STATE OF VERMONT
DEPARTMENT OF LABOR

Curtis Smiley	Opinion No. 12-12WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
State of Vermont	For: Anne M. Noonan Commissioner
	State File No. J-15114

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUE PRESENTED:

Did Defendant waive its right to deny Claimant's claim for permanent partial disability benefits on statute of limitations grounds by scheduling an independent medical examination for the purpose of obtaining a permanent impairment rating?

EXHIBITS:

Defendant's Exhibit A:	First Report of Injury
Defendant's Exhibit B:	Dr. Thatcher medical record, July 8, 1996
Defendant's Exhibit C:	Correspondence from Attorney McVeigh, October 21, 2010
Defendant's Exhibit D:	Correspondence from Attorney McVeigh, November 23, 2010
Defendant's Exhibit E:	Correspondence from Lori Clark, December 23, 2010 and January 4, 2011
Defendant's Exhibit F:	Correspondence from Attorney McVeigh, March 10, 2011
Defendant's Exhibit G:	Denial of Workers' Compensation Benefits (Form 2), with attached correspondence from Ms. Clark, May 16, 2011
Defendant's Exhibit H:	Notice and Application for Hearing (Form 6), with attached correspondence from Attorney McVeigh, June 3, 2011
Defendant's Exhibit I:	Correspondence from Mary Sarazin, September 2, 2011
Defendant's Exhibit J:	Correspondence from Attorney Blake, September 7, 2011
Defendant's Exhibit K:	Correspondence from Attorney McVeigh, October 18, 2011
Defendant's Exhibit L:	Email from Rebecca Smith, October 27, 2011
Defendant's Exhibit M:	Email from Attorney Blake, October 31, 2011
Defendant's Exhibit N:	Email from Rebecca Smith, November 1, 2011

Claimant's Exhibit 1:	Email from Attorney McVeigh, November 1, 2011
Claimant's Exhibit 2:	Correspondence from Ms. Clark, December 23, 2010
Claimant's Exhibit 3:	Statement of Curtis Smiley, January 3, 2012
Claimant's Exhibit 4:	Deposition of Lori Clark, January 31, 2012

FINDINGS OF FACT:

Considering the facts in the light most favorable to the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. Claimant suffered a work-related left ankle fracture on January 20, 1996. Defendant accepted the injury as compensable and paid workers' compensation benefits accordingly.

2. Following a course of medical treatment with Dr. Thatcher, by July 8, 1996 Claimant had returned to work and overall appeared to be doing quite well. He declined physical therapy for his lingering symptoms. Dr. Thatcher anticipated that these would continue to improve over time, and therefore advised him to return for treatment only as needed.

3. There was no further activity on Claimant's claim for a period of approximately fourteen years, until October 21, 2010. On that date, Claimant's counsel entered his appearance on Claimant's behalf with Lori Clark, Defendant's workers' compensation claims adjuster.

4. By letters dated November 23, 2010 and December 6, 2010 Claimant's counsel requested that Ms. Clark confirm when a permanency evaluation for Claimant's work-related injury had been scheduled.

5. By letters dated December 23, 2010 and January 4, 2011 Ms. Clark advised Claimant's counsel that, "as is our privilege under Vermont Workers' Compensation Statute §655," an independent medical examination had been scheduled for Claimant with Dr. Backus. The stated purpose of the exam was "to determine the extent of any permanent disability, and to determine whether you have reached medical end result from your injury." Last, the letters stated, "Please be aware that your workers' compensation benefits will be affected if you do not appear at the above scheduled appointment."

6. Claimant attended Dr. Backus' independent medical examination as scheduled. In doing so, he expended an unspecified amount of time. He also incurred unspecified mileage expenses.

7. On March 10, 2011 Claimant's counsel advised Ms. Clark by letter that he had scheduled a permanent impairment evaluation for his client with Dr. White.

8. On May 16, 2011 Defendant filed a Denial of Workers' Compensation Benefits (Form 2) with the Department, in which it asserted, "Permanency and permanency evaluation is time barred. SOL has expired. Carrier was under no legal obligation to pursue in 1996."

9. Appended to Defendant's Form 2 Denial was a letter from Ms. Clark, in which she offered the following additional assertions:

- That Dr. Backus had rated Claimant with a one percent permanent impairment referable to his work injury; and

- That in a telephone conversation with Claimant's counsel on February 9, 2011 she explained Defendant's position that the statute of limitations had expired. Nevertheless, "in the spirit of compromise and swift resolution" she offered to pay the one percent impairment to Claimant, but only if he would forego any claim for interest and penalties. Otherwise, she asserted, she "would be filing a denial for the entire permanency".

10. On June 3, 2011 Claimant filed a Notice and Application for Hearing (Form 6) with the Department, in which he sought permanent partial disability benefits causally related to his 1996 work injury, with interest. In his cover letter appended to the Form 6, Claimant's counsel asserted: (1) that both Dr. Backus and Dr. White had rated Claimant with a one percent permanent impairment; (2) that Claimant had demanded permanency benefits in accordance with those ratings, plus interest; and (3) that soon after receiving his demand Defendant filed its denial.

11. On September 2, 2011 the Department scheduled an informal conference. It also notified Defendant of its obligation to provide a written answer to Claimant's hearing request, pursuant to Workers' Compensation Rule 4.1300. That rule provides, in relevant part: "The opposing party shall serve an answer specifically stating the defenses to each claim asserted . . .. This provision shall not be construed to bar the timely assertion of additional defenses when justice so requires."

12. On September 7, 2011 Defendant provided its written answer to Claimant's hearing request, as required by Rule 4.1300. In it, Defendant specifically pled statute of limitations as an affirmative defense.

13. In her deposition testimony Ms. Clark acknowledged that she likely knew at the time she scheduled Dr. Backus' January 2011 permanency evaluation that more than six years had elapsed since Claimant's last injury-related medical treatment. However, she denied having had "in her recall" at the time specific knowledge as to exactly when the statute of limitations would have expired on his permanency claim. Ms. Clark did not personally become aware of the latter fact until some time after Dr. Backus' evaluation, when Claimant's counsel raised the issue of interest and penalties in a discussion with her. At that point, she consulted with Defendant's legal counsel and learned that the applicable statute of limitations was six years.

14. Though not addressed in the context of the pending motion for summary judgment, among the disputed legal issues in this claim is the question whether Defendant had an affirmative obligation to investigate the extent of Claimant's permanent impairment at whatever time he likely reached an end medical result for his January 1996 injury. To resolve this question will require an analysis of whether the May 1996 amendment to Workers' Compensation Rule 18, which imposed such a responsibility where none had existed before, was substantive or procedural in nature. If it qualifies as a substantive amendment, then the new rule cannot be applied to claims arising from injuries that occurred prior to its effective date, as Claimant's did. If the amendment is deemed procedural, then it can be used to affect the parties' respective rights and responsibilities in this claim. *Myott v. Myott*, 149 Vt. 573, 575-76 (1988); *Montgomery v. Brinver Corp.*, 142 Vt. 461 (1983). As the parties have not yet submitted this issue for my review, the following discussion is limited solely to the waiver question.

DISCUSSION:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

2. The legal issue presented here is whether by arranging for Claimant to undergo a permanency evaluation Defendant thereby waived its right to deny his claim for permanency benefits on statute of limitations grounds. Defendant asserts that there are no genuine issues of material fact, and that as a matter of law its actions cannot be construed to constitute a waiver.

3. A waiver is the voluntary relinquishment of a known right. To establish it, "there must be shown an act or an omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right in question." *Holden & Martin Lumber Co. v. Stuart*, 118 Vt. 286, 289 (1954). A waiver can be express or implied, but if it is the latter, "caution must be exercised both in proof and application. The facts and circumstances relied upon must be unequivocal in character." *Id.*

4. Applied in the workers' compensation context, the commissioner consistently has held that an employer's payment of medical bills alone does not constitute a waiver of its right to contest other aspects of an injured worker's claim for benefits. *See, e.g., Hastings v. Green Mountain Log Homes,* Opinion No. 03-09WC (January 21, 2009); *Brace v. Vergennes Auto, Inc.*, Opinion No. 42-06WC (October 9, 2006); *Briggs v. Maytag Homestyle Repair, Inc.*, Opinion No. 18-00WC (June 29, 2000). As appears to have been the case in *Hastings*, the cost of paying a relatively small bill sometimes is deemed less burdensome than the cost of litigating responsibility for it. In this respect, an employer's decision to pay a benefit rather than contest liability might reflect more of a business analysis than a legal one.

5. Here, even considering the evidence in the light most favorable to Claimant, I cannot impute to Defendant's adjuster the clear and unequivocal intention necessary to imply any waiver of the statute of limitations defense. Certainly her uncontradicted deposition testimony fails to establish her intent to do so.

6. Nor did the adjuster's actions indicate any intent, express or implied, to abandon the statute of limitations. On its face, all that her decision to schedule Claimant for a permanency evaluation signified was simply her need to assign a dollar value to his claim for benefits. Only with this information in hand could she properly evaluate that claim, if not from a legal perspective then surely from a business perspective.

7. Claimant asserts that it is reasonable to impute to Defendant's adjuster the knowledge that she might deny his claim for permanency benefits on the grounds that it was time-barred merely because fourteen years had passed since he had last treated for his work injury. As Claimant well knows, however, the viability of an employer's statute of limitations defense can be far more complicated than just a matter of counting years. *See, e.g., Longe v. Boise Cascade Corp.*, 171 Vt. 214 (2000). Indeed, whether the defense will shield Defendant from liability in this case depends not just on the waiver issue but also on the question whether Defendant breached a duty to investigate the extent of Claimant's permanent impairment many years earlier. Under this circumstance, it would be unfair to impute to Defendant's adjuster the knowledge that the statute of limitations might be used to defeat Claimant's claim without also imputing to her the knowledge that it might not.

8. Claimant's final argument – that Defendant should not have asked him to expend the time and effort necessary to attend Dr. Backus' permanency evaluation if it did not intend to pay permanency benefits accordingly – is equally unpersuasive. After all, it was Claimant who first requested that Defendant schedule a permanency evaluation, not the other way around. Similarly, it was Claimant himself who scheduled a second permanency evaluation with his own medical expert, Dr. White, in March 2011, some six weeks *after* Defendant's adjuster first raised the statute of limitations as an issue in the case. If anything, knowing that Claimant had retained an attorney and was aggressively pursuing his permanency claim would be another reason for Defendant's adjuster to want to ascertain its dollar value prior to determining how best to proceed. I cannot accept that Defendant somehow misled Claimant to his detriment merely by acquiescing to his attorney's repeated requests that an evaluation be scheduled.

9. I conclude that the evidence is insufficient as a matter of law to establish that Defendant waived its right to deny Claimant's claim for permanency benefits on statute of limitations grounds merely by virtue of the fact that it arranged and paid for him to undergo a permanency evaluation.

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED**. Defendant is not barred on waiver grounds from asserting the statute of limitations as a defense to Claimant's claim for permanency benefits causally related to his January 1996 work injury.

DATED at Montpelier, Vermont this 15th day of April 2012.

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Anne M. Noonan
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.