimant both refer to WC Rules in support of their respective positions.

> An employee must give an employer notice of the injury, a recurrence or aggravation, as soon as practicable, and must file a claim for compensation within six months after the date of injury, recurrence or aggravation. The date of injury, recurrence or aggravation shall be the point in time when the injury, recurrence or aggravation and its relationship to the employment is reasonably discoverable and apparent.

Rule 3.0540

Rule 3.0550 states: "If payments of compensation or benefits have been made voluntarily, no claim for compensation need be filed unless and until payments are denied. An employee shall have six months from the date of denial in which to file a claim."

Finally, the rules mirror 21 V.S.A. § 660 by stating:

> An employee who fails to give notice or make a claim within six months of the date of injury, recurrence or aggravation may nonetheless pursue a claim for compensation and benefits, provided the employee can show either that the employer, the employer's agent or representative had knowledge of the accident, or that the employer has not been prejudiced by the delay or want of notice, but in no event may proceedings for an initial claim for compensation or benefits be commenced more than six years from the date of injury, recurrence or aggravation.

Rule 3.0560

Defendant relies on Rule 3.0550 in support of its position that this claim should be dismissed because claimant failed to pursue the claim within six months of the denial. However, defendant does not show the condition precedent, i.e. that it had been paying compensation voluntarily. Furthermore, the statute and rules provide that the six-month rule does not bar a claim if the employer had knowledge or had not been prejudiced. Clearly the employer had knowledge of this claim. Therefore, claimant does not need to prove lack of prejudice.

Finally, even if I were to accept the defense argument, whether claimant had contact with this Department and the insurer during the six months after the denial is a disputed issue of fact, barring summary judgment.

Therefore, the motion for summary judgment is DENIED.

Dated at Montpelier, Vermont this 4th day of November 2005.

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Patricia A. McDonald
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.