STATE OF VERMONT
DEPARTMENT OF LABOR

Lydia Diamond

v.

Burlington Free Press

Opinion No. 21-16WC

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

For: Anne M. Noonan
Commissioner

State File No. R-19764

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

William B. Skiff, Esq., for Claimant
J. Justin Sluka, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant entitled to additional permanent partial disability benefits after having received a permanent partial disability award for the same injury in 2004?

EXHIBITS:

Claimantôs Statement of Undisputed Material Facts
Defendantôs Statement of Undisputed Material Facts
Defendantôs Response to Claimantôs Statement of Undisputed Material Facts

Defendantôs Exhibit A:	First Report of Injury (Form 1)
Defendantôs Exhibit B:	Medical report of George Connelly, PA-C, April 24, 2001
Defendantôs Exhibit C:	Operative report on right carpal tunnel release, February 7, 2002
Defendantôs Exhibit D:	Operative report on left carpal tunnel release, January 16, 2003
Defendantôs Exhibit E:	Operative report on disc fusion surgery, September 15, 2003
Defendantôs Exhibit F:	Full duty work release from Dr. Horgan, January 20, 2004
Defendantôs Exhibit G:	IME report from Dr. Backus, March 10, 2004
Defendantôs Exhibit H:	Agreement for Permanent Partial Disability Compensation (Form 22) approved August 20, 2004
Defendantôs Exhibit I:	Operative report on disc fusion surgery, April 19, 2012
Defendantôs Exhibit J:	Claimantôs filing of Agreement for Permanent Partial Disability Compensation (Form 22), Agreement for Temporary Total Disability Compensation (Form 21), and IME with impairment rating by Dr. Backus
Defendantôs Exhibit K:	Claimantôs filing of Notice and Application for Hearing (Form 6) concerning entitlement to medical benefits, March 15, 2013

Defendantôs Exhibit L:	Dr. Horganôs letter dated April 1, 2013
Defendantôs Exhibit M:	Dr. Horganôs letter dated April 11, 2014
Defendantôs Exhibit N:	Operative reports on fusion (2012) and revision (2014) surgeries
Defendantôs Exhibit O:	IME report from Dr. White, June 1, 2015
Defendantôs Exhibit P:	Claimantôs request for retroactive permanency benefits, September 24, 2015
Defendantôs Exhibit Q:	IME report from Dr. White, December 7, 2015

FINDINGS OF FACT:

The following facts are undisputed:

1. Claimant is an employee and Defendant is an employer within the meaning of the Vermont WorkersôCompensation Act.

2. Judicial notice is taken of all forms and correspondence in the Departmentôs file relating to this claim.

3. On April 2, 2001 Claimant was rear-ended in a three-car accident arising out of and in the course of her employment delivering newspapers for the Burlington Free Press.

4. As a result of the work accident, Claimant suffered an exacerbation of her pre-existing right carpal tunnel syndrome. She underwent surgical release of her right carpal tunnel in February 2002. Unrelated to this claim, she underwent surgical release of her left carpal tunnel in January 2003.

5. After the carpal tunnel surgeries, it became clear that Claimant had unresolved neck pain dating back to the work-related accident in 2001. Her doctor diagnosed disc herniations in her cervical spine, and she underwent cervical fusion at C5-6 and C6-7 in September 2003.

6. Claimant recovered well from the surgery, with full range of motion. Her doctor released her to return to work in January 2004.

7. At her attorneyôs request, in March 2004 Claimant underwent an independent medical examination with Dr. Backus, an occupational medicine specialist. He determined that she had reached an end medical result and assigned a 22 percent whole person permanent impairment relating to her cervical spine injury.[1] In his report, Dr. Backus cautioned that a two-level fusion carries some risk for future cervical spine complications above or below the level of fusion.

[1] The exacerbation of Claimantôs pre-existing carpal tunnel syndrome resulted in a one percent whole person impairment relating to her left upper extremity. Her carpal tunnel syndrome is not at issue in the pending cross motions for summary judgment.

8. Based on Dr. Backusô independent medical examination, the parties entered into an Agreement for Permanent Partial Disability Compensation (Form 22), which included compensation for the 22 percent permanent impairment attributable to the spine injury. The Department approved the agreement in August 2004.

9. Eight years later, in April 2012, Claimant underwent surgical removal of an anterior cervical locking plate, discectomy, and additional fusion at C3-4. Claimantôs attorney notified Defendant of this surgery in November 2012. Defendant did not voluntarily pay for the surgery.

10. In March 2013 Claimant filed a Notice and Application for Hearing (Form 6) as to whether her April 2012 fusion surgery was causally related to her 2001 work injury. In April 2013 her treating neurosurgeon, Dr. Michael Horgan, opined by letter that the April 2012 fusion surgery was necessitated by adjacent segment syndrome stemming from Claimantôs work-related fusion surgery in 2003.

11. In April 2014 Dr. Horgan determined that the second fusion surgery at C3-4 had not healed properly, and recommended revision surgery. In November 2014 Dr. Horgan performed a bilateral C3-4 laminotomy and posterior cervical fusion with mass instrumentation. Defendant voluntarily paid for this surgery.

12. At her attorneyôs request, in June 2005 Claimant underwent an independent medical examination with Dr. White, an occupational medicine specialist. Dr. White determined that she was at a medical end result and assigned a whole person permanent impairment rating of 35 percent. Of this amount, he attributed twelve percent to Claimantôs 2012 and 2014 surgeries, both of which post-dated Dr. Backusô 22 percent impairment rating.

13. In September 2015 Claimant made a demand for additional permanent partial disability benefits based on Dr. Whiteôs impairment rating.

14. In December 2015 Dr. White re-examined Claimant and confirmed his whole-person impairment rating of 35 percent relative to the cervical spine.

15. In March 2016 the Department issued an interim order that Defendant pay for the April 2012 fusion surgery at C3-C4.

CONCLUSIONS OF LAW:

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 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. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979).

2. The parties here each claim that they are entitled to judgment in their favor as a matter of law on the question of Claimantôs entitlement to additional permanent partial disability compensation. Claimant asserts that her claim is timely under 21 V.S.A. § 660(a) and that she is entitled to the additional benefits as a matter of law. Defendant asserts that Claimantôs request for additional compensation is time-barred under 21 V.S.A. § 668.

3. Section 660(a) of the Vermont Workersô Compensation Act sets forth the general statute of limitations applicable to workersô compensation claims. It provides: ñProceedings to initiate a claim for a work-related injury pursuant to this chapter may not be commenced after three years from the date of injury. This section shall not be construed to limit subsequent claims for benefits stemming from a timely filed work-related injury claim.ò

4. Section 660(a) does not specify a time limit on a claimantôs subsequent claims for specific benefits stemming from a timely filed claim, but Workersô Compensation Rule 3.1700 imposes such a limit. Rule 3.1700 provides:

> **Statute of limitations**. Proceedings to initiate a claim for a work-related injury may not be commenced after three years from the date of injury. 21 V.S.A. § 660(a). This provision shall not be construed to limit a subsequent claim for benefits stemming from a timely filed work-related injury claim; such claims shall be filed within six years of the date on which they accrue. [2]

[2] Rule 3.1700 became effective on August 1, 2015. Prior to that date, the limitations period derived from the limitations period for contract actions generally. *Smiley v. State*, 2015 VT 42; *Hoisington v. Ingersoll Electric*, Opinion No. 52-09WC (December 28, 2009) (six-year contract statute of limitations applies), *citing Fitch v. Parks & Woolson Machine Co.*, 109 Vt. 92, 98 (1937).

5. Neither § 660(a) nor Rule 3.1700 bar Claimantôs claim for additional permanent partial disability compensation. Claimant complied with § 660(a) by initiating a claim for her work-related injury in 2001, the year in which the work-related accident occurred.[3] She complied with Rule 3.1700 by filing her subsequent claim for additional permanent partial disability compensation on September 24, 2015, less than four months after her claim for additional compensation arguably accrued by becoming reasonably discoverable and apparent. *See, e.g., Longe v. Boise Cascade Corp*., 171 Vt. 214, 219 (2000) (statute of limitations begins to run from ñthe point in time when an injury becomes reasonably discoverable and apparentò), *citing Hartman v. Ouellette Plumbing & Heating Corp*., 146 Vt. 443, 447 (1985); *see also Kraby v. Vermont Telephone Co.*, 2004 VT 120 (claim for permanent partial disability benefits not reasonably discoverable and apparent until claimant reaches an end medical result).

6. If § 660(a) and Rule 3.1700 were the only time limits applicable to her claim for additional compensation, as Claimant suggests in her motion, then her claim might go forward. However, Claimant is not just seeking additional benefits; she is seeking to modify an award of compensation that has already been approved. Accordingly, her request is governed by a different provision of the statute than the one she cites in her motion.

7. Section 662(a) of the Workersô Compensation Act provides that if the commissioner approves an agreement for compensation entered into between an employer and an employee, the agreement ñshall be enforceable and subject to modification as provided by sections 668 and 675 of this title.ò Claimant and Defendant here entered into an Agreement for Permanent Partial Disability Compensation (Form 22), and the Department approved their agreement on August 20, 2004. That duly executed and approved agreement constitutes a binding and enforceable contract, subject to modification only as provided in the statute.

8. Section 668 of the Workersô Compensation Act, entitled ñModification of Awards,ò provides in part:

> Upon the commissionerôs own motion or upon the application of any party in interest upon the ground of a change in the conditions, or whenever doubts have arisen as to the jurisdiction of the commissioner at the time the petition was presented, the commissioner may at any time within six years of the date of award review any award by giving at least six daysô notice thereof to the parties personally, or to the attorneys appearing in the cause. On such review, the commissioner may make an order ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter.

[3] In 2001, § 660(a) provided a six-year statute of limitations. In 2003, the legislature amended § 660(a), by reducing the limitations period from six years to three years. Claimant here initiated her claim less than one year following her injury.

9. Prior to 1993, § 668 allowed for an award to be modified without referencing a statute of limitations. In 1993 the legislature amended the section, by inserting the words ñwithin six years of the date of awardò preceding the words ñreview any awardò in the first sentence. By doing so, the legislature manifested its specific intent to limit the time frame for seeking modification of an award to six years.

10. The Department approved Claimantôs permanency award on August 20, 2004. She had six years from that date within which to seek modification upon the ground of a change in conditions. That deadline passed on August 19, 2010.

11. Claimant requested modification of her permanent partial disability award on September 24, 2015, on the grounds that her 2012 and 2014 surgeries resulted in a higher permanent impairment rating than the one on which her 2004 permanency award had been based. However, her request came eleven years after her initial award was approved, and therefore five years beyond the statutory time limit.

12. The Department considered the same issue in *Greenia v. Marriott Corp.,* Opinion No. 46-01WC (January 29, 2002). The claimant in *Greenia* suffered a work-related back injury in 1989 and received an award pursuant to an Agreement for Permanent Partial Disability Compensation that the Department approved in June 1990. The claimantôs condition worsened over time, and she sought modification of her award based on two new permanency evaluations. The commissioner wrote: ñSection 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.ò *Id.*

13. Three years later, the Department partially overruled *Greenia*, on grounds that do not apply to the instant case. *See K.T. v. Specialty Paperboard*, Opinion No. 33-05WC (June 24, 2005). The claimant in that case entered into an Agreement for Permanent Partial Disability Compensation, which the Department approved. More than six years later, he sought permanent total disability benefits arising out of the same work-related injury. The defendant argued that he was time-barred from receiving the additional benefits under § 668 because more than six years had elapsed since the original award. The commissioner held that § 668 did not apply to the claim for permanent total disability because the original award was for permanent partial disability, which was not the same benefit. Accordingly, considering an award of permanent total disability benefits would not require modifying the original award of permanent partial disability benefits for purposes of the statute.

14. Claimant cites several cases in her motion, but none of them govern the result here. In *Hoisington v. Ingersoll Electric,* Opinion No. 52-09WC (December 28, 2009), the claimant received permanent partial disability benefits for a shoulder injury. Later, she sought to add a claim for benefits related to a cervical spine injury. The applicable statute of limitations for the new injury was three years, as provided for in 21 V.S.A. § 660, not the six-year limitations period for modifying a permanency award set forth in § 668.

15. Claimant also cites *Hartman v. Ouellette Plumbing & Heating Corp*., 146 Vt. 443, 447 (1985) for the proposition that the statute of limitations would begin to run on her claim for additional permanent partial disability compensation only when she reached an end medical result. *Hartman* was decided in 1985, eight years before the legislature amended 21 V.S.A. § 668 to add a six-year statute of limitations for modifying an existing award. Thus Claimantôs reliance on *Hartman* is misplaced.

16. The statute of limitations set forth in § 668 is narrow in scope, applying only to requests to modify an existing award. If a claimant is seeking a benefit that was not already the subject of an award, including a benefit stemming from a new injury or aggravation, then 21 V.S.A. § 660(a) and Rule 3.1700 govern. Only if the claimant is seeking to modify a previously approved award under § 668 must the request to do so be made within six years thereafter. The statutory language is clear, and unless and until the legislature acts to revise it, I am bound to enforce it as written.

17. The Vermont Supreme Court has specifically approved this interpretation of the statute. In *Marshall v. State, Vermont State Hospital*, 2015 VT 47A, the Court cited with approval the Departmentôs decision in *Catani v. A.J. Eckert Co*., Opinion No. 28-95WC (May 17, 1995). The Court wrote that permitting parties to challenge the finality of an approved award for permanent partial disability compensation would open the floodgates of litigation and result in a chaotic loss of certainty. *Marshall, supra,* ¶ 16. These findings emphasize that agreements for permanent partial disability compensation are intended to be permanent and that modifying such agreements must be closely scrutinized. *Heller v. Bast & Rood Architects,* Opinion No. 14-13WC (May 9, 2013).

18. The purpose of the Vermont Workersô Compensation Act is to provide employees a remedy which is both expeditious and independent of proof of fault, and to provide employers a liability which is limited and determinate. *Kittell v. Vermont Weatherboard, Inc.*, 138 Vt. 439, 441 (1980). In order to strike a balance between these interests, the legislature has approved the concept that unless modified under § 668, an award of the commissioner is final.

19. I conclude that Claimant has missed the statute of limitations for seeking to modify her permanent partial disability award under § 668. I am therefore without authority to review or modify it.

ORDER:

Based on the foregoing, Defendantôs motion for summary judgment is hereby **GRANTED.** Claimantôs cross motion for summary judgment is hereby **DENIED** and her claim for additional permanent partial disability benefits related to her April 2001 compensable cervical spine injury is hereby **DISMISSED**.

DATED at Montpelier, Vermont, this 7th day of November 2016.

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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.