STATE OF VERMONT
DEPARTMENT OF LABOR

Dan Wirasnik

v.

Chester McLellan Trucking and New America Marketing

Opinion No. 17R-13WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Z-52882

RULING ON DEFENDANT NEW AMERICA MARKETING'S RENEWED MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

James Dingley, Esq., for Claimant
Jeffrey Spencer, Esq., for Defendant Cincinnati Insurance Co.
Kaveh Shahi, Esq., for Defendant New America Marketing, LLC.

ISSUE PRESENTED:

Does the statute of limitations bar Claimant from asserting a claim against Defendant New America Marketing?

EXHIBITS:

Defendant New America Marketing's Exhibit 1: Claimant's Answers to Requests to Admit, October 25, 2013

Defendant New America Marketing's Exhibit 2: *Wirasnik v. WED Precast et al.*, Opinion No. 17-13WC (June 24, 2013)

FINDINGS OF FACT:

I take judicial notice of the Commissioner's prior decision in this claim, *Wirasnik v. WED Precast et al.*, Opinion No. 17-13WC (June 24, 2013). In addition, the following facts are undisputed:

1. Claimant suffered a compensable low back injury in May 2005 while working for WED Precast. WED Precast accepted liability and paid workers' compensation benefits accordingly. Dr. Wieneke placed him at end medical result in April 2007. He then left

WED Precast and went to work for Defendant McLellan in May 2007. In August 2007 he suffered renewed back symptoms.

2. WED Precast denied responsibility for Claimant's renewed symptoms on the grounds that he had suffered an aggravation of the original work injury for which McLellan was now responsible. McLellan also denied responsibility, arguing that Claimant had suffered a recurrence of his 2005 work injury, for which WED Precast remained responsible. Following an informal conference, the Department issued an interim order requiring McLellan to pay benefits based on its determination that Claimant had suffered an aggravation, not a recurrence.

3. In January 2008 the Department accepted McLellan's Form 27 discontinuance of benefits, which was based on a determination by Dr. Upton (McLellan's independent medical examiner) that Claimant had reached an end medical result for his most recent injury. Dr. Upton characterized the injury as an aggravation, not a recurrence. He also determined Claimant had not suffered any additional permanent impairment referable thereto.

4. At McLellan's request, in October 2008 the Department ordered McLellan and WED Precast to arbitrate the issue whether Claimant's renewed symptoms in 2007 constituted an aggravation or a recurrence. An arbitrator was chosen, but no arbitration ever took place. The arbitrator closed his file in April 2010 "due to prolonged inactivity."

5. Claimant began working for Defendant New America in October 2008. His tenure there lasted only a few months. The constant standing that the job entailed caused him significant low back pain.

6. McLellan filed a Form 2 denial of benefits relating to Claimant's renewed symptoms. It argued that Claimant either had suffered a new aggravation or a flare up referable to his work at New America, and that therefore it was no longer responsible for any benefits owed. The Department agreed Claimant had suffered a flare up. In a November 2008 letter to that effect, it directed Claimant to file a Notice of Injury and Claim for Compensation (Form 5) against New America if he wished to pursue benefits. Claimant did not do so.

7. In March 2011 Claimant sought an interim order from the Department to require that one of his three former employers pay medical benefits on account of his ongoing back pain. The Department declined, ruling that McLellan's Form 27 remained reasonably supported and that there was insufficient evidence to impose liability on either WED Precast or New America.

8. In April 2011 McLellan notified the Department by letter that it had chosen not to arbitrate its liability for Claimant's May 2007 injury because doing so would cost more than the benefits it had paid out.

9. On July 18, 2012 Claimant filed hearing requests against both WED Precast and McLellan, as well as a Notice of Injury and Claim for Compensation (Form 5) against New America, in which he sought ongoing medical benefits from his former employers.

This marked the first time Claimant made a formal claim for benefits against New America.

10. During the course of pre-hearing discovery, Defendants deposed Claimant. Throughout the deposition he admitted his memory for dates was faulty. However, New America's attorney specifically asked him what work injury occurred on August 6, 2009. He replied that was when he told his supervisor at New America he could no longer work there due to his constant back pain.

11. There was already evidence in the case to call into question Claimant's answer as to what occurred in August 2009. Namely, there was a letter from the Department's Workers' Compensation Specialist to all of the parties, indicating that Claimant worked for New America in October 2008. As he also testified in his deposition that his tenure at New America lasted for only three or four months, this would have been inconsistent with an August 2009 injury date.

12. In 2013 Defendants each filed a motion for summary judgment. WED Precast argued that McLellan had waived its right to arbitrate liability for the 2007 injury. New America argued that Claimant had failed to file a claim for benefits within the three year statute of limitations. The Commissioner agreed with WED Precast and concluded that McLellan had waived its opportunity to arbitrate the 2007 injury with WED Precast. Therefore, summary judgment was entered for WED Precast against McLellan.

13. Regarding New America's motion for summary judgment, the Commissioner concluded that Claimant's conflicting deposition testimony regarding when and for how long he worked for New America raised a genuine issue of material fact as to whether his claim was barred by the statute of limitations or not. On those grounds, New America's motion for summary judgment was denied.

14. In late December 2013 New America renewed its motion for summary judgment. In support, it filed admissions from Claimant, pursuant to V.R.C.P. 36, establishing that he had worked for New America for some time in 2008, but not at all in 2009. Neither Claimant nor McLellan filed a response to this latest pleading.

DISCUSSION:

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The nonmoving party is entitled to all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 242 (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 trier of fact may consider a renewed motion for summary judgment when additional materials are presented for its consideration. *Morrisville Lumber Co. v. Okcuoglu*, 148 Vt. 180, 182 (1987). Here, the additional materials consist of admissions made pursuant

to V.R.C.P. 36, which by the terms of that rule are conclusively established and binding. V.R.C.P. 36(b) and Reporters Notes thereto.

3. New America now argues that given Claimant's admission that he did not work at all for it in 2009, any new injury (whether aggravation or flare up) he suffered there must have occurred in 2008, and the three-year statute of limitations must have expired in 2011. Because Claimant's claim for benefits against it was not filed until July 2012, New America asserts, it is time-barred.

4. 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 v. Boise Cascade,* 171 Vt. 214, 219 (2000), citing *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 447 (1985). In addition, proceedings to initiate claims under section 660(a) must be commenced within three years of the date of injury.

5. Based on the undisputed evidence, I conclude that Claimant was not employed by New America in 2009, and that any aggravation or flare up of symptoms he suffered as a consequence of his work there must have occurred in 2008. I further conclude from the undisputed evidence that Claimant was specifically advised in November 2008 to file a claim for benefits against New America, but failed to do so. As the applicable statute of limitations would have expired by the end of 2011, any claim made thereafter is time-barred as a matter of law.

ORDER:

Defendant New America's Motion for Summary Judgment is hereby **GRANTED**.

Dated at Montpelier, Vermont, this 31st day of January 2014.

_____
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.

Dan Wirasnik v. WED Precast, Chester McLellan Trucking and New America Marketing (June 21, 2013)

STATE OF VERMONT
DEPARTMENT OF LABOR

Dan Wirasnik	Opinion No. 17-13WC
v.	By: Jane Woodruff, Esq. Hearing Officer
WED Precast, Chester McLellan Trucking and New America Marketing	For: Anne M. Noonan Commissioner
	State File No. Z-52882

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

James Dingley, Esq., for Claimant
Corina Shaffner-Fegard, Esq., for Defendant ARCH Insurance Co.
Jeffrey Spencer, Esq., for Defendant Cincinnati Insurance Co.
Keith Kasper, Esq., for Defendant New America Marketing, LLC.

ISSUES PRESENTED:

1. Did Defendant Chester McLellan Trucking waive its right to argue that Claimant suffered a recurrence of his original work injury in May 2007?

2. Does the statute of limitations bar a claim against Defendant New America Marketing?

EXHIBITS:

Defendant WED Precast's Exhibit 1:	Provencher Affidavit, March 4, 2013
Defendant WED Precast's Exhibit 2:	Dr. Upton Independent Medical Evaluation, January 23, 2008
Defendant WED Precast's Exhibit 3:	Form 2, August 27, 2007
Defendant WED Precast's Exhibit 4:	Interim Order, October 16, 2007
Defendant Wed Precast's Exhibit 5:	Letter from Workers' Compensation Specialist to Attorneys Dingley and Shaffner-Fegard, January 7, 2008
Defendant WED Precast's Exhibit 6:	Defendant McLellan Trucking's Form 27, December 28, 2007
Defendant WED Precast's Exhibit 7:	Defendant McLellan Trucking's Form 27, October 2008

Defendant WED Precast's Exhibit 8:	Letter from Workers' Compensation Specialist to Attorneys Dingley, Spencer and Shaffner-Fegard, November 20, 2008
Defendant WED Precast's Exhibit 9:	Letter from Workers' Compensation Specialist to Attorneys Dingley, Spencer and Shaffner-Fegard, August 9, 2011
Defendant WED Precast's Exhibit 10:	Email from Attorney Shaffner-Fegard to Workers' Compensation Specialist, August 9, 2011
Defendant WED Precast's Exhibit 11:	Letter from Attorney Dingley to Workers' Compensation Specialist, July 18, 2012
Defendant WED Precast's Supplemental Exhibit 1:	Letter from Attorney Spencer to Workers' Compensation Specialist, April 26, 2011
Defendant WED Precast's Supplemental Exhibit 2:	Order to Arbitrate, October 10, 2008
Defendant McLellan Trucking's Exhibit A:	Dr. Wieneke's report, October 24, 2006
Defendant McLellan Trucking's Exhibit B:	Defendant WED Precast's Form 1, May 6, 2005
Defendant McLellan Trucking's Exhibit C:	Form 22, February 7, 2007
Defendant McLellan Trucking's Exhibit D:	Taconic Orthopedics' office note, September 27, 2005
Defendant McLellan Trucking's Exhibit E:	Defendant WED Precast's Form 1, October 18, 2006
Defendant McLellan Trucking's Exhibit F:	Letter from Claims Specialist to Dr. Block, May 26, 2006
Defendant McLellan Trucking's Exhibit G:	Dr. Wieneke letter to adjuster, April 17, 2007
Defendant McLellan Trucking's Exhibit H:	Taconic Orthopedics' office note, July 3, 2007
Defendant McLellan Trucking's Exhibit I:	Letter from Attorney Dingley to Workers' Compensation Specialist, September 7, 2007
Defendant McLellan Trucking's Exhibit J:	Letter from Workers' Compensation Specialist to Attorneys Dingley, Spencer and Shaffner-Fegard, February 14, 2008
Defendant McLellan Trucking's Exhibit K:	Letter from Workers' Compensation Specialist to Attorneys Dingley, Spencer and Shaffner-Fegard, November 20, 2008
Defendant McLellan Trucking's Exhibit L:	Claimant's deposition, March 27, 2013

FINDINGS OF FACT:

For the purposes of these motions, the following facts are not disputed:

1. Claimant suffered a compensable low back injury on May 6, 2005 while working for Defendant WED Precast. WED Precast accepted liability and paid workers' compensation benefits accordingly.

2. Claimant's employment was seasonal, as he was laid off during the winter months. He did not return to WED Precast in the spring of 2007. In April 2007, Dr. Wieneke stated that he had reached an end medical result for his May 2005 work injury. Dr. Wieneke also stated that he could perform light duty work with no heavy truck driving. It is unclear from the record what, if any, symptoms Claimant was still experiencing at this point in time.

3. In May 2007 Claimant took a job with Defendant Chester McLellan Trucking (McLellan) as a heavy truck driver. In August 2007, while driving his truck Claimant suffered renewed symptoms in his low back.[1] He did not file a claim for benefits against McLellan and it is unclear from the record how WED Precast became aware of his symptoms. Subsequently, however, WED Precast filed a Form 2 denial of benefits on the grounds that Claimant had suffered an aggravation of his May 2005 work injury, such that if any benefits were due McLellan was the employer responsible for paying them.

4. In response to WED Precast's Form 2, McLellan filed its own denial of benefits in September 2007, on the grounds that Claimant's May 2007 episode of back pain was a recurrence of his 2005 injury for which WED Precast remained responsible. Following an informal conference, the Department issued an interim order requiring McLellan to pay benefits, on the grounds that Claimant had suffered an aggravation, not a recurrence.

5. McLellan next filed a motion to reconsider the Department's interim order, which was denied. Subsequently, in December 2007 it filed a Form 27 discontinuance on end medical result grounds. In January 2008 the Department rejected this action as well.

6. At McLellan's request, in January 2008 Claimant underwent an independent medical examination with Dr. Upton. Dr. Upton concluded that Claimant had reached an end medical result for his most recent injury, which he characterized as an aggravation of a pre-existing condition. Dr. Upton determined that Claimant had not suffered any additional permanent impairment, and also that he was capable of light duty work. With this opinion as support, the Department accepted McLellan's Form 27 discontinuance.

[1] Within days of this injury, Claimant voluntarily terminated his employment with McLellan because he could not physically continue the work.

7. At McLellan's request, in October 2008 the Department issued an order directing McLellan and WED Precast to arbitration in order to resolve their aggravation/recurrence dispute. While an arbitrator was chosen, no arbitration ever took place. In an April 2010 letter to both McLellan and WED Precast, the arbitrator closed his file "due to prolonged inactivity."

8. In October 2008 Claimant began working for New America Marketing (New America). His tenure there lasted for only a few months. He left the job because the constant standing caused significant low back pain.

9. In November 2008 McLellan filed a Form 2 denial of benefits relating to an October 21, 2008 injury. Claimant had not made a claim for benefits; however, he had sought medical treatment. McLellan argued that any injury he suffered while working for New America was either a new aggravation or a flare up, for which it was not responsible. The Department agreed. In a November 2008 letter it directed Claimant to file a Form 5 Notice of Injury and Claim for Compensation with New America if he wished to pursue benefits. He did not do so.

10. In March 2011 Claimant sought an interim order from the Department to require that one of his three former employers pay medical benefits on account of his ongoing low back pain. Following an informal conference, the Department ruled that it could not do so. Specifically, it found that McLellan's November 2008 denial remained reasonably supported, and that the then-current record was insufficient to impose liability on either WED Precast or New America.

11. In April 2011 McLellan's attorney wrote a letter to the Department in which he advised as follows: "As for the issue of arbitration, that should not be read as any waiver or [sic] our position or somehow that it reverses the Commissioner's findings in this matter. [McLellan's workers' compensation insurance carrier] could have arbitrated to potentially receive reimbursement of the benefits paid prior to the Commissioner's determination on November 20, 2008, *however given the cost benefit it chose not to.*" (Emphasis supplied.)

12. On July 18, 2012 Claimant filed hearing requests against both WED Precast and McLellan, as well as a Form 5 Notice of Injury and Claim for Compensation against New America, in which he sought payment of ongoing medical benefits from his former employers. This marked the first time he had made any formal claim for benefits against New America.

13. In the course of pre-hearing discovery, Defendants deposed Claimant. Throughout his deposition, he admitted that his memory for dates was not very accurate. When asked about his time working for New America, he responded that he thought he had worked there for three or four months, but used phases such as, "I'm not sure when I started for them," and "maybe" it was the spring of 2009 when he finished there.

14. At one point during his deposition, New America's attorney asked Claimant to describe what work injury occurred on August 6, 2009. Claimant responded that that was when he told his supervisor at New America that he could no longer work there. He finished the project he was involved with and then left that employment.

15. According to correspondence from the Worker's' Compensation Specialist to the attorneys for Claimant, WED Precast and McLellan, Claimant worked for New America in October 2008. Assuming that his testimony as to the duration of his employment – three or four months – was accurate, this would call into question whether the conversation he recalled having with his supervisor in August 2009 actually occurred on that date.

16. In August 2010 Claimant began driving a school bus for approximately 26 hours per week. He continues to hold that position.

DISCUSSION:

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The nonmoving party is entitled to all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 242 (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). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of facts offered by either party or the likelihood that one party or another might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115 at ¶15.

2. In this claim, both Defendant WED Precast and Defendant New America have moved for summary judgment. WED Precast argues that summary judgment should be granted in its favor against Defendant McLellan on the grounds that McLellan has waived its right to argue that Claimant suffered a recurrence of his original work injury in May 2007. Defendant New America argues that it is entitled to summary judgment because Claimant failed to file a claim for benefits against it within the applicable statute of limitations. Claimant did not file responses to either of these motions.

WED Precast's Motion for Summary Judgment

3. McLellan argues that it did not waive its right to argue that Claimant suffered a recurrence of his original work injury in the summer of 2007. It points to the fact that it continued to copy WED Precast on correspondence over the years, as well as verbal statements it made during informal conferences (in which WED Precast took part), as affirmative evidence of its intent that WED Precast continue to be a party to any formal hearing involving the question of liability for benefits due Claimant.

4. 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.*

5. The facts here are unequivocal. As its own correspondence shows, McLellan chose not to pursue arbitration against WED Precast in 2007 because in its analysis the costs associated with doing so outweighed the potential benefits. It thus acted in such a way as to voluntarily relinquish its right to establish that Claimant had suffered a recurrence in August 2007 rather than an aggravation. Arbitration being the avenue that the Department, in its discretion, had mandated for resolving that dispute, *see* 21 V.S.A. §662(e), once McLellan abandoned that path it waived its right to contest responsibility as against WED Precast. For that reason, WED Precast is entitled to summary judgment against McLellan.

New America's Motion for Summary Judgment

6. McLellan argues that a genuine issue of material fact exists as to the date when Claimant's episode of low back pain while employed by New America occurred, and for that reason New America's request for summary judgment on statute of limitations grounds must be denied. Specifically, McLellan points to Claimant's deposition testimony, in which he asserted that he told his supervisor about his back pain on August 6, 2009. If true, this would place that event well within the three-year statute of limitations applicable to a work-related injury claim against New America.

7. Clearly the evidence is somewhat conflicting as to when Claimant actually worked for New America. Whether Claimant's assertion that he was still working there on August 6, 2009 will stand up to the rigors of cross-examination at formal hearing is not yet at issue. Rather, for the purposes of ruling on a motion for summary judgment, "all allegations made in opposition to summary judgment are regarded as true if supported by affidavits or other evidence." *Town of Victory v. State of Vermont*, 174 Vt. 539, 540 (2002).

8. Thus, I conclude that Claimant's testimony, for purposes of this motion, places the date of his claimed injury at New America on August 6, 2009. Thus, when he filed his Form 5 Notice of Injury and Claim for Compensation against New America on July 18, 2012, that filing was within the three year statute of limitations. Therefore, I conclude that New America's motion for summary judgment on statute of limitations grounds must be denied.

ORDER:

Defendant WED Precast's Motion for Summary Judgment against Defendant Chester McLellan Trucking is hereby **GRANTED**. Defendant New America Marketing's Motion for Summary Judgment is hereby **DENIED**.

Dated at Montpelier, Vermont, this 21st 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.