Curtis Smiley v. State of Vermont (June 3, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Curtis Smiley

v.

State of Vermont

Opinion No. 15-13WC

By: Phyllis Phillips, Esq.
Hearing Officer

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

ISSUES PRESENTED:

1. Is Claimant's claim for permanent partial disability benefits referable to his January 29, 1996 compensable work injury barred by the applicable statute of limitations?

2. If yes, is Defendant barred from asserting the defense?

EXHIBITS:

Defendant's Exhibit A:	Dr. Thatcher medical record, July 8, 1996
Defendant's Exhibit B:	Dr. Backus report, January 20, 2011
Defendant's Exhibit C:	Dr. White report, March 24, 2011
Defendant's Exhibit D:	Case note, March 6, 1996
Defendant's Exhibit E:	Workers' Compensation Rule 18 (effective May 15, 1996)
Claimant's Exhibit 1:	Dr. Backus report, January 20, 2011
Claimant's Exhibit 2:	Workers' Compensation Rule 18 (effective May 15, 1996)
Claimant's Exhibit 3:	Dr. Thatcher medical record, July 8, 1996

FINDINGS OF FACT:

The following facts are undisputed:

1. This case arises out of an accepted work injury that occurred on January 29, 1996. *See Smiley v. State of Vermont,* Opinion No. 12-12WC (April 15, 2012), and exhibits admitted therein.

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 file for more than fourteen years, until October 21, 2010. On that date, Claimant's attorney entered his appearance. Subsequently, the attorney advised Defendant that Claimant was pursuing a claim for permanent partial disability benefits referable to his 1996 work injury.

4. In November and December 2010, Claimant's attorney requested that Defendant schedule a permanency evaluation. In response, Defendant scheduled an independent medical evaluation with Dr. Backus, which Claimant attended on January 20, 2011.

5. Dr. Backus determined that Claimant had suffered a one percent whole person permanent impairment referable to his 1996 work injury. Following an evaluation in March 2011, Claimant's own medical expert, Dr. White, also calculated his ratable impairment at one percent.

6. Dr. Backus determined that Claimant probably had reached an end medical result for his work-related injury "back in 1996." Dr. White as well determined that Claimant had reached an end medical result, but did not specify a date when this likely occurred.

7. On May 16, 2011 Defendant filed a Denial of Workers' Compensation Benefits (Form 2), in which it denied Claimant's demand that permanency benefits be paid on the grounds that his claim was time-barred.

8. On June 3, 2011 Claimant filed a Notice and Application for Hearing (Form 6) as to whether he was entitled to permanent partial disability benefits referable to his 1996 work injury.

9. On September 7, 2011 Defendant's counsel filed its answer, which pled the affirmative defense of statute of limitations.

10. Claimant initially argued that Defendant had waived its right to assert a statute of limitations defense by scheduling Dr. Backus' January 2011 permanency evaluation. In a ruling dated April 15, 2012 the Commissioner determined that Defendant's statute of limitations defense was still viable. *Smiley v. State of Vermont*, Opinion No. 12-12WC (April 15, 2012).

11. The remaining issue is whether Claimant's claim for permanent partial disability benefits is in fact time-barred, and if so, whether Defendant should be barred from asserting the defense.

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). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979). That is the case here.

2. The legal issues raised by this claim are similar to those that the Vermont Supreme Court has considered in *Longe v. Boise Cascade Corp.*, 171 Vt. 214 (2000), and *Sanz v. Douglas Collins Construction*, 2006 VT 102. As in *Longe*, Defendant argues that Claimant's claim for permanency benefits is barred by the applicable statute of limitations, because he failed to assert it within six years after reaching an end medical result for his work-related injury.[1] Also as in *Longe*, Claimant argues in response that Defendant should be barred from asserting the statute of limitations as a defense because it owed, and breached, a legal duty to investigate whether any permanent impairment had been suffered. As in *Sanz*, the question whether such a duty existed depends on whether an amended rule should be applied retroactively to govern the parties' rights and responsibilities in this case.

Statute of Limitations

3. According to Vermont's workers' compensation statute, the controlling date for determining when the applicable statute of limitations begins to run is the "date of injury." 21 V.S.A. §660(a). That phrase has long been interpreted to mean "the point in time when an injury becomes reasonably discoverable and apparent." *Longe, supra* at 219, citing *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 447 (1985).

[1] The statute of limitations for initiating a claim for workers' compensation benefits has since been amended, and is now three years. 21 V.S.A. §660(a).

4. Determining when an injury has become "reasonably discoverable and apparent" is a question of fact that necessarily varies from case to case. *Kraby v. Vermont Telephone Co.*, 2004 VT 120, ¶6; *see also, Lillicrap v. Martin*, 156 Vt. 165, 172 (1989) (applying reasonable discovery rule in medical malpractice context). Notably, a litigant "need not have an airtight case before the limitations period begins to run," but merely "should have obtained information sufficient to put a reasonable person on notice that a particular defendant may have been liable" for his or her injuries. *Rodrigue v. Valco Enterprises*, 169 Vt. 539, 540-41 (1999) (applying reasonable discovery rule in dram shop action). The limitations period itself affords ample opportunity subsequently to flesh out the facts and pursue available remedies. *Id.*

5. In the context of a claim for permanent partial disability benefits, the reasonable discovery rule typically requires that the statute of limitations not begin to run until the claimant reaches an end medical result. *Kraby, supra*; *Longe, supra*. "The claim period can only begin to run when there is in fact something to claim," *Hartman, supra* at 446. Not every work-related injury justifies permanency compensation. Until treatment concludes, the ongoing medical recovery process still might yield a full recovery with no permanent impairment at all. *Richardson v. Regular Veteran's Association Post #514*, Opinion No. 04-11WC (February 16, 2011).

6. Applying these rules to the current claim, and considering the evidence in the light most favorable to Claimant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), I conclude as a matter of law that the statute of limitations on Claimant's claim for permanent partial disability benefits began to run on or about July 8, 1996. This was the date on which his treating physician released him from active care, with instructions to follow up only as needed. By this time Claimant had returned to work and there is no evidence that he ever considered resuming treatment subsequently. The logical inference is that both Claimant and his doctor appropriately perceived that treatment for the work-related injury had concluded.

7. What expert evidence there is also establishes July 1996 as the most likely end medical result date. With no record of any subsequent treatment, Dr. Backus' conclusion that Claimant probably had reached the point of maximum medical improvement "back in 1996" likely refers to that timeframe. That his opinion necessarily was retrospective in nature does not in any way disqualify it. *See, e.g., Kraby, supra* (treating surgeon's retrospective declaration of end medical result accepted as determinative).

8. Claimant argues that because the determination of end medical result is a medical opinion requiring expert evidence, and because he is not an expert, he cannot be charged with knowledge of that event sufficient to trigger the statute of limitations until an expert so declared it. I disagree. It is true that medical expert testimony is required to establish those elements of a workers' compensation claim about which "a layman could have had no well-grounded opinion," most notably the causal relationship between an injured worker's employment and his or her injury. *Lapan v. Berno's, Inc.*, 137 Vt. 393, 395 (1979). It does not necessarily follow that a lay person can never be deemed to know whether he or she has concluded treatment, either with or without lingering deficits or dysfunction. Such matters are not so far beyond "the untutored understanding of the average layman" that they are only reasonably discoverable with an expert's assistance. *See Lillicrap, supra* at 174 (noting that recipient of health care services may be aware of fact of a "disability or dysfunction," though admittedly not of its cause); *see also, Bruno v. Directech Holding Co.*, Opinion No. 18-10WC (May 19, 2010) (extension of end medical result date not justified where claimant had failed to actively treat during period in question).

9. As the court explained in *Hartman*, *supra* at 447, the issue raised by the reasonable discovery standard is simply "whether the claimant had any reasonable occasion to file a claim sooner than he did." Though this is ordinarily a question of fact, the evidence here is so clear as to render it a matter of law. Claimant probably would not have described his situation in these terms, but as of July 1996 he knew, or should have known, that he had reached an end medical result, and that whatever deficits he was left with were likely permanent in nature. He then had six years within which to investigate and pursue his legal remedies. Having failed to do so, I conclude that his claim for permanent partial disability benefits is now time-barred.

Duty to Investigate

10. Notwithstanding that Claimant's claim for permanency benefits is time-barred, Defendant still might be precluded from asserting the statute of limitations as a defense if it is shown to have had, and breached, a duty to investigate the extent of his permanent impairment in a more seasonable fashion. Such a duty can be imposed either by way of an applicable statute or rule, or by operation of the doctrines of equitable estoppel or equitable tolling. *Longe, supra* at 223.

(a) The 1996 Amendments to Workers' Compensation Rule 18

11. In 1983, when the injury under consideration in *Longe* occurred, neither the workers' compensation statute nor the applicable rules imposed an affirmative duty on an employer to investigate whether an injured worker had suffered a permanent impairment as a result of a work-related injury. *Longe, supra* at 222. Nor was there any duty owed to notify the worker of his or her right to permanency benefits. *Id.* at 223.

12. Effective May 15, 1996 the Department amended Workers' Compensation Rule 18 and imposed upon employers a duty to investigate the extent of an injured worker's permanent impairment. As amended, the rule now states:

> The employer (insurer) shall take action necessary to determine whether an employee has any permanent impairment as a result of the work injury at such time as the employee reaches a medical end result.
>
> . . .
>
> A determination as to whether the claimant has any permanent impairment shall be made within 45 days of filing the notice of termination [of temporary disability compensation].

Workers' Compensation Rules 18.1100 and 18.1200 (formerly Rules 18(a)(1) and 18(a)(2)).

13. Had Claimant's work injury occurred after May 15, 1996, the effective date of these amendments, there would be no reason to question their applicability to his pending claim for permanency benefits. The injury at issue here occurred some five months earlier, however, in January 1996. Under these circumstances, the question arises whether the amendments properly should control the parties' respective rights and responsibilities in this case.

14. Vermont law provides that the amendment of a statutory provision "shall not affect any right, privilege, obligation or liability acquired, accrued or incurred" prior to the amendment's effective date. 1 V.S.A. §214(b)(2); *Myott v. Myott*, 149 Vt. 573, 575-76 (1988). Phrased alternatively, this general rule of statutory construction prohibits legislative amendments that affect substantive rights and responsibilities from being applied retroactively. In contrast, amendments that are solely procedural can be given retroactive effect, and therefore can be applied to claims that already are pending at the time the new statute becomes effective. *Id.*

15. The Supreme Court has applied these well-established rules specifically to workers' compensation claims. Citing to 1 V.S.A. §214, in *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983), the court declared, "The right to compensation for an injury under the Workmen's Compensation Act is governed by the law in force at the time of occurrence of such injury." The date of an employee's work-related injury is thus the controlling date for determining whether a substantive amendment to the statute will apply.

16. The court clarified what constitutes the "right to compensation" for the purposes of determining whether a statutory amendment is substantive or procedural in *Sanz, supra* at ¶6. A post-injury amendment that "fundamentally changes the right to benefits or the obligation to pay them" is substantive, and cannot be applied retroactively. An amendment that does not fundamentally change pre-existing rights and responsibilities is procedural, and can be applied in a pending action.[2] *Id.*

17. The claimant in *Sanz* suffered a work-related injury in 1998, for which he reached an end medical result in 2003. After some dispute regarding the extent of his permanent impairment, in 2004 the employer accepted his claim for permanent total disability benefits. However, it refused to honor his request that benefits be paid in a lump sum rather than weekly. Relying on a 2000 amendment to the statute, which empowered the commissioner to order payment in a lump sum even without the employer's consent, the claimant sought redress, first before the commissioner and then before the Supreme Court. The issue was whether the amendment to the statute, which was enacted *after* the claimant's injury occurred but *before* his claim for permanent total disability benefits accrued, properly governed his case.

18. Claimant premised his assertion that the amended statute applied to his circumstance on two grounds. First, he argued that because the employer's obligation to pay permanency benefits did not arise until he reached an end medical result in 2003, the law in effect as of that date should control. The court disagreed. Relying on the rule enunciated in *Montgomery, supra,* it held that regardless of when a statutorily defined benefit is required to be paid, the right to receive it – "the right to compensation" – is still acquired at the time of the injury. *Sanz, supra* at ¶11. By the same token, the court continued, "the obligation to pay those benefits is also governed by the law in force at the time of injury." *Id.*

19. Next, the claimant in *Sanz* argued that because the amendment in question altered only the method by which an employer might be obligated to pay permanency benefits, but not the obligation to pay benefits itself, it was procedural rather than substantive in nature, and therefore could be applied retroactively to his claim. The court rejected this argument as well. By allowing the commissioner to order an employer to discharge its payment obligation all at once rather than gradually, it reasoned, the amendment would "fundamentally alter" the employer's obligation. *Id.* at ¶13. Just as significantly, by awarding claimants the opportunity to use or invest a large up-front payment, the amendment would "fundamentally change" the benefit owed them. *Id.* Thus, because the amendment substantially affected both the claimant's right to compensation and the employer's obligation to pay it, the court concluded that it was substantive in nature. As a consequence, it could not be applied retroactively to injuries that predated its enactment. *Id.*

[2] The same substantive-versus-procedural analysis applies to amendments to the administrative rules that govern workers' compensation proceedings. Workers' Compensation Rule 46.1000; *see, e.g., Taft v. Central Vermont Public Service Corp.*, Opinion No. 03-11WC (January 25, 2011).

20. Claimant here makes essentially the same arguments as were asserted in *Sanz*. First, he argues that although the amendments to Rule 18 were not enacted until *after* his work injury occurred, nevertheless they should govern his claim for permanency benefits because they became effective *before* he reached an end medical result. The court specifically rejected this argument in *Sanz, supra* at ¶11, and so I do as well.

21. Second, Claimant asserts that the amendments to Rule 18 can be applied retroactively, because they did not alter any of the parties' fundamental rights or obligations and therefore are appropriately characterized as procedural rather than substantive in nature. Again, I disagree. As the result in *Longe* demonstrated, both the duty to pay permanency benefits and the duty to investigate whether such benefits are payable go to the heart of the responsibilities owed by an employer to an injured worker. By imposing the latter obligation on employers where clearly, according to the court in *Longe*, none had existed before, the amended rule fundamentally altered each party's respective rights and responsibilities. As a consequence, the amendments can only be applied prospectively, to claims involving injuries that occurred after their effective date. That is not the case here.

(b) <u>*Equitable Estoppel and Equitable Tolling*</u>

22. Having concluded that the duty to investigate imposed by the amended Rule 18 did not apply to Defendant's conduct here, the only other basis for excusing Claimant's failure to pursue his permanency claim in a timely manner is if the circumstances justify invoking the doctrines of equitable estoppel or equitable tolling. *Longe, supra* at 226. The undisputed facts do not support applying either doctrine.

23. The doctrine of equitable estoppel promotes fair dealing and good faith "by preventing 'one party from asserting rights which may have existed against another party who in good faith has changed his or her position in reliance upon earlier representations.'" *Beecher v. Stratton Corp.*, 170 Vt. 137, 139 (1990), quoting *Fisher v. Poole*, 142 Vt. 162, 168 (1982). At the doctrine's core is the concept that through its conduct, the party against whom estoppel is asserted must have intended that the other party would be misled to his or her detriment. *Id.*; *Longe, supra* at 224.

24. Absent either a promise or some degree of fraudulent misrepresentation or concealment, generally the doctrine of equitable estoppel will not bar a defendant from asserting the statute of limitations as a defense to another party's claim. *Beecher, supra.* In the workers' compensation context, estoppel applies "when the conduct or statements of an employer or its representatives lull the employee into a false sense of security, thereby causing the employee to delay the assertion of his or her rights." *Freese v. Carl's Service*, 375 N.W.2d 484, 487 (Minn. 1985), quoted in *Longe, supra* at 224.

25. The doctrine of equitable tolling has even more limited application. It is justified only when either "'(1) the defendant actively misled the plaintiff or prevented the plaintiff in some extraordinary way from filing a timely lawsuit; or (2) the plaintiff timely raised the precise claim in the wrong forum.'" *Longe, supra* at 224-225, quoting *Beecher, supra* at 143.

26. Claimant has failed to assert any facts here from which I might conclude that he was misled to his detriment as a result of Defendant's conduct. That he was unaware of his right to seek permanency benefits is apparent from his own failure to act, but this is not sufficient to establish estoppel. *Longe, supra.* What is required is that his failure must have been induced in some way by Defendant's intentional conduct. There is no evidence whatsoever that this is what occurred.

27. Even considering the evidence in the light most favorable to Claimant, I conclude as a matter of law that neither the doctrine of equitable estoppel nor that of equitable tolling justifies barring Defendant from asserting the statute of limitations as a defense to Claimant's claim for permanency benefits.

Summary

28. "The burden is generally on the party seeking relief to take some affirmative action in order to protect his or her rights." *Longe, supra* at 225. If he or she fails to do so, thereby letting the statute of limitations expire, then "absent a legal disability or circumstances sufficient to invoke the doctrines of equitable estoppel or equitable tolling, he has no right to relief." *Id.* at 226. Claimant here did not take action until some years after the statute of limitations on his claim for permanency benefits had expired. His failure to do so is not excused by any neglect of duty on Defendant's part, nor by circumstances sufficient to justify equitable relief in his favor. As a matter of law, his claim is time-barred.

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's claim for permanent partial disability benefits referable to his January 29, 1996 work-related injury is barred by the applicable statute of limitations and is therefore **DENIED**.

DATED at Montpelier, Vermont this 3rd day of June 2013.

_____
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.