Greenia v. Marriott Corporation (March 13, 2002)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. B-25212
Linda Greenia	)	
	)	By: Margaret A. Mangan
	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Marriott Corporation	)	
	)	Opinion No. 46A-01WC

AMENDED JUDGMENT

This matter came to the Department on the defense motion to amend filed on February 26, 2002. Claimant argues that the motion must be denied as untimely under the Rules of Civil Procedure, which provide that the motion to amend findings must be made "not later that 10 days after entry of judgment." V.R.C.P. 52 (b). However, this is a timely motion under V.R.C.P. Rule 60. And justice requires correction of the factual error.

In a ruling dated January 29, 2002 this Department held that the claimant was barred from reopening a Form 22 for her 1989 injury, but was granted 30 days to make a claim for a new injury or aggravation. Included in that decision is a finding that the claimant continued to work for the Marriott until June 27, 1999 when she left because she could no longer work due to back pain. The affidavit on which that finding was based stated that the claimant worked until June 27, 1999, but did not specifically state that the continuous work was for the Marriott. In the defense motion to amend, an affidavit from the Marriott was produced demonstrating that claimant left that job in 1993. Since then she has worked for six different employers. Claimant does not challenge that job history.

The Marriott argues that correction of the factual error mandates reconsideration of the ruling that allows the claimant to amend her claim. The defense agrees that the claimant may have a claim for new injury or aggravation, but argues that such a claim cannot be against the Marriott "as the alleged injury or aggravation did not occur until many years after the claimant had stopped working for the Marriott." Defendant's Motion for Clarification and Amendment of Judgment at 3. If an aggravation or new injury occurred and was reasonably discoverable and apparent while claimant worked for the Marriott, the six-year statute of limitation will indeed bar a claim against it. 21 V.S.A.§§ 656, 660. However, claimant must be left to her proof on a new injury claim. The ruling that the Form 22 Settlement Agreement in this case cannot be reopened stands. However, claimant must be permitted to bring a new claim.

The defense request that the factual error be corrected is GRANTED. The claimant's work history (first sentence in the third paragraph) is amended as follows:

"Claimant left the employ of the Marriott on July 19, 1993. Since then she has worked for six other employers."

Dated at Montpelier, Vermont this 13th day of March 2002.

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R. Tasha Wallis
Commissioner

Greenia v. Marriott Corporation (January 29, 2002)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. B-25212
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	)	By: Margaret A. Mangan
Linda Greenia	)	Hearing Officer
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v.	)	For: R. Tasha Wallis
	)	Commissioner
Marriott Corporation	)	
	)	Opinion No. 46-01WC

Submitted on motion

APPEARANCES:

William B. Skiff, II. Esq. for the claimant
Robin A. Ober, Esq. for the defendant

RULING ON DEFENSE MOTION TO DISMISS

This matter came before the Department on the defense motion to dismiss Linda Greenia's claim on the basis that it is barred by the parties' Form 22 Settlement agreement.

The essential facts, accepted for this motion only, are not in dispute. On March 31, 1989 the claimant suffered a work-related back injury while working for Marriott Corporation and later had surgery. Argonaut Insurance, the carrier for the Marriott, accepted the claim. On June 19, 1990 this Department approved the parties' Form 22 Agreement for Permanent Partial Disability Compensation that called for 66 weeks of benefits based on a 20% loss at the lumbar spine.

Claimant continued to work for the Marriott until June 27, 1999 when she left because she "could no longer work due to… back pain." (Claimant's affidavit, Oct. 23, 2001.) The parties then entered into agreements for temporary total disability beginning on June 27, 1999 and temporary partial disability beginning on August 8, 1999. The date of injury specified on the Form 21 is March 31, 1989. Benefits continued through December 9, 2000. On October 25, 2000 the insurer voluntarily and without agreement paid permanent partial disability (PPD) benefits for 27.5 weeks based on a 5% rating from Dr. Davignon. Claimant characterizes that last PPD payment as a de facto acceptance of a new injury upon which additional benefits could be based. Defendant characterizes it as an innocent error that benefited the claimant, but in no way binds the defendant.

Claimant now alleges that as a result of work her back condition worsened and she is unable to engage in regular gainful employment. She seeks permanent total or, in the alternative, additional permanent partial disability benefits. She has not filed a Form 5, Notice of Injury and Claim for Compensation.

In support of its position that the Form 22 bars this claim, defendant relies on 21 V.S.A. § 668 and Rule 17 of the Vermont Workers' Compensation and Occupational Disease Rules. Because the claimant has not raised any evidence of fraud or material mistake of fact, the defendant argues she is barred from presenting a claim for permanent total disability compensation. Furthermore, the defendant argues that modification is not permissible under § 668 because the settlement agreement was entered into more than eleven years ago, well beyond the six years provided by § 668.[1]

According to Rule 17.0000 which construes compensation agreements**,**

> Once executed by the parties and approved by the Division, these forms [21, 22, 23, 24, 14, 15,] shall become binding agreements and absent evidence of fraud or material mistake of fact the parties shall be deemed to have waived their right to contest the material portions thereof….

The insurance carrier, claimant and Commissioner's designee all signed the Form 22 at issue here. They also all signed the Forms 21 (Temporary Total Agreement) and 24 (Temporary Partial Agreement), both clearly identifying March 31, 1989 as the date of injury with a second period of disability beginning in June 1999.

Rule 17 provides that a Form 22 permanency agreement is binding absent fraud or material mistake of fact. See also, *Catani v. A.J. Eckert Co*., Opinion No. 28-95 WC (July 14, 1995) (Absent compelling evidence of error, Form 22 is a full and final determination of permanency dispute); *Mayhew v. PCI of Vermont*, Opinion No. 33-99WC (July 30, 1999) (no compelling evidence of error found to justify modifying a Form 22). In the present case, I find no evidence of error, fraud or mutual mistake in the Form 22 of April 1999.

Nor do I find applicable to this case any exception to the binding nature of a Form 22, as delineated in 21 V.S.A. § 668 and § 677. Section 668 allows for modification of awards on the ground of a change in condition, if brought within six years of the date of the award. In this case, that exception does not apply because the action was brought well beyond six years.

[1] Upon the commissioner's own motion or upon the application of any party in interest upon the ground of a change in the conditions,… the commissioner may at any time within six years of the date of award review any award…. Such a review shall not affect any money already paid. 21 V.S.A. § 668.

Section 677 permits the commissioner to grant a new hearing on the ground of newly discovered evidence "when a petition, setting forth the substance of such evidence, verified by the oath of the petitioner, is presented." Claimant argues that she has met her burden with two letters stating opinions regarding impairment ratings. However, those letters pertain to examinations of the claimant in August 2000 and November 2000, more than ten years after the Department approved the Form 22. "Newly discovered evidence" relates to evidence of facts in existence at the time of judgment of which the aggrieved party was ignorant, not a point later in time. See, *Gonzalez v. Gannett Satellite Information Network, Inc*. 903 F. Supp. 329, 332 (D.C.N.Y. 1995) aff'd, 101 F.3d 109 (2nd Cir. N.Y. 1996). Therefore, by definition the evidence the claimant now offers is not newly discovered evidence that warrants modification.

Clearly, the statute of limitations has run on any attempt to reopen the Form 22 for the 1989 claim. However, underlying this entire action is the suggestion that it was not the March 1989 injury, but rather subsequent work that accounts for the claimant's present condition. Claimant should be permitted to prove such a claim for a new injury or aggravation.

To dismiss the claim at this juncture would ignore the claimant's assertion that a decade of work after she signed a Form 22 injured her back.

ORDER:

Accordingly, claimant is barred from reopening the Form 22 for her 1989 injury, but is granted 30 days from the date this opinion is mailed from the Department to amend her claim.

Dated at Montpelier, Vermont this 29th day of January 2002.

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R. Tasha Wallis
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.