STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. M-16259
	)	
Walter Comstock	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
Columbo Granite, Inc.	)	Commissioner
	)	
	)	Opinion No. 06-01WC

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The claimant is represented by Steven Robinson, Esq.; the defendant by John Serafino, Esq.

Walter Comstock, who worked as a stone cutter for years, alleges that he developed silicosis from his work, which ended in 1986. He filed an Occupational Disease Notice of Injury and Physician Statement on April 19, 1999 (dated April 5, 1999). Then, on September 8, 2000 the claimant filed a Form 5, Employee's Notice of Injury and Claim for Workers' Compensation, for a date of injury of April 5, 1999.

On May 4, 1999 the employer denied the claim for lack of medical documentation and for an untimely filing. On December 9, 1999, through counsel, the defendant filed a Motion for Summary Judgment on the basis that no disablement occurred within five years after he stopped working for Colombo Granite. It was not until the claimant consulted with counsel that his opposition to the Motion for Summary Judgment was filed on April 17, 2000.[1] Since then both parties, at the hearing officer's request, have briefed applicable constitutional issues.

The claimant argues that he had no knowledge of a silicosis diagnosis until December 1998.

The following facts are undisputed for purposes of this motion only:

1. Walter Comstock's work for Colombo Granite ended in 1986 when he retired.

2. On April 5, 1999 Brooke Judd, M.D. signed a Physician's Statement opining that Mr. Comstock was, as of that date, disabled by an occupational disease; silicosis.

[1]. The defendant argues that the response is untimely under V.R.C.P. 56 (requiring service within 30 days) and should not be considered. Because rigid adherence to that timeframe would have defeated the informal nature of this proceeding, especially for a then-unrepresented claimant, an extension of the time frame was warranted. Rule 7 (a), Workers' Compensation and Occupational Disease Rules ("The Vermont Rules of Civil Procedure and the Rules of Evidence as applied in Superior Court shall, in general, apply to all hearings conducted under 21 V.S.A. § 663, except as provided in these Rules, and only insofar as they do not defeat the informal nature of the hearing.")

3. Before Dr. Judd's, no other Physician's Statement was on file regarding this claim for benefits because of alleged silicosis.

Conclusions of Law:

In the claimant's initial opposition to the employer's motion, he argued that this action is made under the Workers' Compensation Act, not the Occupational Disease Act, which no longer exists and which he contends should have no legal affect this claim. However, it cannot be ignored that at the time the claimant left the employ of Columbo Granite in 1986, the Occupational Disease Act was in effect. That statute applied to "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 employment." 21 V.S.A. § 1002 (5). When the Occupational Disease Act was repealed on July 1, 1999, the diseases previously classified as occupational diseases under the Occupational Disease Act became subject to the Workers' Compensation Act, 21 V.S.A. § 601 et. seq.

Silicosis, the disease the claimant alleges he developed from his work in the granite industry, is one characteristic of that trade and one to which an employee is not ordinarily exposed away from employment. As such, silicosis is an occupational disease. The law applicable to this action must be the one in force at the time of the injury, in this case the one in effect when the claimant was last exposed to asbestos in 1986. See, *Montgomery v. Brinver Corp*., 142 Vt. 461, 463 (1983); 1 V.S.A. § 214. Therefore, the law in effect in 1986, the Occupational Disease Act, controls this case.

Vermont's Occupational Disease Law allowed compensation for "disablement … arising out of and in the course of employment and resulting from an occupational disease." 21 V.S.A. § 1001. "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).

For purposes of the Occupational Disease Act, the date of disability was "the date upon which any physician consulted by the employee and who is licensed to practice medicine in Vermont shall state in writing… that in the opinion of such physician the employee then has an occupational disease…and is disabled thereby." 21 V.S.A. § 1004 (a). The defendant argues that the date of disability--and disablement--can be no earlier than the date of the doctor's written statement and, because the statement in this case was not made within five years of the last injurious exposure, the employer owes no compensation and this claim should be dismissed.

The claimant argues that the five years after the last injurious exposure of such a disease has not yet expired because his exposure is ongoing. Such ongoing exposure, he alleges, is from the trapped silica particles in his lungs. However, the statute specifically references the "last injurious exposure to such disease <u>in the employment.</u>" § 1006 (a) (emphasis added). This claimant has not been engaged in employment, a necessary component of "exposure," since he retired in 1986. Therefore, even if I accepted the claimant's argument that the disease process itself qualifies as continued exposure, it is not "in the employment" as required by statute.

Next, the claimant urges the Department to apply the discovery rule in this case. Since he first discovered that he had silicosis in 1998, a discovery rule would place him well within the five years required by 21 V.S.A. § 1006(a). The overall occupational disease statutory scheme evinces a legislative purpose to bar use of the discovery rule in all but ionizing radiation cases under § 1006(b) [2]. The defendant argues correctly that under the precept of *expressio unius est exclusio alterius,* by specifically singling out radiation cases for application of the discovery rule, the legislature excluded all other occupational disease cases from application of the rule.

Furthermore, the plain meaning of § 1006 (a) requires that the claim be brought within five years of the last injurious exposure in the employment, which this claimant has not done. When the Legislature "bases the commencement of a limitations period upon a determinable fact and does not state or imply the need to determine accrual of an action extrinsically," no discovery rule applies. *Leo v. Hillman*, 164 Vt. 94, 97-100 (1995). With such a statute this Department "must apply its plain language and resist the temptation to adjust the law on the basis of specific facts." Id. at 99.

Citing *University of Vermont v. Grace,* 152 Vt. 287, 291 (1989), the claimant argues that "one cannot maintain an action before one knows there is one. To say to one who has been wronged, you had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy, makes a mockery of the law." He contends that to deny the claim as untimely would be a violation of Vt. Const. Ch I, Art 4, which provides" "[e]very person within the state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character…" Further, the claimant argues that it would be a violation of equal protection under Vt. Const. C. 1 Art. 7. He maintains that he is part of a class of occupational disease victims denied any legal remedy due to the sheer arbitrariness in the onset and discovery of their disease. Because 21 V.S.A. § 660 in the Workers' Compensation Act creates a two-year discovery rule, the claimant argues that it modified the substantive rights defined by 21 V.S.A. § 1006, now repealed. A person whose last injurious exposure occurred in July 1999, therefore, would benefit from the two-year discovery rule and would not be limited by § 1006. Yet those, like this claimant, who did not discover their disease within five years have no legal remedy. Such a disparity cannot survive constitutional scrutiny, the claimant argues, because it is not necessary to accomplish the State's objectives. He points to the recent repeal of the Occupational Disease Act and the current applicability of the discovery rule to occupational disease cases as evidence that the state no longer believes, as a matter of public policy, that industry should be absolved of liability for occupational diseases that do not mature within five years. According to the claimant, perpetuating such a defunct policy furthers "no rational, much less reasonable, purpose."

[2] "The time limit prescribed in subsection (a) of his section [five years] shall not apply in the case of an employee whose disablement or death was due to occupational exposure to ionizing radiation…" [T]he right of an employee…to claim compensation…shall not be barred for failure to file a claim within such period, if such claim is filed within one year after the date upon which the employee first suffered incapacity from the exposure to radiation and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by his present or prior employment." 21 V.S.A. § 1006(b).

Defendant argues that this agency has no power to determine the constitutional validity of statutes. Indeed, the Vermont Supreme Court in *Westover v. Village of Barton Electric Department*, 149 Vt. 356, 357 (1988) determined that "[to] make the system of administrative agencies function, the agencies must assume the law to be valid until the judicial determination to the contrary has been made."

With the assumption that the statute is valid, this claim must be denied. However, denial of a claim under the Occupational Disease Act is not necessarily tantamount to denying all relief for this claimant. The Occupational and Workers' Compensation Acts modified existing common law remedies. Now, without recourse to those remedial statutes, common law and other statutory remedies may be available to the claimant.

Accordingly, the defendant's motion for Summary Judgment is granted and this claim is hereby DISMISSED.

Dated at Montpelier Vermont this 7th day of March 2001.

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R. Tasha Wallis
Commissioner