

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Christa Hoisington

Opinion No. 52-09WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

Ingersoll Electric

For: Patricia Moulton Powden
Commissioner

State File No. M-22917

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ATTORNEYS:

Heidi Groff, Esq., for Claimant
John Valente, Esq. and Kelly Smith, Esq., for Defendant

ISSUE:

Defendant moves for summary judgment on the grounds that Claimant's request for workers' compensation benefits causally related to the cervical injury she allegedly suffered in the context of her May 13, 1999 work injury is time barred under 21 V.S.A. §660.

FINDINGS OF FACT:

Considering the evidence in the light most favorable to the non-moving party, *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990), and also taking judicial notice of all relevant forms and correspondence in the Department's claim file, I find the following facts:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.
2. In 1999 Claimant worked as an electrician for Defendant.
3. On May 13, 1999 Claimant fell while climbing over a large pipe. She suffered a right shoulder injury and allegedly injured her neck as well.
4. At the time of her work injury Claimant had a prior medical history of cervical complaints, including radicular symptoms in her right arm and evidence of degenerative disc disease in her cervical spine. Claimant underwent cervical disc surgery in 1988. Following that, she successfully returned to work without restrictions. According to Dr. Turek, there is no record that she treated medically for any cervical complaints between 1989 and 1999.

5. Defendant accepted Claimant's right shoulder injury as compensable and began paying workers' compensation benefits accordingly.
6. Within days of her work injury Claimant was complaining of both right shoulder pain and radiating cervical symptoms as well.
7. Claimant underwent shoulder surgery in September 1999. Her shoulder range of motion subsequently improved, but her right arm numbness continued.
8. In December 1999 the Department approved an Agreement for Temporary Total Disability Compensation (Form 21), which reflected that Claimant had injured her right shoulder as a result of the May 1999 accident at work. The Agreement does not mention any cervical injury causally related to that event.
9. On September 11, 2000 the Department approved a Notice of Intention to Discontinue Payments (Form 27) on the grounds that Claimant had reached an end medical result for her right shoulder injury.
10. On October 31, 2000 the Department approved an Agreement for Permanent Partial Disability Compensation (Form 22) in which the parties agreed that in accordance with Dr. Davignon's determination Claimant had suffered a 16% whole person impairment referable to her right shoulder injury.
11. Claimant did not return to work, and continued to treat for shoulder instability, cervical pain and radicular symptoms. She underwent two additional shoulder surgeries, the first in January 2001 and the second in February 2002, but still complained of severe shoulder and neck pain. Two of her treating physicians, Drs. Zweber (practicing physical medicine/rehabilitation) and Shafritz (an orthopedic surgeon) commented on the complicated nature of her problem. Her symptoms seemed to implicate both (a) a neurogenic component suggestive of cervical disc disease; and (b) muscular instability in her shoulder.
12. At Defendant's request, Claimant underwent an independent medical evaluation with Dr. Backus on August 19, 2002. Her complaints at that time included right shoulder, neck and arm pain, and headaches. According to Dr. Backus, Claimant acknowledged her prior history of cervical pain, but reported that until the May 1999 work injury her neck had been doing well, with no symptoms similar to those she now was experiencing.
13. Dr. Backus' exam focused on Claimant's right shoulder and upper extremity. He determined that she had reached an end medical result and rated her with a 17% whole person permanent impairment. With that opinion as support, on October 4, 2002 the Department once again approved Defendant's termination of temporary disability benefits.

14. On December 19, 2002 Defendant filed a Denial of Workers' Compensation Benefits (Form 2) with the Department, in which it denied responsibility for treatment of Claimant's cervical disc disease as having been neither caused nor aggravated by her work injury. On January 10, 2003 the Department notified Claimant's attorney¹ of the denial and advised him to file a written request for hearing if he wished to appeal it.
15. Responding to a January 25, 2003 letter from Claimant's attorney, her treating orthopedic surgeon, Dr. Monsey, stated on January 30, 2003 that Claimant's cervical disc disease "has been a slowly progressive condition which was asymptomatic until her fall at work in May of 1999." Dr. Monsey concluded that Claimant's work injury "exacerbated a pre-existing condition."
16. Dr. Monsey performed cervical fusion surgery on February 11, 2003. Unfortunately, complications arose and Claimant had to undergo a second cervical surgery in May 2003. Defendant paid for both surgeries.
17. On May 13, 2003 Claimant's attorney corresponded with the Department as follows:

In reviewing this file recently, I noted your letter of 10 January 03. The purpose of this letter is simply to advise you that upon closer scrutiny of the medical evidence, the carrier fully accepted the cervical injury and authorized the cervical fusion surgery, which took place on 11 February 03. Implicit in this action, obviously, is the acknowledgment that no end result has as yet been reached.

There are no disputes in this matter, but I felt the Department should be updated as to where the case is at. A second cervical surgery took place last week.

The letter, which was copied to Defendant's adjuster, also included a brief summary of dependency benefits that still were due for the period from October 10, 2002 (when Defendant previously had terminated temporary disability benefits, *see* Finding No. 13 above, and began advancing permanency instead) until November 17, 2002 (when Claimant's dependent child turned twenty-one).
18. At Defendant's request, in February 2004 Claimant underwent an independent medical evaluation with Dr. Peterson. Dr. Peterson stated that it was "clear from the records that [Claimant] suffered injuries to her right shoulder and her neck" as a result of the May 1999 work injury. Dr. Peterson determined that she had reached an end medical result for both injuries. He rated her with a 14% whole person impairment referable to her shoulder injury and a 32% whole person impairment referable to her neck injury, for a combined total whole person impairment of 42%.

¹ In November 2008 Claimant retained new counsel. For the purposes of these findings, references to her attorney are to her prior counsel, not her current one.

19. At Defendant's request, Dr. Brigham performed a review of both Dr. Backus' and Dr. Peterson's impairment ratings in July 2004. For the purposes of that review Dr. Brigham assumed that Claimant's cervical condition was in fact causally related to her May 1999 work injury. Dr. Brigham concluded that Dr. Peterson's impairment rating was essentially correct, but that he should have apportioned away that aspect of the cervical impairment related to Claimant's 1988 cervical disc surgery. With that in mind, Dr. Brigham reduced the total whole person impairment attributable to Claimant's May 1999 work injury to 24%.
20. In October 2004 Defendant asked Dr. Brigham to conduct another review of Claimant's medical records, this time with an eye towards determining whether in his opinion her cervical condition had been caused or aggravated by the May 1999 work injury. Dr. Brigham concluded that the May 1999 event neither caused any new cervical spine injury nor aggravated Claimant's "significant pre-existing cervical degenerative disease." Upon reconsidering his prior review of Claimant's permanent impairment, therefore, Dr. Brigham eliminated entirely the rating referable to her cervical condition. He concluded that Claimant suffered only a 12% whole person impairment, all of it referable to her right shoulder injury.
21. At the request of Claimant's attorney, Dr. Turek evaluated Claimant on October 19, 2004. Dr. Turek noted that absent any documentation that Claimant had sought medical treatment for cervical complaints between 1989 and 1999, "one can only conclude that [her] previous injury had stabilized after an uncomplicated discectomy." He further observed that Claimant had been working full time without restrictions at the time of her May 1999 work injury. Following that injury her status "rapidly and severely declined," resulting in multiple cervical surgeries. From this Dr. Turek concluded that Claimant's cervical condition was in fact causally related to her May 1999 work injury. Considering both her shoulder injury and her cervical injury, Dr. Turek rated Claimant's total whole person impairment at 36%.
22. With Dr. Brigham's opinion as support, in February 2005 Defendant filed a Notice of Intention to Discontinue Benefits (Form 27) as to Claimant's right shoulder injury on end medical result grounds. Defendant also sought to terminate its responsibility for medical treatment related to Claimant's cervical condition, stating, "[question] cervical spine being causally related to this case." In this aspect as well Defendant relied on Dr. Brigham's opinion as support for its position.
23. Claimant's attorney responded to the Form 27 by letter to the Department dated February 7, 2005. In it he stated, "[T]here is no dispute that EMR has now been attained and that TTD may be ceased in accordance with that." Along with the letter Claimant's attorney also filed with the Department both Dr. Turek's and Dr. Peterson's impairment rating reports. As noted above, *see* Finding Nos. 18 and 21, both of these reports included Claimant's cervical condition as a ratable component of her work injury.

24. On February 9, 2005 the Department approved Defendant's discontinuance. At the same time, it notified Claimant's attorney of Claimant's appeal rights, stating, "[I]f you disagree with the discontinuance of treatment related to the cervical spine, you may APPEAL by submitting a WRITTEN request for hearing to this office . . ." (emphasis in original).
25. Claimant has not worked since her May 1999 injury. She applied for social security disability benefits on July 31, 2002 and was found entitled. Notwithstanding that determination, Claimant endeavored to identify suitable alternative employment for which she might be retrained. A functional capacities evaluation completed in February 2004 determined that she had a part-time light work capacity, insufficient for her to return to her previous employment as an electrician. Claimant worked with a vocational rehabilitation counselor from 2002 until 2006, albeit with sustained interruptions due to her various surgeries and her ongoing symptoms. There is no evidence that Claimant's vocational rehabilitation file was ever formally closed, but no progress reports have been filed with the Department since July 18, 2006.
26. On August 22, 2008 Claimant's attorney filed a Notice and Application for Hearing (Form 6) with the Department, in which he stated that Claimant "has suffered extensive permanent impairment and has been rendered permanently disabled by her injury and its consequences." After winding its way unsuccessfully through the Department's informal dispute resolution process, the claim now has been referred to the formal hearing docket.

CONCLUSIONS OF LAW:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).
2. In the current litigation Claimant seeks permanent total disability benefits causally related to her May 1999 work injury, which she asserts encompassed not only her right shoulder but her cervical spine as well. Alternatively, Claimant seeks additional permanent partial disability benefits for the rated impairment to her cervical spine. Defendant asserts in response that as a matter of law both claims are time-barred under 21 V.S.A. §660(a). On those grounds, it seeks summary judgment.

3. At the time of Claimant's original work injury in May 1999, §660(a) read, in pertinent part, as follows:

Proceedings to initiate a claim for benefits pursuant to this chapter may not be commenced after six years from the date of injury.

In May 2004, however, the statute was amended to read instead:

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. *This section shall not be construed to limit subsequent claims for benefits stemming from a timely filed work-related injury claim* (emphasis supplied).

4. In order to address Defendant's argument properly, it is necessary first to determine which version of the statute applies. Generally, the statute of limitations that applies to a particular cause of action is the one in effect when the cause of action accrued. *Carter v. Fred's Plumbing & Heating, Inc.*, 174 Vt. 572 (2002), *citing Cavanaugh v. Abbott Labs.*, 145 Vt. 516, 521 (1985). To apply this rule to the current claim, therefore, I must determine when Claimant's cause of action for permanent total disability compensation, or alternatively, for additional permanent partial disability compensation, first accrued.
5. An injured worker's right to compensation itself is acquired at the time he or she suffers a work-related injury. 21 V.S.A. §618; *Sanz v. Douglas Collins Construction*, 2006 VT 102. The time at which certain benefits may become due, however, whether temporary or permanent, partial or total, depends on such factors as the severity of the injury, the claimant's medical progress and his or her ability to work. *Id.* Given these variables, in many workers' compensation claims a claimant's entitlement to specific benefit payments does not ripen until some time after his or her right to compensation arises.
6. This concept – that although a claimant's *right to compensation* arises at the time of injury, his or her *entitlement to benefits* often may not accrue until much later – is particularly applicable to permanency benefits. Typically (though not always) a claimant knows that he or she has suffered a work-related injury at the time it occurs. Treatment progresses, and at its conclusion hopefully the claimant has made a full recovery, with no residual impairment, and therefore no permanency, at all.

7. Unfortunately, this is not always the case. It may be months, even years, before it becomes apparent that despite all reasonable treatment the injury has in fact left a permanent mark. With that in mind, a cause of action for permanent partial disability benefits cannot accrue until a claimant reaches end medical result. *Longe v. Boise Cascade Corp.*, 171 Vt. 214 (2000). Until that point is reached, there is no way to know whether any impairment from which he or she still suffers might yet respond to treatment or whether it now has become permanent. *Kraby v. Vermont Telephone Co.*, 2004 VT 120; see *AMA Guides to Evaluation of Permanent Impairment* (5th ed.) at §2.4 (advising against performing permanent impairment rating until patient reaches point of maximum medical improvement). And if the impairment is not yet permanent, then logically the claimant cannot yet claim entitlement to permanent partial disability benefits.
8. Similarly, a cause of action for permanent total disability benefits cannot accrue until it becomes reasonably apparent, both medically and vocationally, that as a result of his or her work injury a claimant most likely will never be able to return to regular gainful employment. *K.T. v. Specialty Paperboard*, Opinion No. 33-05WC (June 24, 2005). Until that point occurs, it would be premature to make a claim for permanent total disability benefits.
9. The implications for evaluating a statute of limitations defense are clear, therefore. A claim period can only begin to run when there is in fact something to claim. *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 446 (1985). Thus, the statute of limitations on a claim for permanent partial disability benefits begins to run when the claimant reaches end medical result. *Kraby, supra*; *Longe, supra*. On a claim for permanent total disability benefits, the statute begins to run when it becomes reasonably discoverable and apparent that the claimant is permanently precluded from working. *K.T. v. Specialty Paperboard, supra*.
10. In the current claim, the parties do not dispute that Claimant reached an end medical result at least as of February 9, 2005 when Defendant's discontinuance on those grounds became effective. Her cause of action for permanent partial disability benefits related to her cervical condition arose, and the statute of limitations began to run, as of that date.
11. As for Claimant's permanent total disability claim, Defendant argues that her cause of action accrued in July 2002, when she applied for and was granted social security disability benefits. The standard for evaluating entitlement to these benefits, however, differs from the one that applies in the workers' compensation context. It is worth noting, furthermore, that Claimant continued to engage in vocational rehabilitation efforts even after she became eligible for social security disability benefits. According to her vocational rehabilitation counselor's last report, these efforts appear to have continued at least until July 18, 2006. I find that to be the earliest date upon which her cause of action for permanent total disability benefits accrued and the statute of limitations began to run.

12. As noted above, the statute of limitations that applies to a particular cause of action is the one in effect when the cause of action accrued. *Carter, supra*. Having found that Claimant's claims for both permanent partial and permanent total disability benefits arose after May 2004, when the most recent amendment to §660(a) took effect, I conclude that the amended statute applies, not the prior one.
13. The analysis does not end there, however. True, the amendments to §660(a) reduced the statute of limitations applicable to proceedings to initiate a claim for a work-related injury from six years to three years. But in language critical to this claim, by its specific terms the amended statute also mandates that the three-year limitations period "not be construed to limit a subsequent claim for benefits stemming from a timely filed work-related injury claim."²
14. Interestingly, while repealing the six-year limitations period applicable to *benefit claims* in favor of a three-year limitations period applicable to *work-related injury claims*, the amended statute no longer specifies what the time limit is for initiating a subsequent claim for benefits once the initial work-related injury claim itself has been timely filed. When faced with this dilemma – the absence of any limitations period specifically applicable to workers' compensation claims – under an early incarnation of Vermont's statute, the Supreme Court determined that a claim for workers' compensation benefits was essentially an action of contract, and therefore applied the six-year contract statute of limitations. *Fitch v. Parks & Woolson Machine Co.*, 109 Vt. 92, 98 (1937). I am compelled to take the same path here.
15. I conclude, therefore, that the applicable statute of limitations for the benefit claims at issue in this case is six years from the date each of them accrued. As noted above, Claimant's claim for permanent partial disability benefits accrued on February 9, 2005; her claim for permanent total disability benefits accrued on July 18, 2006. Claimant's attorney filed a Notice and Application for Hearing as to both claims on August 22, 2008. This was well within the applicable six-year limitations period. As a matter of law, neither claim is time-barred.
16. As a final matter, Claimant requests a ruling that Defendant be barred from contesting the compensability of her cervical condition on the grounds that it waived its right to do so by virtue of its actions over the past several years. This argument raises factual questions that cannot be resolved on the basis of the record before me now. It is inappropriate to address them here.

² Notably, the amended statute also repealed the language referencing "proceedings to initiate a claim for *benefits* pursuant to this chapter," and replaced it instead with language referencing "proceedings to initiate a claim for a *work-related injury* pursuant to this chapter" (emphasis supplied). That change as well incorporates the distinction between a claimant's right to compensation following a work-related injury and his or her subsequent entitlement to specific benefits.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant's Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 28th day of December 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.