STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Jeannette Trayah	)	Opinion No. 36-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Solo Cup Co. a/k/a	)	For: Laura Kilmer Collins
Fonda Group, and	)	Commissioner
University of Vermont,	)	
	)	State File Nos: L-17815; M-07516 &
	)	83-11672

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

ISSUES:

1. Should Defendant/Employer, University of Vermont, be granted summary judgment on liability for an injury to Claimant/Plaintiff, Jeannette Trayah?

2. Should Claimant be granted summary judgment on the issue of compensability and should the matter be referred to arbitration?

BACKGROUND:

In 1983, claimant incurred an injury arising out of and in the course of her work as a security guard at University of Vermont (UVM). On October 17, 1983, claimant had a radial head incision in her right elbow as a result of her work related injury. Claimant received permanent partial disability benefits for the period from August 26, 1984 to October 18, 1984. Voluntary permanent partial disability payments were ceased in 1984 and claimant failed to take further action. On October 1, 1998, claimant incurred a new injury to her right elbow while employed by the Fonda Group (Fonda). Claimant underwent reconstructive surgery on her right elbow on October 28, 2002.

STANDARD:

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:

UVM makes two arguments in support of its motion for summary judgment. First, UVM argues that claimant's injury is not a recurrence of the 1983 injury, but instead it is an aggravation of an injury while working with Fonda. Second, UVM argues that any claim against it by claimant is barred by the statute of limitations period provided in 21 V.S.A. § 660. These arguments are unpersuasive and summary judgment should be denied.

A. Medical Evidence

UVM argues that the current injury is not a recurrence of the 1983 injury, but instead it is an aggravation of a pre-existing condition while working at Fonda. Therefore, it concludes that because claimant's subsequent employment aggravated a pre-existing condition, Fonda becomes solely liable for the entire disability. However, as claimant notes in his response, the medical evidence cuts both ways. Claimant takes particular note of Dr. Forester's diagnosis of claimant's injury as "Chronic ulnar collateral ligament instability of the right elbow secondary to the above injury." Also, Dr. Backus and Dr. Johansson's medical reports do not foreclose the claimant from holding UVM liable for the injury. The claimant must be afforded the opportunity to present evidence, to the trier of fact, from the in-depth medical reports and years of medical records.

B. Statute of Limitations

UVM argues that the current claim for permanent partial disability should be barred because it is outside the six-year statute of limitations period provided in 21 V.S.A. § 660. A claim for benefits under the Vermont Workers' Compensation Act must be brought within six years of the date the claim accrues. 21 V.S.A. § 660. It is black letter law the claim period runs from the time the compensable injury becomes reasonably discoverable and apparent. See *Hartman v. Oulelette Plumbing & Heating Corp.*, 146 Vt. 443, 447 (1985). The issue then becomes when is the injury reasonably discoverable and apparent.

UVM argues that the claim becomes reasonably discoverable and apparent at the date that claimant reaches Medical End Result. It relies on *Longe v. Boise Cascade*, 171 Vt. 214 (2000), and *Kraby v. Vermont Telephone Co.*, 2004 Vt. 120 (2004) to support its position. However, *Kraby* notes that the Commissioner is not mandated to measure an injury from the date of Medical End Result. *Kraby*, 2004 Vt. at ¶5. The *Kraby* Court also states that the determination of when an injury is reasonably discoverable and apparent varies from case to case. *Id.* at ¶6. Likewise, *Longe* did not mandate that the Commissioner must measure from the period of Medical End Result. In *Longe*, both parties agreed that the point the injury became reasonably discoverable and apparent was at the time of Medical End Result. Therefore, the point that the injury becomes discoverable and apparent is a question of fact decided by the trier of fact.[1]

C. Arbitration

Claimant argues that summary judgment should be granted and the matter should be referred to arbitration. Pursuant to 21 V.S.A. § 662, the Commissioner has promulgated rules allowing insurer or employer disputes to be addressed through arbitration. See Rule 8. These disputes may proceed to arbitration only by order of the Commissioner or by mutual agreement of the parties. Rule 8.0000. However, other disputes that arise in a claim may not be addressed in arbitration. Rule 8.0001. Since only claimant has requested arbitration, the matter could only proceed to arbitration if ordered by the Commissioner.

The claimant argues that the compensability of the 2002 surgery is not at issue in this matter, so summary judgment should be granted and the issue should be referred to arbitration. Claimant concludes that since compensability is not at issue, the only dispute is between the employers.[2] However, UVM only claimed that it is not liable for any injury that occurred. It made no comment on the compensability of the injury and did not address it directly. Furthermore, since there is a long medical history and several different employers, questions of the claimant's activities become relevant in deciding compensability. There has been no express waiver of an opportunity to object to the compensability of the injury, and therefore, summary judgment would be inappropriate.

Since claimant has not carried the burden of proof in showing that no issue of material fact exists regarding the compensability of the injury, summary judgment should not be granted and this matter should not be sent to arbitration.[3] Claimant did not provide specific evidence that compensability of the injury was not at issue. Therefore, summary judgment on compensability and the request for arbitration should be denied.

---

[1] Even in the case that the time of Medical End Result is the point an injury becomes reasonably discoverable and apparent, this exact point is still a question of fact that may be disputed by the claimant. Therefore, it too would be a question best suited for the trier of fact.

[2] As discussed above, there may be a dispute between the claimant and UVM as to when the injury became reasonably discoverable and apparent.

[3] Besides the issues of compensability and questions involving the medical history, this matter is inappropriate for arbitration because of the quickly approaching hearing date, and the familiarity of the Department with this matter.

CONCLUSION:

UVM failed to carry its burden of proof under V.R.C.P. 56(c), and therefore, summary judgment on the issue of liability is denied. Claimant also failed to carry its burden of proof under V.R.C.P. 56(c), and therefore summary judgment on the issue of compensability is also denied.

The matter shall proceed toward its June 30, 2005 scheduled hearing.

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

_____
Laura Kilmer Collins
Commissioner