

H. C. v. McDermott's, Inc.

(July 8, 2008)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

H. C.

Opinion No. 25R-08WC

v.

By: Phyllis G. Phillips, Esq.  
Hearing Officer

McDermott's Inc.

For: Patricia Moulton Powden  
Commissioner

State File No. X-62893

**RULING ON CLAIMANT'S MOTION FOR RECONSIDERATION**

Claimant moves for reconsideration of the Commissioner's Ruling on Cross Motions for Summary Judgment on both factual and legal grounds.

As to the factual basis for his request, Claimant has proffered new expert evidence that he alleges raises a genuine issue of material fact, thus rendering summary judgment inappropriate. Specifically, Claimant has produced a report from Carl G. Tremmel, a technical consultant in analytical chemistry, who disputes the findings of Defendant's expert witness to the effect that Claimant was intoxicated at the time of his injury. To the contrary, Mr. Tremmel believes that one of the chemicals contained in the Mountain Dew bottle from which Claimant drank probably produced symptoms that were misread as alcohol intoxication but in fact were not. In Mr. Tremmel's expert opinion, Claimant was not intoxicated at the time he drank from the bottle and therefore, Claimant argues, his claim should not be barred by 21 V.S.A. §649.

Claimant has propounded no explanation for his failure to produce Mr. Tremmel's report earlier other than to say that the evidence was "unavailable" at the time the Cross Motions for Summary Judgment were submitted. This excuse is simply insufficient. Claimant was on notice that Defendant intended to rely on an intoxication defense in this claim since October 30, 2006. Defendant's Motion for Summary Judgment clearly raised the issue and included its own expert witness' opinion in support. Claimant had ample time either to develop rebuttal evidence or to request an extension of time prior to filing his response. *See* V.R.C.P. 56(f). He failed to do so then, and it is too late to do so now. *Wentworth v. Fletcher Allen Health Care*, 171 Vt. 614, 616-617 (2000) (precluding a party who had adequate notice and opportunity to respond completely to opponent's summary judgment motion from advancing evidence of material factual dispute after summary judgment had been entered against it).

As for the legal basis for his request for reconsideration, Claimant contends that the Commissioner misapplied the “ticking time bomb” theory to the facts. It is Claimant who has misinterpreted the theory, however. The ticking time bomb theory operates to expand the “in the course of employment” window so as to provide the necessary causal relationship between an earlier work event and an injury that occurs later. It is not a time machine, however, and cannot be used to change the actual date upon which the physical harm to the body occurs. It is the fact of Claimant’s intoxication on that date that controls the outcome of this claim and justifies summary judgment in Defendant’s favor.

For the foregoing reasons, Claimant’s Motion for Reconsideration is **DENIED**.

DATED at Montpelier, Vermont this 8<sup>th</sup> day of July 2008.

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Patricia Moulton Powden  
Commissioner