

R. S. v. Burlington Electric Dept.

(September 21, 2006)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Opinion No. 39-06WC

R. S.

By: Margaret A. Mangan
Hearing Officer

v.

Burlington Electric Department

For: Patricia Moulton Powden
Commissioner

State File No. W-05113

RULING ON DEFENSE MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Frank E. Talbott, Esq. for the Claimant
William J. Blake, Esq. for Guaranty Fund Management
Robert G. Cain, Esq. for CNA Insurance Company
Richard R. Hennessey, Esq. for National Union Fire Insurance
Eric A. Johnson, Esq. for The Hartford
John T. Leddy, Esq. for Vermont League of Cities and Towns
Corina Schaffner-Fegard, Esq. for Insurance Company of North America

ISSUE:

Should Defendant/Employer, Burlington Electric Department, be granted summary judgment on liability for an injury to Claimant on the basis of a statute of limitations defense?

UNCONTESTED FACTS:

1. Claimant began working for the Burlington Electrical Department (BED) on January 19, 1969 at first as a welder and later as mechanic 1st class and certified welder Class 15A. In 1982 he was promoted to Chief Mechanic.
2. Claimant installed and removed asbestos from pipes and packed loose asbestos directly onto pipes without adequate respiratory protection. Exposure was a regular occurrence at the Moran Generating Plant.
3. Claimant was transferred from the Moran Plant to the McNeil plant in 1984 or 1985, around the time the Moran Plant was closed.
4. Claimant retired from Burlington Electric in 1995. Prior to his retirement he was not disabled from working because of any asbestos-related condition.

5. Claimant was diagnosed in June of 2004 with pleurisy, emphysema and bronchiectasis caused by direct exposure to asbestos.
6. Claimant seeks medical costs for the treatment of his lung conditions.
7. As listed above, several insurers provided workers' compensation coverage to Burlington Electric during the time Claimant worked there.

STANDARD:

Defendant insurers argue that the Occupational Disease Act bars this claim. See 21 V.S.A. §1006(a)(1987) (repealed by 1999, No.41, §8(a)(1)). In response, Claimant argues that he filed a timely claim under the Workers' Compensation Act. § 660(b).

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.C.R.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)). In this case, when evaluating the merits of the motions for summary judgment, the defense has the burden of proof, and the Claimant 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 (1987). 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). A judgment on the pleadings is appropriate if the pleadings contain no allegations that, if proven, would permit recovery. See *Hinsdale v. Sherman*, 171 Vt. 605, 606 (2000).

Giving the Claimant the benefit of all reasonable doubts and inferences leads to the conclusion that his pulmonary condition resulted from his work-related exposure to asbestos and is an "occupational disease" under Vermont's Occupational Disease Act ("ODA"). The Vermont Supreme Court citing the ODA defines an occupational disease as:

a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment, and to which an employee is not ordinarily subjected or exposed outside of or away from his employment, and which arises out of and in the course of such employment.

Campbell v. Savelberg, 139 Vt. 31 (1980).

Claimant's condition is occupational because he was exposed to asbestos in his particular trade, he would not have been exposed otherwise, and his diseases are caused by exposure to asbestos. Thus, Claimant's claim falls under the ODA rather than worker's compensation.

Effective July 1, 1999, the Legislature repealed the ODA, replacing it with a new statutory scheme under 21 V.S.A. § 660(b). The ODA contained a statute of repose which read: "Compensation shall not be payable for disablement by reason of occupational disease unless such disablement results within five years after the last injurious exposure to such disease in the employment...." §1006(a) (repealed). The applicable statute of limitations under 21 V.S.A.

§660(b) states: “A claim for occupation disease shall be made within two years of the date the occupational disease is reasonably discoverable and apparent.”

The statute of limitations that applies to a particular cause of action is generally the one in effect when the cause of action accrued. *Cavanaugh v. Abbott Labs.*, 145 Vt. 516, 521 (1985). Claimant's cause of action began to accrue for asbestos-related pulmonary disease, an occupational disease as defined by 21 V.S.A. § 1002, on the last day of injurious exposure. Claimant admits his last day of injurious exposure was in 1984 or 1985, thus, his five-year limitation period elapsed in 1990—well before the legislature repealed the ODA in 1999 and before Claimant's diagnosis in August 2004.

Although the legislature limited availability of the remedy to workers' compensation claimants when it issued the non-retroactive statute repealing the ODA. 21 V.S.A. §660(b); the legislature did not interfere with a vested right of claimant, and thus, there was no constitutional deprivation or right to redress when occupational disease claim was found to be barred by ODA's limitations period. *Carter v. Fred's Plumbing and Heating, Inc.*, 174 Vt. 572, 575 (2002).

DISCUSSION:

Claimant argues that this is a workers' compensation claim, not an occupational disease claim, because he was never "disabled" during the time the ODA was in effect. Consequently, he argues that his injury did not occur until the 2004 diagnosis. Since his claim was filed that year, he contends it is timely.

The Defense, by and through its attorneys, moves for summary judgment as a matter of law on the issue whether this claim is timely. It argues that this claim falls outside the five-year statute of limitations provided in 21 V.S.A § 1006(a), which was in effect at the time of Claimant's last injurious exposure. In support of its argument Defendants cite to the uncontested fact that Claimant's last alleged injurious exposure to asbestos occurred in 1984 or 1985—well before July 1, 1999 when the ODA was repealed. I agree.

Here, Claimant is in the same position as claimants in *Carter v. Fred's Plumbing and Heating, Inc.*, 174 Vt. 572 (2002) and in *Sheltra v. Vt. Asbestos Group*, 175 Vt. 499 (2003), where claims were time-barred under 21 V.S.A. § 1006(a) because, in both cases, claimants' causes of action had expired under the ODA's statute of repose *before* the effective date of the new statute, 21 V.S.A. §660(b). Like Carter, whose last injurious exposure was in 1981, and Sheltra, whose last injurious exposure was in February 1994, the present Claimant's last injurious exposure was in 1984 or 1985, thus, in *Carter*, *Sheltra*, and here as well, five years has elapsed before July 1, 1999, when §1006(b) was repealed and § 660(b) became effective. The Court in *Carter* determined that the Legislature did not intend that the new state of limitations in §660(b) apply retroactively to save causes of action that had already expired. *Id.* at 575.

Under this clearly binding precedent, Claimant's argument that no injury occurred until the diagnosis cannot be accepted. *Carter*, 174 Vt. 572. "Unfortunately for plaintiff, the line was drawn in a manner that does not afford him relief. *Id.* at 575.

ORDER:

Therefore, Defendant's motions for summary judgment are GRANTED.

Dated at Montpelier, Vermont this 21st day of September 2006.

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.