

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

)	State File No. M-25299
)	
Harold Carter)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
Fred's Plumbing and Heating, Inc.)	Commissioner
)	
)	Opinion No. 14A-01WC

AMENDED RULING ON MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Vincent Illuzzi, Esq. for the claimant
David A. Barra, Esq. for Employers' Mutual
John W. Valente, Esq. for American Fidelity/AIG
Edward R. Kiel, Esq. for Travelers/Aetna
Christopher McVeigh, Esq. for Fidelity/Continental
Gregory P. Howe, Esq. for Fred's Plumbing & Heating

Background

After the claimant filed his appeal to the June 6, 2001 opinion in this case, the commissioner withdrew that portion of the decision dismissing the party insurers. Since then, Liberty Mutual by stipulation and order has been dismissed, Attorney Howe has entered an appearance for Fred's Plumbing and Heating, the claimant has filed a motion to reconsider the decision, the defendant insurers have renewed their motions for summary judgment and have challenged this Department's authority to withdraw a decision once an appeal has been filed and Fred's Plumbing and Heating has filed a Motion for Summary Judgment.

This amended decision is issued in the interest of judicial economy. The essential legal basis on which Summary Judgment for the defendants was granted, that this claim is time barred, has not changed.

Opinion and Order

In June 1999 the claimant filed a claim against Carl Hackett d/b/a Hackett's Plumbing and Heating and Fred's Plumbing and Heating alleging that he had developed an occupational disease while working as a plumber. The employer and the carriers have moved for summary judgment. All defendants argue that the applicable statute of limitations bars this action; and the carriers argue that there is no evidence that any one of them provided workers' compensation insurance to the employer during the relevant time periods. They have submitted an affidavit and deposition transcript of Edward Camp, agent who had sold insurance to the employer. This

opinion is based on official Department forms, a transcript of an interview between the Travelers and the claimant, offered by the claimant, and the transcript of the deposition of Mr. Camp.

Uncontested Facts:

1. The claimant worked in the field as a plumber, during which time he may have been exposed to asbestos, from 1957 through 1981.
2. From approximately April 1957 to November 1973, Hackett employed the claimant.
3. From approximately November 1973 until he retired in 1988, claimant worked for Fred's Plumbing and Heating, Hackett's successor in interest.
4. From 1981 to 1988 the claimant worked in the shop where the potential exposure to asbestos was absent.
5. Claimant has not worked since he retired in 1988.
6. On June 4, 1999 Robert Primeau, M.D. signed a physician statement that the claimant has pulmonary asbestosis.
7. No evidence has been produced to prove what company insured the employer for workers' compensation purposes before 1983.
8. Edward Camp testified that he has a vague memory that Employers' Mutual insured the employer from 1974 to 1983, but he had no records to substantiate that belief.
9. American Fidelity/AIG insured the employer from 1983 to 1986.
10. At no time relevant to this action did Liberty Mutual insure the employer for workers' compensation purposes. At his deposition, Mr. Camp explained that he had erred in a letter stating that Liberty Mutual had insured the employer from 1986 to 1987.
11. It was Aetna who insured the employer from 1986 to 1987.
12. Travelers insured the employer from 1987 to 1989.
13. Fidelity/Continental insured the employer from 1989 to 1995.

CONCLUSIONS OF LAW:

1. When there is no genuine issue of material fact and a party is entitled to judgment as a matter of law, summary judgment should be granted. *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt 25, 28 (1999). “In determining whether a dispute over material fact exists, we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material.” *Id.* (citation omitted). Taking the facts in the light most favorable to this claimant, any exposure to asbestos occurred during the time he worked in the field, from 1957 to 1981. There is no suggestion that he had any such exposure when he worked in the shop from 1981 to 1988, nor that there was any exposure after 1988.
2. The law in effect at the time of the last injurious exposure controls for the purpose of this claim. *Cf. Montgomery v. Brinver Corporation*, 142 Vt. 461 (1983) (right to compensation under Workers' Compensation Act governed by the law in force at the time of the occurrence of the injury.) That law was the Vermont's Occupational Disease Act, which was in effect and existence when the claimant suffered his last injurious exposure to asbestos in 1981 and when he discovered his injury, a date that was no later than his physician's statement in June 1999. Therefore, if this claim accrued at the time of discovery, the law in effect at that time—the Occupational Disease Act—would control and bar this claim. *See, Cavanaugh v. Abbott Laboratories*, 145 Vt. 516 (1985). (Applicable statute of limitations is the one in effect when plaintiff's cancer first discovered).
3. The Occupational Disease Act allowed compensation for “disablement arising out of and in the course of employment and resulting from an occupational disease.” 21 V.S.A. § 1001. The Act also provided that “[c]ompensation 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.” *Id.* § 1006 (a).
4. 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.” *Id.* § 1004 (a). In this case, the physician statement is dated June 4, 1999, more than five years after his last injurious exposure to asbestos. Therefore, under the statute in effect at the time of the claimant's last injurious exposure, this action is time barred. *See, Comstock v. Columbo Granite, Inc.*, Opinion No. 06-01WC (Mar. 7, 2001) (claim for silicosis filed more than five years after the claimant's last injurious exposure dismissed; discovery of silicosis occurred before 1999 repeal of Occupational Disease Act).
5. The claimant's motion to reconsider the decision to dismiss this case is denied.
6. However, any determination as to the liability of the various insurers is one for the superior court, not this department. While the commissioner “should pass upon the primary liability of the parties defendant, he is not required or authorized under the act to pass upon the ultimate rights or liability as between carriers. For such relief or aid some tribunal other than that of the Commissioner of Industrial Relations must be resorted to.” *Morrisseau v. Legac*,

123 Vt. 70, 78 (1962); See also *King v. Lowell*, 160 Vt. 614 (1993) (mem) (determination of allocation of payments, if any, must be resolved between subcontractor and general contractor in a superior court).

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, the Employer's Motion for Summary Judgment is GRANTED.

Dated at Montpelier, Vermont this 6th day of November 2001.

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.

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Keith J. Kasper, Esq. for Liberty Mutual

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CONCLUSIONS OF LAW:

1. When there is no genuine issue of material fact and a party is entitled to judgment as a matter of law, summary judgment should be granted. *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt 25, 28 (1999). "In determining whether a dispute over material fact exists, we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Id.* (citation omitted). Taking the facts in the light most favorable to this claimant, any exposure to asbestos occurred during the time he worked in the field, from 1957 to 1981. There is no suggestion that he had any such exposure when he worked in the shop from 1981 to 1988, nor that there was any exposure after 1988.
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3. The Occupational Disease Act allowed compensation for “disablement arising out of and in the course of employment and resulting from an occupational disease.” 21 V.S.A. § 1001. The Act also provided that “[c]ompensation 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.” Id. § 1006 (a).
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5. As set out below, even if this were a timely claim with respect to the employer, the action against each of the insurance companies named would have to be dismissed.

Employer’s Mutual:

6. Mr. Camp was unable to substantiate his initial suggestion that Employer’s Mutual insured the employer from 1974 to 1983 and no party has produce any evidence that Employers Mutual ever insured Fred’s Plumbing and Heating or Hackett’s. Therefore, Employer’s Mutual could not be liable on the evidence available at this time.

Liberty Mutual:

7. It is obvious from the record that Liberty Mutual, brought into this action due to a misunderstanding, never insured the employer in this case and should never have been made a party. Its motion for summary judgment with prejudice must be granted.

American Fidelity/AIG:

8. American Fidelity/AIG was on the risk from 1983 to 1986, after the claimant’s exposure to asbestos. Therefore, it cannot be responsible for the development of his asbestosis.

Travelers/Aetna:

9. Travelers and/or Aetna insured the employer from December 1, 1986 to December 1, 1989 after the claimant’s alleged exposure to asbestos. It cannot be responsible for this claim either.

Continental Insurance:

10. It is clear from the undisputed facts that Continental Insurance Company was not on the risk at the time of the claimant's exposure to asbestos. It came on the risk after his retirement from Fred's Plumbing and Heating. Therefore, as a matter of law, Continental Insurance Company could have no liability for this claim.

ORDER:

Based on the Foregoing Findings of Fact and Conclusions of Law, the Defendants' Motions for Summary Judgment are GRANTED.

Dated at Montpelier, Vermont this 6th of June 2001.

R. Tasha Wallis
Commissioner

Appeal:

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