Marjorie Alden v. Fletcher Allen Health Care (August 21, 2009)

STATE OF VERMONT
DEPARTMENT OF LABOR

Marjorie Alden	Opinion No. 32-09WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Fletcher Allen Health Care	For: Patricia Moulton Powden Commissioner
	State File No. E-14159

RULING ON DEFENDANT FLETCHER ALLEN HEALTH CARE'S MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

ATTORNEYS:

Richard Cassidy, Esq., for Claimant
Stephen Ellis, Esq., for Defendant Fletcher Allen Health Care
James O'Sullivan, Esq., for Defendant CNA Insurance Company

ISSUES:

1. Is Claimant's current claim against Fletcher Allen Health Care (FAHC) time-barred under either 21 V.S.A. §656 or 21 V.S.A. §660(a)?

2. Is Defendant CNA Insurance Company (CNA) barred from asserting FAHC's liability for Claimant's current claim under either 21 V.S.A. §656, 21 V.S.A. §660(a) and/or the equitable doctrines of waiver, estoppel or laches?

3. Do genuine issues of material fact exist as to whether Claimant's job responsibilities in 2000 and thereafter caused her to suffer an aggravation and/or new injury?

FINDINGS OF FACT:

Taking the evidence in the light most favorable to the non-moving parties, as is required when considering a motion for summary judgment, *Carr v. Peerless Insurance Co.*, 168 Vt. 465, 476 (1998), I find the following facts:

1. On January 30, 1992 Claimant sustained a work-related low back injury while employed by FAHC.

2. CNA was on the risk at that time and accepted the claim.

3. Claimant underwent L3-4 disc surgery in November 1992. After she reached an end medical result, Claimant and CNA entered into a Form 22 Agreement for Permanent Partial Disability Compensation, which the Department approved on November 3, 2003.

4. Claimant's prior medical history includes L5-S1 disc surgery in 1970.

5. In July 1996 FAHC became self-insured for workers' compensation purposes.

6. In or around September 2000 Claimant transferred from bedside nursing to the Dermatology Clinic. Claimant's job responsibilities in this position required both sitting – while working on the computer, writing and/or talking on the telephone – and standing – while retrieving supplies, delivering paperwork and, once or twice a week, assisting in surgery.

7. At some point after her transfer Claimant began to experience increased low back and right leg pain. Claimant did not complete any injury or incident report relating to these increased symptoms, but she did inform her supervisor, Deb LeBlanc, that she planned to seek medical treatment. This she did, in February 2001, with Dr. Monsey, an orthopedic surgeon.

8. In March 2001 Erin Fournier, an occupational therapist at FAHC's Work Enhancement and Rehabilitation Center, evaluated Claimant's work station in the Dermatology Clinic. The stated reason for the assessment was "low back and right leg pain exacerbated 09/00, about the same time worker started this job." Ms. Fournier's report identified risk factors for musculoskeletal strain and recommended various changes to Claimant's work station, all of which FAHC subsequently implemented. Claimant's supervisor, Deb LeBlanc, was listed on the report as the contact person. The report indicated that a copy was sent to Jan Lyons, whom Claimant has identified as the "Office Manager for Unit 5."

9. In November 2003 Dr. Monsey performed L4-5 disc surgery to address Claimant's ongoing complaints.

10. On December 26, 2003 Attorney Chris McVeigh wrote to Claimant, advising that "Fletcher Allen Health Care/CNA Insurance Company has retained me to investigate your claim for workers' compensation benefits." Presumably this letter was prompted by the submission of the bills for Dr. Monsey's November 2003 surgery for payment in conjunction with Claimant's 1992 work injury.

11. On March 25, 2004 Attorney McVeigh filed a Form 2 Denial of Workers' Compensation Benefits with the Department. The form identified CNA as the carrier and FAHC as the employer. The stated reason for the denial was that "the medical evidence does not support the legal causal relationship of [Claimant's] current claim to her 1992 injury or surgery."

12. Appended to the Form 2 was a copy of Dr. Monsey's March 17, 2004 deposition. In it, Attorney McVeigh identified himself as "represent[ing] Fletcher Allen Health Care in [Claimant's] workers' compensation claim."

13. Dr. Monsey posited in his deposition that Claimant's most recent symptoms might have been due to epidural scarring caused by the disc surgery she had undergone in 1970 and not by her 1992 injury or surgery. At another point in the deposition, Attorney McVeigh inquired of Dr. Monsey as follows:

> Q: Okay. In your note of February 12, 2001, in the subjective portion of that note, it states quote: "Over the past year her work has changed such that she is spending the majority of her time now sitting, which has been associated with worsening symptoms." Period. "The pain is clearly worse with prolonged sitting or driving." Period. Close quote. Did I read that accurately?
>
> A: Yes.
>
> Q: Is prolonged sitting a cause of increasing pain for an area that has epidural scarring?
>
> A: For individuals who have back and leg pain related to neuro compression, sitting is a significant risk factor for both the development of those symptoms and the exacerbation of those type of symptoms.
>
> Q: Okay. Why?
>
> A: The theory is that sitting increases the intradiscal pressure more than a variety of other maneuvers such as standing and walking.
>
> Q: If someone is sitting over a prolonged period of time, can the increase in the intradiscal pressure on the nerve cause permanent increased symptoms?
>
> A: The sitting, in and of itself, doesn't cause permanent symptoms. Individuals who have prolonged neural compression are more likely to have ongoing residual symptoms even with decompression of that root. So the length of time of symptoms is a prognostic factor for resolution after decompression.

14. In addition to appending Dr. Monsey's deposition to the Form 2, Attorney McVeigh also filed a letter from Dr. Monsey, dated January 19, 2004 and addressed "To Whom It May Concern," that stated:

> [Claimant] has right leg pain. These symptoms have been present since her injury in 1992 secondary to an injury while at work. The symptoms became progressively more severe necessitating her most recent surgical intervention. These current symptoms are an aggravation of an ongoing problem secondary to her injury at Fletcher Allen Health Care in 1992.

15. Claimant appealed CNA's denial of benefits in a letter to the Department dated April 20, 2004. In it, Claimant acknowledged that she had continued to have right leg pain, numbness and tingling after her 1992 work injury and surgery. She stated, "I went for further x-rays and cat scans and stopped making claims in 1994, although I am not sure why I did this."

16. Claimant further stated that she did not believe Dr. Monsey was correct in attributing her epidural scarring to her 1970 surgery. She continued:

> I have worked at FAHC for 30 years as a nurse, 27 of those as a bedside nurse. I have moved to the Dermatology Clinic because I felt that I could not do the heavy lifting and bending required to do bedside nursing . . .
>
> Before I went to see Dr. Monsey it had gotten more difficult to sit for any length of time or walk any distance, and I would trip "over a blade of grass."
>
> I guess, not claiming all those years of treatments on the workers comp was my own stupidity or oversight but I guess I have no excuse. I do wish that you would review my case.

17. In a letter dated April 28, 2004 the Department advised both Claimant and Attorney McVeigh, whom it identified as "legal counsel for Fletcher Allen Health Care/CNA Insurance," that it was considering Claimant's April 20, 2004 letter as a request for hearing pursuant to Rule 4.1100.

18. On May 4, 2004 Attorney McVeigh filed a second Form 2, this time denying CNA's responsibility for the medical charges relating to Dr. Monsey's November 2003 surgery on the grounds that "the statute of limitations for [Claimant's] claim has expired."

19. On August 24, 2004 Claimant notified the Department that she was appealing CNA's determination that her claim was time-barred. Once again, the Department treated this correspondence as a request for hearing. On October 21, 2004 it held an informal conference with both Claimant and Attorney McVeigh.

20. On June 20, 2005 Claimant's attorney entered his appearance on Claimant's behalf.

21. On September 8, 2006 Claimant's attorney corresponded with Attorney McVeigh. In the letter, Claimant's attorney asserted that Claimant had "a viable workers' compensation claim against her employer, Fletcher Allen Health Care," for benefits causally related to Dr. Monsey's November 2003 surgery. As to that surgery, Claimant's attorney further stated:

> [Dr. Monsey's] surgery addressed a site that had not previously been operated on. The precise date of the injury is unclear. However, a record from Fletcher Allen's Work Enhancement and Rehabilitation Center relates that, in September 2000, [Claimant] experienced exacerbated low back and right leg pain coinciding with her having begun a new job, suggesting that something may have happened then.

> In any event, it is clear that this is a new injury and that a claim was asserted in a timely fashion.

22. On December 8, 2006 Attorney McVeigh deposed Claimant. In introducing himself he indicated, "I'm representing Fletcher Allen Health Care and CNA in your workers' compensation claim."

23. On March 2, 2007 Attorney McVeigh corresponded with the Department's Specialist as follows:

> I am writing to inform you that it appears that Liberty Mutual, who was Fletcher Allen Health Care's insurer in all of 2000, should be put on notice regarding this claim.[1] This action involves [Claimant's] claim that she experienced an aggravation of her low back condition in 2000 while working at Fletcher Allen Health Care.
>
> It is my understanding that CNA Insurance Company's coverage for Fletcher Allen Health Care ended in 1996.

24. In response to Attorney McVeigh's letter, the Specialist indicated that the file contained no evidence upon which to base an aggravation claim and that therefore she could not take the action he requested. In response to that, Attorney McVeigh forwarded copies of documents that he asserted indicated that Claimant's condition worsened as a result of her job change, specifically (a) Dr. Monsey's February 12, 2001 office note (referenced and quoted in paragraph 13 above); and (b) excerpts from Claimant's December 2006 deposition transcript. With that information in hand, in June 2007 the Specialist put FAHC on notice of its potential responsibility for Claimant's current claim.

25. Claimant's attorney filed a Form 6 Notice and Application for Hearing on February 14, 2008. In it, Claimant's attorney alleged, "Claimant sustained injury to L4-5 disc after having previously sustained injury to L5-6 (a/k/a L5-S1) in 1972 and to L3-4 in 1992. Employer has persisted in denying claim."

DISCUSSION:

1. Claimant's current claim for workers' compensation benefits posits that the low back and right leg pain that necessitated her 2003 surgery resulted either from the compensable work injury she sustained in 1992 or from the change in her work environment and job responsibilities that occurred when she transferred to the Dermatology Clinic in 2000. If the former, then her condition represents a recurrence, for which CNA is liable. If the latter, then her condition is indicative of an aggravation or new injury, for which FAHC, in its capacity as a self-insured employer, ordinarily would be responsible.

[1] Attorney McVeigh was mistaken as to FAHC's workers' compensation insurance coverage. As of July 1996 FAHC was self-insured.

2. FAHC moves to dismiss and/or for summary judgment on three alternative grounds. First, it asserts that any aggravation or new injury claim made by Claimant is time-barred under either 21 V.S.A. §656 and/or 21 V.S.A. §660(a). Alternatively, it asserts that any attempt by CNA to pass responsibility onto it under an aggravation or new injury theory is barred, either under those same statutory provisions and/or under the equitable doctrines of waiver, estoppel and laches. Last, it asserts that the undisputed medical evidence conclusively establishes that Claimant's job transfer in 2000 caused neither an aggravation nor a new injury and that therefore it is entitled to judgment in its favor as a matter of law.

3. Summary judgment is proper when "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, after giving the benefit of all reasonable doubts and inferences to the opposing party." *State v. Delaney*, 157 Vt. 247, 252 (1991). To prevail on a motion for summary judgment, the facts must be "clear, undisputed or unrefuted." *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979); *A.M. v. Laraway Youth and Family Services*, Opinion No. 43-08WC (October 30, 2008).

FAHC's Argument for Summary Judgment against Claimant

4. As against Claimant, FAHC asserts that her claim is barred because she failed to comply with either the notice provisions of 21 V.S.A. §656 or the statute of limitations provided in 21 V.S.A. §660(a). According to FAHC's characterization of the evidence, Claimant has admitted that she knew shortly after transferring to the Dermatology Clinic in September 2000 that her new job responsibilities were causing new and/or aggravated symptoms in her low back. Therefore, FAHC argues, under §656 Claimant was obligated to put it on notice of any claim for compensation within six months of that date, or by March 2001, and under §660(a) she should have initiated her claim for benefits within six years, or by September 2006.

5. Section 656 provides in relevant part as follows:

> (a) 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;
>
> (b) The date of injury . . . shall be the point in time when the injury . . . and its relationship to the employment is reasonably discoverable and apparent.

6. Prior to its amendment in 2004, section 660(a) provided in relevant part as follows:

> (a) . . . 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 . . . Proceedings to initiate a claim for benefits pursuant to this chapter may not be commenced after six years from the date of injury.[2]

7. Notably, these statutory provisions require only that an injured worker notify his or her *employer*, not that he or she also discern the employer's workers' compensation insurance status and notify the appropriate adjuster or third party administrator as well. This is, obviously, as it should be. That information is readily available to the employer, but rarely so to its employees.

8. Here, Claimant has testified by affidavit that at least by the time she began treating with Dr. Monsey in February 2001 her supervisor knew that she was experiencing increased low back pain possibly related to having transferred from bedside nursing to the Dermatology Clinic at some point in September 2000. There also is evidence that FAHC arranged for a work site assessment in March 2001 and thereafter implemented the recommendations suggested as a result. At a minimum, this evidence is sufficient to raise genuine questions of material fact as to whether FAHC had timely "notice of the injury" under §656(a), and/or whether it had "knowledge of the accident" under §660(a). Until those factual issues are resolved, summary judgment against Claimant is inappropriate.

9. The evidence also establishes that Claimant "initiated a claim for benefits" as early as December 2003, when the medical bills relating to her November 2003 surgery were submitted for payment as work-related. Even assuming that Claimant's injury occurred immediately after her job transfer in September 2000, this still was well within the six-year limitations period mandated by §660(a).

10. FAHC makes much of the fact that Claimant's claim for benefits arising out of her November 2003 surgery initially was directed to CNA, its insurer at the time of Claimant's 1992 injury, and that neither Claimant nor CNA made any claim specifically against it, in its status as self-insured employer, until June 2007, after the statute of limitations for a September 2000 date of injury would have passed. It is not necessary at this juncture to reach the legal merits of FAHC's argument. For now, it is enough to note the factual questions germane to it that remain unresolved – to what extent Claimant's supervisor was aware of Claimant's increased symptoms and their possible connection to her new job, why no new incident or injury report was filed in conjunction with the medical treatment Claimant sought in February 2001, how the medical bills for Claimant's November 2003 surgery found their way to CNA. These are genuine issues of material fact that cannot be resolved in the context of a motion for summary judgment.

---

[2] In 2004 the limitations period for initiating a new injury claim was reduced from six to three years. The current claim arises under the old statute of limitations.

11. Because genuine issues of material fact exist as to FAHC's claimed defenses under either §656 or §660(a), its motion to dismiss and/or for summary judgment against Claimant must fail.

FAHC's Argument for Summary Judgment against CNA

12. As against CNA, FAHC argues that it is entitled to summary judgment because CNA's attempt to shift responsibility for Claimant's workers' compensation benefits is time barred, either under the statutory provisions cited above or under the equitable doctrines of waiver, estoppel and/or laches.

13. I cannot discern from the language of §656 any legislative intention to apply the six-month notice requirement to actions between insurance carriers (or in this case, between a carrier and a self-insured employer) in the same manner as it applies as between an injured worker and his or her employer. In fact, the statutory references to "claimant" and "employee" strongly suggest otherwise.

14. As applied to the facts of this claim, furthermore, the six-year statute of limitations provided for in §660 could not have begun to run against CNA at least until late 2003, when it first received notice of Claimant's claim for workers' compensation benefits related to her November 2003 surgery. That defense is unavailing to FAHC as well, therefore.

15. What remains are FAHC's equitable arguments against CNA – waiver, estoppel and laches. FAHC asserts that these defenses are available to it as a result of Attorney McVeigh's acts and omissions, most notably his failure to notify FAHC of its own potential exposure for Claimant's claim, separate and apart from CNA's exposure, in a more timely fashion than he did.

16. These defenses might well prove successful in a third-party action against CNA. Under the circumstances, however, I cannot grant them in this forum. Should the evidence ultimately establish that Claimant did in fact suffer an aggravation or new injury causally related to her job transfer in 2000, under our workers' compensation law her right to recover will be against FAHC, not CNA. To dismiss FAHC from the claim for reasons that have nothing at all to do with Claimant's actions would leave her with an entitlement to workers' compensation benefits, but no responsible employer or carrier from which to collect them. This would be manifestly unfair and I cannot allow it.

17. I conclude, therefore, that there is no statutory basis upon which to grant FAHC summary judgment against CNA. Nor do the circumstances of this claim permit me to do so on equitable grounds.

FAHC's Argument for Summary Judgment against Both Claimant and CNA

18. Last, FAHC asserts that it is entitled to summary judgment as against both Claimant and CNA on the grounds that the undisputed facts establish, as a matter of law, that Claimant's job responsibilities after her job transfer in 2000 did not cause any aggravation or new injury. As support for this argument, FAHC cites to Dr. Monsey's deposition testimony, quoted in Finding of Fact No. 13 above, in which he states that the sitting Claimant may have done in the context of her Dermatology Clinic job would not, "in and of itself cause permanent symptoms."

19. Questions of recurrence, aggravation, flare-up or new injury are inherently fact-specific. Expert testimony on the issue is often complex, contradictory and confusing. Such is the case here. While Dr. Monsey did indicate in the context of his deposition that prolonged sitting alone did not cause an aggravation, in his January 19, 2004 "To Whom It May Concern" letter (referred to in Finding of Fact No. 14 above), he stated that the symptoms that necessitated his November 2003 surgery were "an aggravation of an ongoing problem" secondary to her 1992 work injury. Taken together, Dr. Monsey's statements do not make a conclusive case either for or against aggravation. Summary judgment is, therefore, improper.

ORDER:

For the foregoing reasons, Defendant FAHC's Motion to Dismiss and/or for Summary Judgment is **DENIED**, both as to Claimant and as to Defendant CNA.

DATED at Montpelier, Vermont this 21st day of August 2009.

_____
Patricia Moulton Powden
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.