Humphrey v. Vermont Tap & Die Co. (96-187) [Filed 23-Apr-1997]

ENTRY ORDER

SUPREME COURT DOCKET NO. 96-187

JANUARY TERM, 1997

Carroll Humphrey	}	APPEALED FROM:
	}	
	}	
v.	}	Department of Labor & Industry
	}	
	}	
Vermont Tap & Die Co. and CNA Insurance Company	}	DOCKET NO. D 18559; H-678
	}	
v.	}	
	}	
Vermont Tap & Die Co. and Alexsis, Inc.	}	

In the above-entitled cause, the Clerk will enter:

Defendant Alexsis, Inc. appeals from a decision of the Commissioner of the Department of Labor and Industry holding that Alexsis had waived either its right to recover workers' compensation benefits it voluntarily paid or to contest its obligation to provide additional benefits. We affirm in part, reverse in part, and remand for further proceedings.

Carroll Humphrey worked as a laborer for Vermont Tap and Die Company. In March 1991, he injured his shoulder and filed a workers' compensation claim. Alexsis, his employer's workers' compensation carrier, processed the claim and paid benefits for about a month. One year later, in April 1992, Humphrey began experiencing pain in his previously-injured shoulder and filed another workers' compensation claim. CNA Insurance Company, which had since replaced Alexsis as Tap and Die's workers' compensation carrier, denied the claim. Humphrey thereupon filed with Alexsis, which accepted the claim and began payments.

About two years later, in May of 1994, Humphrey resumed work and Alexsis discontinued payments. Later that year, Humphrey again felt pain in his shoulder and filed another claim with Alexsis. This time Alexsis denied the claim, asserting that it involved a new injury that occurred while CNA was Tap and Die's carrier. In October 1994, the Department of Labor and Industry issued an interim order directing CNA to provide payment of the c[aim until the dispute between CNA and Alexsis was resolved. Following a hearing, the Commissioner issued a decision holding that under the doctrines of waiver, estoppel and laches Alexsis was precluded from recovering from CNA the benefits that it had voluntarily made to Humphrey from April 1992 to May 1994. Additionally, the Commissioner ordered Alexsis to reimburse CNA for benefits that CNA had paid to Humphrey from 1994 to 1996 pursuant to the interim order, and further ruled that Alexsis would be responsible for paying any additional benefits on the claim. This appeal by Alexsis followed.

Alexsis challenges the Commissioner's finding that it waived its right to contest the claim. Waiver is the intentional relinquishment or abandonment of

a known right and may be inferred from the party's words or conduct. Tooley v. Robinson Springs Corp., 163 Vt. 627, 628, 660 A.2d 293, 295 (1995) (mem). We have held that the essence of a waiver is a voluntary choice. and thus the party must have acted with a knowledge of all the material facts. Eastman v. Pelletier, 114 Vt. 419, 423, 47 A.2d 298, 301(1946).

We agree that Alexsis waived its right to recover from CNA the payments that it voluntarily made between 1992 and 1994. Alexsis had access to all of the information it reasonably required to determine whether to accept the claim in 1992. Humphrey had originally filed with CNA and shortly thereafter visited a physician, Dr. Maas who reported that he was "having more difficulty with his right shoulder. There has been no specific injury. It is hurting and grinding." CNA denied the claim based on the finding by Dr. Maas that there was no specific work injury. Alexsis was aware of Dr. Maas's report and of CNA's denial of coverage based upon that report. Alexsis's adjuster investigated the claim, gathered and reviewed the pertinent medical records, and accepted the claim as Alexsis's responsibility. noting that she considered it a continuation of the original March 1991 injury. At no time did Alexsis notify or suggest to CNA that CNA was responsible. Indeed, Alexsis reimbursed CNA the S7O.00 it had spent to obtain Dr. Maas's medical records.

The same cannot be said of Alexsis's conduct subsequent to that date. After Humphrey returned to work in May 1994, Alexsis discontinued payments. When Humphrey reinjured his shoulder, Alexsis promptly denied the claim, asserting that the injury was nOt a recurrence of the original injury but was a new injury that occurred while CNA was the insurer. We fail to discern how this conduct, in contrast with Alexsis's previous actions, can be construed as a waiver. Nor is Alexsis barred by the doctrines of laches or estoppel. "'[T]he doctrine of estoppel is based upon the grounds of public policy, fair dealing, good faith, and justice, and its purpose is to forbid one to speak against his own act, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon."' My Sister's Place v. City of Burlington, 139 Vt. 602, 609, 433 A.2d 275, 279 (1981) (quoting Dutch Hill Inn, Inc. v. Patten, 131 Vt. 187, 193, 303 A.2d 811, 815 (1973)). Essential to a finding of equitable estoppel is a showing of prejudice. The Commissioner concluded that because CNA did not have the opportunity to manage the claim from 1992 to 1994 it was forever prejudiced; however, the Commissioner stated that "[i]t would be too speculative to inquire into whether CNA Insurance would have managed the claimant's treatment any different than Alexsis." Thus there is no basis for a finding of prejudice sufficient to estop Alexsis from contesting the claim subsequent to 1994.

Laches is equally inapplicable. "Laches is the failure to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party . . ." Stamato V. Quazzo, 139 Vt. 155, 157, 423 A.2d 1201, 1203 (1980). CNA contends that the two-year period Alexsis managed the claim (1992-1994) represents an unreasonable delay. However, we held in American Trucking Ass'ns. V. Conway, 152 Vt. 363, 381-2, 566 A.2d 1323, 1334-5 (1989), that even a thirty-year lapse of time could be justified when there was no showing of prejudice.

Accordingly, we reverse that portion of the Commissioner's decision holding: (1) that Alexsis was barred from contesting its liability for the payment of benefits subsequent to 1994; and (2) that CNA was entitled to reimbursement from Alexsis for payments made pursuant to the Commissioner's interim order.

Based on the finding that estoppel, laches, and waiver controlled, the Commissioner deemed it unnecessary to determine whether Humphrey's later

injuries constituted an aggravation or recurrence of his original injury, and thus did not rule on the merits as to whether CNA or Alexsis was responsible for the payment of benefits. Accordingly, the matter must be remanded for further proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

BY THE COURT:

_____
Ernest W. Gibson III, Associate Justice

_____
John A. Dooley, Associate Justice

_____
James L. Morse, Associate Justice

_____
Denise R. Johnson, Associate Justice

_____
Frederic W. Allen, Chief Justice (Ret.)
Specially Assigned

Humphrey v. Vermont Tap & Die (March 12, 1996)

VERMONT DEPARTMENT OF LABOR AND INDUSTRY

CARROLL HUMPHREY	)	File Nos. D-18559; H-678
	)	
	)	By: Frank E. Talbott, Esq.
v.	)	Contract Hearing Officer
	)	
	)	For: Mary S. Hooper
VERMONT TAP & DIE	)	Commissioner
	)	
	)	Opinion No. 1-96WC

APPEARANCES
Catherine Roberts-Suskin for the claimant
Christopher McVeigh, for the defendant CNA Insurance
Steve Ellis for the defendant Alexsis Insurance

ISSUES

The main issue in this case is which insurance company, as between CNA Insurance and Alexsis Insurance, is responsible for benefits to the claimant. The sub-issues involved are:

1. Has Alexsis Insurance waived any claim it may have had

against CNA Insurance for reimbursement;

2. Is Alexsis Insurance estopped from making a claim against CNA Insurance;

3. Did the claimant suffer an aggravation or recurrence in July 1992?

THE CLAIM

The parties have stipulated to the following:

1. Carroll Humphrey is due certain workers' compensation benefits for the period July or August 1992 to the present, and continuing, owing to an injury arising out of and in the course of his employment by Vermont Tap and Die, Inc. (specified in more detail below).

2. The workers' compensation benefits due to the claimant for the period July 1992 to the present include a medical expense in the amount of $366.79, payable to North Country Hospital.

3. Additionally, the claimant is owed mileage reimbursement in an amount agreed upon by the parties.

4. The claimant was underpaid temporary total disability benefits for the period June 22, 1994 to October 19, 1994, due to under calculation of his weekly benefit rate.

5. The correct weekly benefit rate for the claimant (including dependency allowance) from June 22, 1994 through June 30, 1994, was $453.75, and from July 1, 1994 to June 30, 1995, $456.35, making the correct gross amount of temporary total disability benefits due for the period June 22, 1994 through June 30, 1995 the sum of $24,365.45.

6. Alexsis Insurance Company has recouped from temporary total disability benefits due to the claimant for this period the sum of $2,377.32, which recoupment the claimant does not contest.

8. Therefore, the claimant has been underpaid a net sum of $318.24 in temporary total disability benefits as of June 30, 1995.

9. Accordingly, the parties agreed that whichever insurance carrier is determined to be liable to the claimant agrees to pay the claim for medical benefits, mileage reimbursement and underpaid temporary total disability benefits, and to pay ongoing weekly benefits at the rate of $461.37, effective July 1, 1995.

STIPULATIONS

1. Between September 1992 and September 1994, Alexsis Insurance did not contact CNA Insurance about any alleged responsibility CNA had for the claimant's workers' compensation claim arising out of his August 1992 claim for benefits.

2. After its August 31, 1992, denial of the claimant's claim for workers' compensation benefits, CNA did not gather any additional medical records concerning the claimant's condition or treatment,

and did not further investigate the claimant's claim based on the August 1992 incident.

3. Between September 1992 and October 1994 when the Department of Labor & Industry issued an interim order to CNA, CNA did not medically manage the claimant's care or provide any rehabilitative care to him.

4. Alexsis reimbursed CNA Insurance $70.00 for the expense of obtaining Dr. Maas' medical records of his treatment of the claimant in August 1992.

5. The parties agreed that judicial notice may be taken of the official forms required to be filed in this case, found in the Department's file.

FINDINGS

1. During the hearing, the following exhibits were admitted into evidence:

Joint Exhibit 1	:	Stipulation
Joint Exhibit 2	:	Medical records of Dr. Broderick
Joint Exhibit 3	:	Medical records of Dr. Renstrum
Joint Exhibit 4	:	Medical Records of Dr. Murphy
Joint Exhibit 5	:	Medical records of Dr. Maas
CNA Exhibit A	:	Transcript of Deposition of Mary Boucher
CNA Exhibit B	:	Transcript of Deposition of Joyce Lawson
CNA Exhibit C	:	Computer Notes of Mary Boucher
CNA Exhibit E	:	Workers' Compensation Claim Report dated 7/23/92
CNA Exhibit F	:	8/31/92 letter from Attorney Roberts-Suskin to Ms. Babiec
CNA Exhibit G	:	Collection of letters between Attorney Roberts-Suskin and Alexsis Insurance

2. During the hearing, the following exhibit was marked for identification, but not admitted into evidence:

CNA Exhibit D	:	Recorded statement taken by Cathy Babiec

3. On March 18, 1991, the claimant suffered a strain in his right arm and shoulder while lifting a basket at work. This injury arose out of and in the course of employment at Vermont Tap & Die. Alexsis Insurance was the defendant's workers' compensation insurer at the time.

4. On March 29, 1991, Dr. James Maas reported that the claimant was experiencing an "unrehabilitated shoulder (sic) with probable partial rotator cuff tear and question Grade 1 AC separation." Dr. Maas prescribed physical therapy.

5. On April 26, 1991, Dr. Maas saw the claimant again, and found that the claimant had no complaints, had full range of motion in his shoulder and no pain. Dr. Maas concluded that the claimant's shoulder injury had resolved, and that the claimant could return to work.

6. The claimant returned to work on April 28, 1991, doing light duty work for two or three weeks, then returned to full, regular duties.

7. Alexsis Insurance paid compensation benefits due the claimant for this injury, though it never paid any permanent partial disability benefits.

8. Subsequently, CNA Insurance became the workers' compensation carrier for the defendant.

9. On July 23, 1992, the claimant filed a Workers' Compensation Claimant's Report with CNA Insurance saying that he started feeling a shock and rubbing pain in his right arm and shoulder whenever he lifted or put pressure on it, and that this pain started approximately three months earlier.

10. The claimant did not see Dr. James Maas after his April 26, 1991, visit, until July 31, 1992. At that time, Dr. Maas reported that the claimant "is now having difficulty with his right shoulder. There has been no specific injury. It is hurting and grinding."

11. CNA Insurance denied this claim on August 31, 1992, on the basis that the medical records from Dr. Maas do not specify any specific work related injury.

12. The claimant then made a claim to Alexsis Insurance. The adjuster assigned to the claimant's file was Mary Boucher. Ms. Boucher testified, after reviewing her computer log, that on September 17, 1992, she made a note of accepting the claimant's notice of claim in July and August 1992, "under the March '91 accident" and that the necessary forms with a check were to be submitted.

13. Dr. Maas sent the claimant to see Dr. James M. Murphy at the Hitchcock Clinic. Dr. Murphy concluded that the claimant was suffering from "persistent shoulder discomfort from repetitive use."

14. In December 1992, Dr. Philip Gates, performing an IME for Alexsis, concluded that the claimant "probably did have a rotator cuff injury in 1991 and because of never having a complete rehabilitative effort for his shoulder ended up with some relative muscle imbalance, and then when he began doing repetitive work got a chronic rotator cuff tendinitis."

15. Dr. Maas continued to treat the claimant until March 1993,

noting no significant differences in the claimant's symptoms since July 1992. In March 1993, Dr. Maas referred the claimant to Dr. Renstrum.

16. In November 1993, Dr. Renstrum performed an arthroscopic Bankart repair on the claimant's right shoulder. The claimant then underwent physical therapy.

17. The claimant was released to return to work on May 23, 1994. However, on June 21, 1994, the claimant returned to Dr. Renstrum complaining of increased pain at work. Dr. Renstrum took the claimant out of work again. On October 24, 1994, Dr. Renstrum performed another operation. Since then the claimant has undergone physical therapy, and has apparently not reached medical end result, as of the last medical record in evidence from Dr. Renstrum, dated June 16, 1995.

18. When the claimant returned to work in May 1994, Alexsis Insurance filed a Form 27, Notice of Intention to Discontinue Payments. Because the claimant was later taken out of work again by Dr. Renstrum, the claimant filed a Form 5, Notice of Injury and Claim for Compensation.

19. In response to the claimant's Form 5 filed on August 2, 1994, Alexsis Insurance, for the first time, denied liability, arguing that the claimant's condition was the result of an aggravation of the original injury of March 18, 1991.

20. On October 20, 1994, the Department issued an interim order directing CNA Insurance to pay benefits to the claimant under 21 V.S.A. §662(c).

21. When CNA Insurance denied the claimant's claim in August 1992, Alexsis Insurance accepted the claim without condition or reserve, and, in fact, reimbursed CNA Insurance for the cost of $70.00 it had incurred in obtaining Dr. Maas' medical records. The first time Alexsis Insurance denied the claim was on September 6, 1994, which was over two years after the claimant was taken out of work, and twenty-one months after Alexsis' own IME physician, Dr. Gates, clearly suggested that the claimant's injury of 1991 was aggravated by continuing to work for the defendant doing repetitive work in 1992.

22. The claimant hired his attorney in 1992, because of Alexsis Insurance's delay in paying temporary total disability benefits.

23. The claimant's attorney testified that she dealt with Mary Boucher at Alexsis Insurance, and was never told by Alexsis that it questioned whether the claimant was entitled to benefits after August 1992, on account of the claimant's injury at that time being an aggravation for which another carrier was responsible. Indeed, Alexsis consistently acted as of it was accepting liability after August 1992, as if it were further treatment for the 1991 injury.

24. Mary Boucher, the adjuster working for Alexsis Insurance on this file, also testified that her routine would be to investigate a claim immediately by talking with the employer and employee, and gathering medical records to determine whether a claim should be accepted or not. She also testified that it was not Alexsis

Insurance Company's practice to voluntarily advance payments if she thought another carrier was responsible; and she testified that Alexsis would not investigate a claim for the period of one or two years before denying it.

25. In 1994, Joyce Lawson at Alexsis Insurance became the adjuster on this file.

26. Both Ms. Boucher and Ms. Lawson testified that they conducted ongoing medical reviews of the claimant's claims, and neither one contested the claimant's entitlement to compensation from Alexsis Insurance based on his August 1992, injury.

27. It is clear from the evidence that Alexsis Insurance made a decision to accept the claimant's claims beginning in July and August 1992, as a continuation of the claimant's 1991 injury, and to begin paying benefits voluntarily without making a claim against CNA Insurance.

28. CNA argues that Alexsis did not competently manage the claimant's claim. In particular, it points to two incidents. The claimant's treatment with Dr. Renstrum was delayed because Alexsis Insurance did not deliver the needed medical records to Dr. Renstrum. The claimant canceled his initial appointment with Dr. Renstrum twice before finally seeing him. Also, the claimant had to cancel his IME appointment with Dr. Gates in December 1992, due to Alexsis' failure to deliver the medical records to him.

CONCLUSIONS

1. Under Vermont law, the doctrine of laches is available to bar a claim where the failure to assert the claim for an unreasonable period of time has been prejudicial to the adverse party. Turner v. Turner, 121 Vt. 253 (1973). The doctrine of laches is applied to prohibit the maintenance of actions where the party requesting relief has failed to assert his right or an unreasonable and unexplained period of time and where the delay has prejudiced the defending party. American Trucking Ass'ns v. Conway, 152 Vt. 363 (1989).

2. Also under Vermont law, waiver is the intentional relinquishment or abandonment of a known right, and it may be demonstrated by words or conduct. Toys, Inc. v. F.M. Burlington Co., 155 Vt. 44 (1990); Lynda Lee Fashions, Inc. v. Sharp Offset Printing, Inc., 134 Vt. 167 (1976). Unlike estoppel, waiver does not require proof of prejudice to be effective as a defense to bar a claim. Id.

3. The doctrine of equitable estoppel "precludes a party from asserting rights which otherwise may have existed as against another party who has in good faith changed his position and relies upon earlier representations." My Sister's Place v. City of Burlington, 139 Vt. 602 (1981). The party to be estopped must know the facts; intend that his conduct be acted on or he must so act that the party asserting the estoppel has the right to believe it is so intended; and the latter party must be ignorant of the true facts and rely on the other's conduct to his detriment. Id.

4. Under the Processes And Procedure For Claims Under the Vermont Workers' Compensation And Occupational Disease Acts,

(Sept. 1989), upon receipt of a claim, an insurance carrier was required to "promptly investigate and determine whether or not compensation is due." If the carrier were to determine that compensation was not due, it was required to notify the Commissioner of denial of the claim, and the reasons therefore, within 21 days of the notice of the injury. If the carrier were to determine that compensation was due, it was to file a compensation agreement to be approved by the Commissioner. Alexsis Insurance did neither of these things in August 1992, when it received notice from the claimant that the claimant was looking to it for compensation. Alexsis did not act to deny liability for two years.

5. 21 V.S.A. §662 sets forth a procedure which requires that the insurance company either enter into a clear agreement for compensation, or deny compensation and so inform the Commissioner. It further provides that if one carrier denies compensation on the assertion than another carrier is responsible, an interim order for compensation can be made without prejudicing either carrier's future rights to a hearing and determination of liability.

6. The Commissioner has consistently held that the inability to control or manage a claim or the medical treatment being received by a claimant is prejudicial. CNA Insurance was prejudiced by Alexsis Insurance Company's delay in making a claim against CNA Insurance. It would be too speculative to inquire into whether CNA Insurance would have managed the claimant's treatment any different than Alexsis Insurance. Simply the lack of opportunity to manage the claim is sufficient to find prejudice.

7. Alexsis argues a carrier "irrevocably accepts a claim only where it provides benefits pursuant to a signed agreement" and "absent such an agreement a carrier preserves its procedural right to seek reimbursement."

8. There is no legal support for Alexsis' argument that if there is no formal agreement between the carrier and the claimant, the carrier preserves procedural rights. Just as the doctrines of waiver, estoppel and laches would be available to a claimant against a carrier who pays benefits for two years without challenging liability (regardless of the lack of an executed compensation agreement), so are those doctrines available to a carrier against whom a reimbursement claim is brought.

9. Therefore, under the doctrines of waiver, estoppel and laches, Alexsis will not be permitted to shift responsibility for this claim to CNA Insurance. When Alexsis accepted the claim in September 1992, it knew that CNA had denied the claim. Alexsis reimbursed CNA for its expenses in reviewing the claim before its denial. Alexsis continued to collect and evaluate the claimant's medical records, and never asserted any claim against CNA. CNA clearly relied upon Alexsis' acceptance of the claim, as it took no action to monitor the claim, manage medical treatment, or collect or review any medical records. CNA was not informed of any facts alleging that the claimant's condition in 1992 was an "aggravation" of the 1991 injury, and, therefore, took no action to investigate or medically develop its position during the claimant's treatment between August 1992 and September 1994.

10. The Commissioner does not intend to rule by this decision that a carrier irrevocably waives its procedural rights by making voluntary payments. Rather, the Commissioner rules only that in this case, under these circumstances, Alexsis Insurance voluntarily accepted liability and waived its right to seek reimbursement or shift responsibility to CNA.

11. Therefore, the Commissioner need not determine whether the claimant's treatment beginning in July 1992 was for an aggravation of the claimant's 1991 injury, as even if the Commissioner were to find that it was an aggravation, Alexsis Insurance is barred from denying liability and from seeking reimbursement from CNA Insurance under the circumstances of this case.

ORDER

IT IS THEREFORE ORDERED, that Alexsis Insurance reimburse CNA Insurance for benefits it has paid to the claimant, and that Alexsis Insurance continue paying benefits to the claimant according the parties' stipulations in this case, and according to the terms of the Vermont Workers' Compensation Act.

Dated this 12th day of March 1996.

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Mary S. Hooper
Commissioner