STATE OF VERMONT
DEPARTMENT OF LABOR

Lorrette Labbe

v.

Lunenburg Fire District #2

Opinion No. 25-13WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. D-18109

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Patty Turley, Esq., for Claimant
Corina Schaffner-Fegard, Esq., for Defendant

ISSUE PRESENTED:

Does the statute of limitations bar Claimant from asserting a claim for permanent total disability benefits pursuant to 21 V.S.A. §644?

EXHIBITS:

Defendant's Exhibit 1:	Physical therapy note, April 11, 1991
Defendant's Exhibit 2:	Operative report, November 29, 1991
Defendant's Exhibit 3:	Dr. Mayor office note, June 10, 1993
Defendant's Exhibit 4:	Dr. Mayor's August 13, 1993 letter to adjuster
Defendant's Exhibit 5:	Dr. Mayor's December 16, 1993 letter to adjuster
Defendant's Exhibit 6:	Specialist's January 12, 1994 letter to adjuster
Defendant's Exhibit 7:	Attorney Boemig's January 19, 1994 letter to adjuster
Defendant's Exhibit 8:	Dr. Jennings's March 18, 1994 letter to Ms. Duffany
Defendant's Exhibit 9:	Dr. Lapinsky's April 3, 2003 report
Defendant's Exhibit 10:	Attorney Stephen's June 10, 2010 correspondence with adjuster

FINDINGS OF FACT:

The following facts are undisputed:

1. Claimant suffered a work related injury to her back on March 13, 1991. Defendant accepted the injury as compensable.

2. Claimant underwent a laminectomy and L5-S1 surgical fusion with Dr. Mayor at Dartmouth Hitchcock Medical Center on November 29, 1991.

3. In a June 10, 1993 letter, Dr. Mayor wrote: "The patient requires massage therapy for control of symptoms. It is unlikely that she will be restored to any further medical treatment or a functional level that would allow her to resume her work."

4. In an August 13, 1993 letter to the insurance adjuster, Dr. Mayor clarified his June 1993 opinion as follows: "[P]ermanent total disability . . . can be interpreted as 100% impairment."

5. In a December 1993 letter to the adjuster, Dr. Mayor wrote that it was his opinion that Claimant had reached an end medical result.

6. With Dr. Mayor's August 13, 1993 letter as support, on October 15, 1993 Defendant filed a Notice of Intention to Discontinue Benefits on the grounds that Claimant had reached an end medical result. In January 1994 the Department asked Defendant to provide additional information to support its proposed discontinuance. Claimant was copied on this correspondence. Subsequently, the parties entered into an agreement whereby Claimant received permanent partial disability benefits in accordance with a 48-percent whole person impairment referable to her lower back.

7. Claimant retained Attorney Boemig on or about January 19, 1994. The record does not reflect for how long this representation continued.

8. At Defendant's request, Dr. Jennings performed an independent evaluation of Claimant in early 1994. In a March 1994 letter Dr. Jennings clarified an earlier report as follows: "I do feel that [Claimant] is essentially unemployable. I do not believe there is a job available that she would be able to handle, even if it were sedentary type work. So, in that regard, as far as returning to work, she is 100% disabled."

9. At Defendant's request Dr. Lapinsky performed another independent evaluation of Claimant in April 2000.[1] Dr. Lapinsky concluded that Claimant was totally disabled and had no functional work capacity.

10. Claimant first filed a claim for permanent total disability benefits on June 9, 2010, through Attorney Stephen, whom she had retained to represent her in July 2009. This was nineteen years after the original work injury, seventeen years after her own doctor first rendered an opinion that she was 100 percent disabled, and ten years after Dr. Lapinsky's medical opinion to that effect.

[1] The record does not reflect what prompted Defendant's decision to refer Claimant for another independent evaluation at this point.

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 issue presented in this case is whether Claimant is barred by the statute of limitations from asserting her claim for permanent total disability benefits. Defendant argues that because she did not file her claim within the six-year statute of limitations, it is now time-barred. Claimant counters that, having complied with the statutory filing and notice requirements at the time of her initial injury, once Defendant accepted compensability the burden shifted to it to either terminate or deny further benefits. Because Defendant never acted affirmatively to deny her claim for permanent total disability benefits after even its own independent examiners concluded that she was permanently unable to work, she argues, it cannot now rely on the statute of limitations to avoid responsibility for those benefits.

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 v. Boise Cascade*, 171 Vt. 214, 219 (2000), citing *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 447 (1985).

4. 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 v. Vermont Telephone Co.*, 2004 VT 120; *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. *Smiley v. State of Vermont*, Opinion No. 15-13WC (June 3, 2013), citing *Richardson v. Regular Veteran's Association Post #514*, Opinion No. 04-11WC (February 16, 2011).

5. The same analysis applies to a cause of action for permanent total disability benefits. Such a claim cannot accrue until it becomes reasonably apparent, both medically and vocationally, that as a result of his or her work injury a claimant most likely will never be able to return to regular gainful employment. *Hoisington v. Ingersoll Electric*, Opinion No. 52-09WC (December 28, 2009), citing *K.T. v. Specialty Paperboard*, Opinion No. 33-05WC (June 24, 2005). Until that point occurs, it would be premature to make a claim for permanent total disability benefits.

6. In the instant case, there are three possible dates on which Claimant's claim for permanent total disability benefits arguably became reasonably discoverable and apparent: (1) December 1993, by which time her treating physician, Dr. Mayor, had concluded that she had reached an end medical result, was "100 percent disabled," and likely would not be able to resume her prior employment; (2) March 1994, when Defendant's first independent medical examiner, Dr. Jennings, stated his opinion that she was "essentially unemployable" and "100 percent disabled;" and (3) April 2000, when Defendant's second independent medical examiner, Dr. Lapinsky, also concluded that she was totally disabled and had no functional work capacity.

7. Viewing the evidence in the light most favorable to Claimant, I find that her cause of action for permanent total disability benefits must have accrued at least by April 2000. By that date, the cumulative opinions of three physicians, all to the same effect, should have triggered her to take action to protect her rights. She then had six years within which to flesh out the facts, file her claim for benefits and, if Defendant declined to pay voluntarily, pursue her available remedies. *Smiley, supra* at Conclusion of Law No. 4 (citations omitted). She did not do so until ten years had passed, however. By this time, the statute of limitations on her claim had run.

8. With reference to the commissioner's decision in *W.P. v Madonna Corp.*, Opinion Nos. 18-06WC (April 12, 2006) and 18A-06WC (June 5, 2006), Claimant contends that Defendant's obligation to pay permanent total disability benefits became automatic once its independent medical examiners determined that she was unemployable. As a consequence, she asserts, Defendant cannot rely on the statute of limitations to protect against its own failure to fulfill its statutory obligations.

9. The claimant in *Madonna* became paralyzed from the waist down as a result of his work injury. As this was an enumerated injury under 21 V.S.A. §644, upon accepting the injury as compensable Defendant immediately became obligated to pay permanent total disability benefits. After some thirteen years of doing so, it ceased payments based on its interpretation of the statute at the time, which it argued capped the claimant's entitlement to benefits at a maximum of 330 weeks. Twenty years later, the claimant sought and was awarded retroactive benefits. *Id.*, Opinion No. 18-06 (April 12, 2006).

10. In rejecting Defendant's statute of limitations defense, the commissioner in *Madonna* noted the unusual circumstances of the case. The claimant was not seeking a separate benefit based on a newly founded entitlement, because his paralysis had automatically rendered him permanently and totally disabled from the beginning. Consequently, he should not have had to file a new claim in order for benefits to continue, and Defendant could not claim lack of notice during the limitations period as an excuse. *Id.*, Opinion No. 18A-06 (June 5, 2006).

11. The situation here is more commonplace. Some two years after her injury Claimant reached an end medical result, and her status changed from temporary to permanent disability. Given the confluence of both medical and vocational factors necessary to support a claim for permanent total disability benefits, *Hoisington, supra,* even with the medical experts' summary pronouncements that she was "100 percent disabled" or "essentially unemployable" her entitlement was not automatic. True, Defendant could have accepted responsibility and commenced paying. When it failed to do so, the responsibility fell to Claimant to take action at some point within the six-year limitations period.

12. As the Vermont Supreme Court has instructed, "[t]he 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; *Smiley, supra.* If it 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," there is no right to relief. *Longe, supra* at 226.

13. 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.

14. 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.

15. 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.

16. Even considering the evidence in the light most favorable to Claimant, there are no facts from which I might conclude that she was misled to her detriment as a result of Defendant's conduct. To the contrary, Claimant was represented by counsel at the very time that her own treating doctor and Defendant's medical expert both were asserting that her work injury had rendered her permanently disabled and unemployable. That being the case, the bar for establishing her right to equitable relief is even higher. *See, e.g., Beecher, supra.* The facts here simply do not support it.

17. I acknowledge that barring Claimant from asserting her right to permanent total disability benefits may seem a harsh result. However, it would be unfair to impose upon Defendant the duty to defend against a claim some ten years (at least) after it ripened. The purpose of a limitations statute is "to make necessary the bringing of an action within a reasonable time and thus prevent fraudulent and stale claims from being brought at a time when witnesses have died or disappeared and documentary evidence has been lost or destroyed. The mischief which such statutes are intended to remedy is the general inconvenience resulting from delay in the assertion of a legal right which it is practical to assert." *Ayer v. Hemingway*, 2013 VT 37, ¶33 n.5 (Robinson, J., dissenting), quoting *Reed v. Rosenfeld*, 115 Vt. 76, 79 (1947).[2]

18. I conclude as a matter of law that because Claimant failed to assert her claim for permanent total disability benefits within the applicable limitations period, her claim is time-barred. I further conclude that neither the doctrine of equitable estoppel nor that of equitable tolling precludes Defendant from asserting the statute of limitations as a defense.

ORDER:

Defendant's Motion for Summary Judgment is **GRANTED**. Claimant's claim for permanent total disability benefits causally related to her March 19, 1991 work injury is **DISMISSED**.

DATED at Montpelier, Vermont this 25th day of November 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.

[2] That the Department's claim file in this case has long since been destroyed provides just one example of the "mischief" that already has complicated the fact-finding process.