

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

Paul Kraby	)	Opinion No. 44-03WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Vermont Telephone Company	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	State File No. H-22277

Submitted on medical records, affidavits and briefs

**APPEARANCES:**

James J. Dunn, Esq., for the Claimant  
Andrew C. Boxer, Esq. , for the Defendant

**ISSUE:**

Is Mr. Kraby’s claim for permanent partial disability benefits barred by the statute of limitations?

**UNDISPUTED FACTS:**

1. Claimant incurred a right knee injury in the course of his employment with the Defendant on May 12, 1995 while climbing a telephone pole.
2. At all relevant times Claimant was an employee and Vermont Telephone Company (formerly GTE) his employer.
3. Travelers was the workers’ compensation carrier for Vermont Telephone Company at all relevant times.
4. Dr. Edgar Holmes diagnosed Claimant’s knee condition as a torn medial meniscus and performed surgery on June 27, 1995.
5. Claimant followed up with this surgeon on two postoperative visits on July 6, 1995 and on August 7, 1995.

6. The parties entered into a Form 21 Agreement for Temporary Total Disability Compensation for the postoperative period, which was approved by this Department.
7. On July 13, 1995 the carrier filed a Form 28, Notice of Change in Compensation Rate, reflecting the July 1, 1995 annual adjustment.
8. On October 20, 1995, the carrier filed a Form 13, Report of Benefits and Related Expenses Paid, reflecting the amount of temporary total disability benefits paid for the period June 27 to July 10, 1995 as well as the amount of medical benefits paid.
9. On August 8, 2001 the Claimant filed a Form 6, Notice and Application for Hearing, for permanent partial disability benefits.
10. Citing *Longe v. Boise Cascade*, 171 Vt. 214 (2000) the carrier denied the claim for permanent partial disability benefits on the grounds that the statute of limitations had run.
11. In November of 2002 Claimant obtained an opinion from his surgeon, Dr. Holmes, stating that a reasonable time following the surgery Claimant had to the point of medical end result is between six to eight weeks and that Claimant has a 7% whole person impairment from his work-related injury.
12. Claimant signed an affidavit stating the he was not aware of a claim for permanent partial disability benefits until August of 2001.

#### **CONCLUSIONS OF LAW:**

1. In support of the defense that this claim is barred by the statute of limitations, Defendant argues that the six year statute of limitation for permanency began to run on May 26, 1995, the date of injury, or at the latest on June 27, 1995, the date of surgery and, therefore, expired in June 2001. It is undisputed that the claim for permanency was not made until August 7, 2001.
2. Two sections of the Vermont Workers' Compensation Act govern the time in which a claim may be made. Section 656 of title 21 requires one to file a notice of injury as soon as is practicable after the injury and a claim within six months. Section 660 extends the time to six years if the employer had knowledge of the accident or had not been prejudiced by the delay.
3. "The date of injury.... shall be the point in time when the injury or disease, and its relationship to the employment is reasonably discoverable and apparent. " § 656(b). Pursuant to 21 V.S.A. § 648(a), when an injury results in permanent partial impairment, the employer shall pay permanent partial benefits at the termination of disability.

4. In this case, the initial claim for benefits had been filed well within the applicable statute of limitations. Whether there still is a viable claim for permanency benefits, however, depends on a date when the right to permanency was reasonably discoverable and apparent. The Vermont Supreme Court explained: “for purposes of the notice and claim provisions of § 656, and for purposes of the six-year statute of limitations, the date of injury ‘is the point in time when an injury becomes reasonably discoverable and apparent.’” *Longe v. Boise Cascade Corp.*, 171 Vt. 214,219 (2000) (citing *Hartman v. Ouellette Plumbing & Heating*, 146 Vt. 443, 447 (1985)).
5. The Court in *Longe* made clear that a claimant cannot rely on the original notice of injury to secure rights to permanency benefits, noting that not all claims result in permanent partial impairment. *Id.* at 222. Because the *Longe* claimant had not brought his permanency claim within six years of the date when his right to permanency was reasonably discoverable and apparent, the Court held that his claim for permanency benefits was time barred. The operative date in *Longe* for when the right to permanency was reasonable discoverable and apparent, as stipulated by the parties, was the medical end result date.
6. Although this Department asked the attorneys to brief the applicability of § 656 and § 660 to this case and asked whether the claimant could prove lack of prejudice, I no longer find such an analysis controlling. On careful re-reading of *Longe*, I agree with the claimant’s position it does not bar this claim.
7. The carrier was aware of the initial injury for which claimant had surgery. Contrary to the defense assertion, this claimant’s right to permanency could not have been reasonably discoverable and apparent at the time of that surgery, which was followed by a short period of temporary total disability. In fact, it is difficult to understand how anyone would know about the right to permanency before one reaches medical end result, when not all injuries result in permanency. The only evidence on this issue is Dr. Holmes’s retrospective determination that medical end result was reached six to eight weeks after the surgery, which would have been between August 8 and August 22, 1995. Because claimant brought this claim within six years of that determination, his claim is a viable one.
8. As a prevailing Claimant, he is entitled to reasonable attorney fees and necessary costs pursuant to § 678. That award will be made after a final determination of the amount of permanency due is made, which is beyond the scope of this ruling.

**ORDER:**

THEREFORE, Claimant is entitled to permanent partial disability benefits for his work-related injury of May 12, 1995.

Dated at Montpelier, Vermont this 4<sup>th</sup> day of December 2003.

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Michael S. Bertrand  
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.