Randall v. North Country Vending, Inc. (February 25, 2005)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Troy Randall	)	Opinion No. 18-05WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
North Country Vending, Inc.	)	For: Laura Kilmer Collins
	)	Commissioner
	)	
	)	State File No. S-10767

APPEARANCES:

Steven Adler, Esq., for the Claimant
Keith J. Kasper, Esq., for the Defendant TIG.
Andrew C. Boxer, Esq., for Defendant Travelers

RULING ON MOTIONS FOR SUMMARY JUDGMENT

These motions came before the department first on claimant's motion for summary judgment on the issue of compensability, opposed by The Travelers, and later on TIG's motion for summary judgment on the grounds that this claim is barred by the six-year statute of limitations in effect at the time of this injury, 21 V.S.A. § 660. (Since amended to provide for a three-year statute of limitations).

For purposes of this motion, the undisputed facts are as follows.

1. Claimant worked for North Country Vending, a company owned by his father, since 1985.

2. On December 1, 1996 claimant was injured at work while moving and lifting vending machines. Although no report was filed with the workers' compensation insurance carrier, TIG, the employer paid for medical expenses and kept him on the payroll during the disability.

3. Claimant had back surgery, although records do not reference a work related event.

4. On December 11, 2001, a First Report of Injury was filed for a back injury. In the section asking how the accident occurred is written: "EE [employee] had back surgery in 1996, and fracture back in 2000; EE has been in pain for last 2 to 3 months, EE went to Dr., had a MRI, EE had a hernia disk, work related due to

lifting, moving and other work activities." The Travelers was the workers' compensation carrier for North Country Vending in 2001.

5. On October 15, 2004, claimant filed a Form 5 Notice of Injury with this department for the 1996 injury. TIG filed a Form 2 Denial on October 18, 2004.

The Vermont Rules of Civil Procedure apply to contested workers compensation proceedings, if they do not interfere with the informal nature of the hearing. WC Rule 7.100; see also *Dodge v. Precision Construction Products, Inc*. 2003 VT 11 ¶ 5. Therefore, these motions for summary judgment are properly before the Department. Judgment will be granted if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56 (c)(3). In considering the respective motions, the nonmoving party shall be given the benefit of all reasonable doubts and inferences. See *King v. Gorczyk,* 2003 VT 34, ¶7.

Claimant argues that his and his father's affidavits describing work related activities that led to claimant's back injuries and 2004 medical opinions establishing causation prove there are no genuine triable issues, entitling him to judgment as a matter of law. However, as The Travelers has shown, medical records contemporaneous with the claimed injury do not mention a work related event, calling into question the basis of the later medical opinion and challenging credibility, thereby precluding judgment as a matter of law for the claimant.

Next, TIG argues that the claim for the 1996 injury is barred as untimely and seeks judgment as a matter of law. TIG interprets the facts to mean that no claim was brought for a 1996 injury until 2004, clearly outside the statute of limitations. Claimant on the other hand argues that timely notice was given to the employer in 1996, but that the employer failed to notify TIG.

The Vermont Workers' Compensation Act (Act) has two statutes of limitations. Under § 656 (a), "A proceeding under the provisions of this chapter for compensation shall not be maintained unless a notice of the injury has been given to the employer as soon as practicable after the injury occurred, and unless a claim for compensation with respect to an injury has been made within six months after the date of the injury." However, failure to file a timely notice "shall not be a bar to proceedings under the provisions of this chapter, if it is shown that the employer . . . had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice." § 660; see also 2004 *Kraby v. Vermont Telephone Co*. 120 ¶ (employer's knowledge of the accident meets statutory requirement).

In this case, the employer had knowledge of the injury, knowledge that must be imputed to the carrier because '"employer' includes the employer's insurer so far as applicable." § 601(3). Furthermore, this employer-insurer unity in identity for workers' compensation is reinforced in the statutory requirement that insurance polices and contracts must include a provision stating that "notice to or knowledge of the occurrence of an injury on

the part of the employer shall be deemed notice or knowledge, as the case may be on the part of the insurance carrier…" § 694.

Next was the requirement that "Proceedings to initiate a claim for a work-related injury pursuant to this chapter may not be commenced after six years from the date of injury." §660(a). TIG argues that the "proceeding to initiate the claim" was the Form 5 in 2004, outside the six years. But it cannot be ignored that a claim for claimant's back injury was filed in 2001, within the six years. That the insurer was Travelers, not TIG, is not knowledge a claimant would have had. What was known in 2001 about the 1996 injury is a material issue of fact, precluding summary judgment.

Therefore, both motions for summary judgment are DENIED.

Dated at Montpelier, Vermont this 25th day of February 2005.

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Laura Kilmer Collins
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.