STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Keith Therieau	)	Opinion No. 33-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Specialty Paperboard	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. C-07603

RULING ON DEFENSE MOTION TO DISMISS

Defendant, by and through its attorneys Glen L. Yates and Robin Ober Cooley, Esq., moves for dismissal of this permanent total disability claim. Claimant, by and through his attorney, Timothy A. O'Meara, opposes the motion.

This renewed motion to dismiss is based on the defense position that Mr. Therieau's current claim for permanent total disability benefits is barred by previous agreements for permanent partial disability benefits (Forms 22).

Because defendant fails to demonstrate that no genuine issue of material fact exists, its motion is denied.

DISCUSSION:

Defendant concludes that a Form 22 agreement for permanent partial disability benefits cannot be reviewed and there is no issue of material fact. However, a closer look at the issues presented below demonstrates that the Form 22 is inapplicable to the present permanent total disability claim because the two are separate claims. See *Longe v. Boise Cascade Corp.*, 125 Vt. 214 (2000) (a claimant must make a claim for each benefit sought).

Standard of Review

In the Department's March 4, 2005 *Decision on Defendant's Motion to Dismiss* ("Department's March 4, 2005 Decision"), the Department applied the summary judgment standard for the motion to dismiss. When pleadings are brief in nature, it is not uncommon in motions to dismiss to encounter information that is supplied and which is outside the pleadings. In these cases, Vermont Rules of Civil Procedure 12(c) provides that if "matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." See *Bennett Estate v. Travelers Ins. Co.*, 138 Vt. 189, 191 (1980). Since the Department's pleadings are brief in nature and information is supplied from outside the pleadings, it will apply a standard of summary judgment to decide the motion to dismiss.[1]

Summary judgment is appropriate where there is no dispute of material fact and a party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3); *Robertson v. Mylan Laboratories, Inc.* 176 Vt. 356, 362 (2004) (citing *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt. 25, 28 (1999)). When evaluating the merits of a motion for summary judgment, the party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. *Miller v. Town of West Windsor* 167 Vt. 588, 589 (1997). Any allegations to the contrary must be supported by specific facts sufficient to create a genuine issue of material fact. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).

Discussion

The plain Language of the Forms 22 signed by the parties and approved by this Department provided for a certain number of weeks of benefits for a specific percentage of whole person impairment for the permanent partial disability awards.

The relevant operative language is immediately above the parties' signature lines under the heading "Approval and Review." The relevant language is stated as follows:

> **This agreement or any settlement thereunder …is subject to review by said Commissioner upon his own motion or on the motion of either party upon the ground of a change of physical condition of the employee entitled to compensation hereunder.**

Once approved the Form 22 was binding on the parties as to the agreement's express terms. It cannot be read to foreclose or waive any claim not expressly addressed in the agreement. The Form 22 agreement addresses average weekly wage, medical end and permanent partial disability benefits. Except as provided by statute, or expressly addressed in the agreement,

[1] Footnote [1] of the Department's March 4, 2005 Decision, put the parties on notice that they had thirty days to file a motion to reconsider or to reopen the records if they wished to raise issues pertaining to the Department's use of a summary judgment standard. The Department has not received any motion by either party and a specific standard was not specified in *Defendant's Renewed Motion to Dismiss*. Therefore, the Department should assume there is no objection to use of this standard.

those provisions are not subject to challenge. The Form 22 does not address either permanent total disability of vocational rehabilitation; therefore, claims for those benefits could be made even after a Form 22 is signed, as long as the claim is made within the applicable statute of limitations period.

The Defendant argues that Form 22 is binding in nature and cannot be altered under the current circumstances. To support this argument, Defendant relies on *Catani v. A.J. Eckert Co.*, Opinion No. 28-95WC (July 14, 1995); and *Mayhew v. PCI of Vermont*, Opinion No. 33-99WC (July 30, 1999). However, Defendant's reliance on these cases is misplaced because they involved attempts to modify provisions specifically covered by the Form 22 (date of medical end and amount of P.P.D.), not a claim for a different benefit. To the extent that *Greenia v. Marriot,* Opinion No. 46-01WC (Jan. 29, 2002) provides otherwise, it is overruled.

Statute of Limitations

Defendant argues further that the permanent total disability claim cannot be made because the statute of limitations has expired pursuant to 21 V.S.A. § 668. However, since the permanent total disability claim is a new claim, the claim period can only begin to run when there is in fact something to claim. See *Kraby v. Vermont Telephone Company*, 2004 VT 120, December 14, 2004 (Appealed from Opinion No. 44-03WC). In *Longe*, 125 Vt. 214 , 219 , the Court held that the statute of limitations does not begin to run until the injury becomes reasonably discoverable and apparent. In the current case, Claimant did not have evidence of a permanent total disability until January 7, 2004, when Dr. Jenkyn stated in a letter that Claimant "is 100% disabled for all work activities." Until January of 2004, Claimant was not aware of his permanent total disability and therefore could not show any causal link between his injury and the employer.

Conclusion:

Defendant has failed to meet its burden of proving there are no genuine issues of material fact. V.R.C.P. 56(c). The issues of whether a causal link exists and the timing of the permanent total disability are in dispute. Therefore, the *Defendant's Renewed Motion for Summary* is hereby DENIED.

Dated at Montpelier, Vermont this 24th day of June 2005.

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Laura Kilmer Collins
Commissioner

K. T. v. Specialty Paperboard (August 18, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Keith Therieau	)	Opinion No. 33A-05WC
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Specialty Paperboard	)	For: Patricia A. McDonald
	)	Commissioner
	)	
	)	State File No. C-07603

RULING ON MOTION FOR PERMISSION TO TAKE INTERLOCUTORY APPEAL

In its current motion, defendant moves for leave to take an interlocutory appeal of this Department's denial of its motion to dismiss. See Opinion No. 33-05WC (June 24, 2005). The issue presented is whether claimant is barred from pursuing a permanent total disability (PTD) claim because she received permanent partial benefits for the same injury. Defendant argues that the PTD claim is barred, although the Commissioner declined to dismiss it. Claimant opposes the motion.

Under V.R.A.P.5 (b)(1), "[u]pon motion of any party the Presiding judge shall permit an appeal to be taken from an interlocutory order or ruling if the judge finds that the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of litigation."

An interlocutory appeal is the exception to normal appellate jurisdiction. Appeals after final judgment allow the court to review a complete record. In contrast, an interlocutory appeal creates piecemeal litigation, delay and expense. *In re Pyramid Co*., 141 Vt. 294, 300 (1982). Permission to take such an appeal is reserved for a narrow class of case such as *Dodge v. Precision Construction Products* Opinion No. 38-01WC (2001).

Three criteria must be satisfied before permission to proceed with an interlocutory appeal will be granted: 1) the issue must involve a controlling question of law; 2) there must be substantial ground for difference of opinion as to the correctness of the order; and 3) an interlocutory appeal should materially advance the termination of litigation. *In re Pyramid Co*., 141 Vt. at 301.

Defendant fails to meet these necessary requirements. The basis for the denial of the motion to dismiss is that the Form 22 agreements for permanent partial disability benefits never addressed the permanent total claim now presented. That is not a controlling question of law. The correctness of the order can only be judged with development of a complete record, which is not possible now. Finally, with the myriad facts yet to be decided, it is unlikely that an interlocutory appeal will materially advance the termination of litigation.

Accordingly, the motion to take an interlocutory appeal is hereby DENIED.

Dated at Montpelier, Vermont this 18th day of August 2005.

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Patricia A. McDonald
Commissioner