STATE OF VERMONT
DEPARTMENT OF LABOR

Larry Bohannon

v.

Town of Stowe

Opinion No. 03-14WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. CC-02061

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
John Leddy, Esq., for Defendant

ISSUE PRESENTED:

Does the statute of limitations bar Claimant as a matter of law from asserting a claim for workers' compensation benefits against Defendant?

EXHIBITS:

Claimant's Exhibit 1:	Bonneau deposition excerpts, October 11, 2012
Claimant's Exhibit 2:	Claimant deposition excerpts, November 16, 2011
Claimant's Exhibit 3:	Wells deposition excerpts, October 11, 2012
Claimant's Exhibit 4:	Weather Source, official weather for Stowe, Vermont on October 1, 2007
Claimant's Exhibit 5:	Dr. Keith office notes, October 4, 2007
Claimant's Exhibit 6:	Short term disability forms, October 29, 2007
Claimant's Exhibit 7:	Email from Specialist, September 29, 2010
Claimant's Exhibit 8:	Darcie Bohannon deposition excerpts, May15, 2012
Claimant's Exhibit 9:	Boyle deposition excerpts, July 25, 2013
Defendant's Exhibit A:	Darcie Bohannon deposition excerpts, May 15, 2012
Defendant's Exhibit B:	Dr. Keith deposition excerpts, May 22, 2013
Defendant's Exhibit C:	Claimant deposition excerpts, November 16, 2011
Defendant's Exhibit D:	Bonneau affidavit, February 6, 2012
Defendant's Exhibit E:	First Report of Injury, February 5, 2007
Defendant's Exhibit F:	Boyle letter to Claimant, February 13, 2007
Defendant's Exhibit G:	Gann deposition excerpts, November 16, 2011
Defendant's Exhibit H:	Boyle deposition excerpts, July 25, 2013

Defendant's Exhibit I:	Out of work notes, October 4 and 11, 2007
Defendant's Exhibit J:	Request to use sick leave bank, October 30, 2007
Defendant's Exhibit K:	Short term disability forms, October 29, 2007
Defendant's Exhibit L:	Resignation letter, November 4, 2007
Defendant's Exhibit M:	Notice and Application for Hearing, October 8, 2010
Defendant's Exhibit N:	Notice and Application for Hearing, December 7, 2010
Defendant's Exhibit O:	Denial of Workers' Compensation Benefits, January 7, 2011
Defendant's Exhibit P:	Claimant deposition excerpts, November 16, 2011

FINDINGS OF FACT:

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

1. Claimant has a pre-existing history of back problems. Following a snowmobile accident in 1984, he underwent spinal surgery. For the past ten years he has suffered constant back pain and has walked with a limp.

2. Claimant worked on Defendant's road crew from approximately 2001 to 2007. In January 2007 he strained his lower back while pulling an air compressor with two other employees. He did not lose any time from work and did not require medical attention. Susanne Gann, Defendant's human resources coordinator, filed a First Report of Injury with the Department. Defendant's insurer kept a record of the claim as well.

3. On October 1, 2007 Claimant was working on North Hill Road with five co-workers. Claimant drove the grader to spread the gravel that the other five workers hauled to the site. While the others went to get more gravel, Claimant got off his grader and started shoveling the gravel. As he shoveled, he twisted and felt a sharp pain down his left leg that caused him to drop to his knees.

4. Claimant told Melvin Wells, a co-worker, that he had injured his back. Mr. Wells recalled the conversation as occurring in October 2007. Claimant also informed Steve Bonneau, his supervisor, that he was injured. Mr. Bonneau asked him to fill out some forms about the injury. Claimant complied, in the town garage after work that same day, while Mr. Bonneau waited.

5. Both Mr. Bonneau and Ms. Gann confirmed that Defendant's standard work injury protocol was for an injured worker to fill out a report of injury within 72 hours and give it to his or her supervisor. The supervisor then would give the form to Ms. Gann, who would file a First Report of Injury with the Department.

6. Mr. Bonneau did not recall if Claimant informed him of a work injury in October 2007. He had no memory of Claimant filling out an injury report form. Ms. Gann also had no

record of any claimed October 1, 2007 work injury, and did not file a First Report of Injury with the Department.

7. Claimant sought treatment from Dr. Keith on October 4, 2007. In his office note Dr. Keith recounted that Claimant's symptoms began on October 1, 2007 after he shoveled some gravel at work. Dr. Keith advised Claimant to apply for long-term disability, as he had been struggling with pain for several years with no new treatment options. Dr. Keith also instructed Claimant not to work until further notice for medical reasons.

8. On October 30, 2007 Claimant went to Defendant's office and completed an application for short-term disability benefits. The parties presented two different copies of the form; one indicated that Claimant had suffered a work injury and on the other, the "work injury" box was unchecked. It is unclear why the two forms were inconsistent. However, on the physician's statement accompanying the application, Dr. Keith indicated that Claimant's injury was work-related.

9. Claimant's wife accompanied him on this visit to Defendant's office. She specifically remembered asking Ms. Gann if Claimant should file for workers' compensation benefits. Ms. Gann did not respond to the question.

10. Also at this meeting Claimant presented Defendant with a letter in which he requested time from Defendant's leave bank. His reason for doing so was so that he would have income to cover his living expenses until Defendant's insurer acted upon his application for short-term disability.

11. On November 4, 2007 Claimant submitted his letter of resignation to Defendant. In the letter he explained he could no longer perform his job duties. Thereafter, he received short-term disability benefits. In addition, Defendant paid him wages until January 2008, using accumulated time from its leave bank.

12. The next significant event in this case occurred on September 28, 2010 when Claimant entered into a conversation with his neighbor, one of the Department's workers' compensation specialists, about his October 2007 work injury. The specialist asked Claimant if his claim was pending with the Department, and gave him a Notice and Application for Hearing to fill out. Claimant's wife completed the form, but erroneously used October 4, 2007 as the date of injury rather than October 1, 2007. The form was dated October 8, 2010 and was received and filed with the Department on the same day.

13. Claimant's attorney filed a second Notice and Application for Hearing on December 7, 2010. The attorney used the wrong date of injury, October 4, 2007, on that form as well.

14. Defendant's adjustor denied the claim on January 7, 2011. The reason for the denial was, "Form 1 not timely filed and filing is over 3 years from loss date."

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. With reference to the three-year limitations period provided for in 21 V.S.A. §660, Defendant here asserts that the statute of limitations on Claimant's October 1, 2007 injury expired on October 1, 2010. Because Claimant did not file his claim for workers' compensation benefits until October 8, 2010, it argues, as a matter of law the claim is now time-barred. In response, Claimant asserts that he took the steps necessary to report his injury on the day it occurred, by informing his supervisor and completing an injury report, thus satisfying the notice requirement of 21 V.S.A. §656. In addition, he argues that genuine issues of material fact exist as to whether the doctrine of equitable estoppel should preclude Defendant from raising the statute of limitations as a defense. For these reasons, he claims, summary judgment is inappropriate.

3. The Vermont Supreme Court has directly addressed the two statutes of limitations applicable to workers' compensation claims, referencing the relevant sections of the workers' compensation act as follows:

> First, under 21 V.S.A. 656, a claimant (1) must file a notice of injury with the employer "as soon as practicable" after he or she sustains an injury, and (2) must file a claim "within six months after the date of the injury." However, 21 V.S.A. §660 excuses the failure to timely give notice or make a claim "if it is shown that the employer, his agent or representative, had knowledge of the accident or that the employer has not been prejudiced by such delay or want of notice." 21 V.S.A. §660. Second, a claimant must file a notice of hearing with the Department "within six years[1] from the date of injury." *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 216 (2000) (internal citations omitted).

(a) *Notice of Injury under §656*

4. Taking the evidence in the light most favorable to Claimant as the nonmoving party, *State v. Delaney, supra*, for the purposes of this summary judgment motion I find that on the day of the injury he both informed his supervisor of the accident and, in the supervisor's presence, completed an injury report. Pursuant to §§656 and 660, with these actions he is deemed to have satisfied the six-month notice requirement.

[1] Section 660 was amended in 2004 to reduce the statute of limitations from six years to three years. Claimant's injury having occurred in 2007, it is governed by the latter limitations period.

(b) Statute of Limitations under §660

5. Proceedings to initiate a workers' compensation claim under §660(a) must be commenced within three years of the "date of injury." That phrase has long been interpreted to mean "the point in time when an injury becomes reasonably discoverable and apparent." *Longe v. Boise Cascade, supra* at 219, citing *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 447 (1985).

6. Applying the law to the facts of this case, the controlling date when the statute of limitations began to run is October 1, 2007. This is the date reflected in Dr. Keith's October 4, 2007 office note, which is the most contemporaneous record that exists of the event. Although no First Report of Injury was ever filed, Dr. Keith's office note corroborates Claimant's version of events, and thus establishes October 1, 2007 as the date of injury.

7. Since the statute began to run on October 1, 2007, Claimant had until October 1, 2010 to file a claim for benefits with the Department. He did not accomplish that requirement. The undisputed evidence reveals that his Notice and Application for Hearing was not filed with the Department until October 8, 2010, seven days after the limitations period expired.

(c) The Doctrine of Equitable Estoppel

8. Having concluded that Claimant failed to file a timely claim for benefits does not end the inquiry. Claimant's conduct may be excused if the circumstances justify invoking the doctrine of equitable estoppel. *Longe, supra* at 226.

9. 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.

10. 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.

11. I conclude here that a genuine issue of material fact exists regarding whether Defendant should be precluded from asserting the statute of limitations as a defense to Claimant's claim. According to Claimant's version of events, at Mr. Bonneau's direction he completed an injury report in a timely fashion. Consistent with Defendant's standard protocol (as evidenced in the context of its handling of his injury some nine months earlier), Claimant reasonably might have believed he had taken all of the steps necessary to assert his rights under the workers' compensation statute. If adequately proven at trial, these facts conceivably establish that he was lulled into a false sense of security, and thus form the basis for a claim of equitable estoppel sufficient to bar Defendant's statute of limitations defense.

12. Genuine issues of material fact also exist as to whether and why Defendant directed Claimant to file an application for short-term disability benefits following his October 1, 2007 injury instead of taking the steps necessary to pursue his claim for workers' compensation benefits. The fact that two versions of the application exist, one denoting a work-related injury and the other not, is relevant to the equitable estoppel issue and therefore merits further explanation.

13. The sole purpose of summary judgment review is to determine if a genuine issue of material fact exists. If such an issue does exist, it cannot be adjudicated in the summary judgment context, no matter how unlikely it seems that the party opposing the motion will prevail at trial. *Fonda v. Fay*, 131 Vt. 421 (1973); *Southworth v. State of Vermont Agency of Transportation*, Opinion No. 45-08WC (November 12, 2008). However tenuous or unlikely the evidence in support of Claimant's equitable estoppel argument is, he is entitled nonetheless to present his case and litigate the question. Therefore, summary judgment against him is not appropriate.

ORDER:

Defendant's Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 26th day of February 2014.

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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.