STATE OF VERMONT
DEPARTMENT OF LABOR

Michael Dunroe

v.

Monro Muffler Brake, Inc.

Opinion No. 17-15WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. FF-63352

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Erin Gallivan, Esq., for Claimant
William Blake, 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:	Deposition of Michael Dunroe, June 13, 2014
Defendant's Exhibit A:	Deposition of Michael Dunroe (excerpted), June 13, 2014
Defendant's Exhibit B:	Dr. Mar office note, 11/06/2008
Defendant's Exhibit C:	Dr. Mar office note, 05/06/2009
Defendant's Exhibit D:	Letter from Kenneth Mar, M.D., May 06, 2009

FINDINGS OF FACT:

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

1. Claimant has been employed in the automotive tire industry for virtually his entire work life. He began working as a service technician for Tire Warehouse in Bangor, Maine in 1980, while still in high school. Since 1985 he has worked at the company's Rutland, Vermont location, where he is now the store manager. Claimant's supervisor, John Roderick, works out of the Claremont, New Hampshire store. Defendant purchased the business in 2009, but with no change in name or management. *Claimant's deposition at 8-15*.

2. Claimant's staff at the Rutland store consists of an assistant manager, a "key holder" or crew manager, and three service technicians. The store sells, services and installs tires, but does not offer any mechanical services such as brake work or lube jobs. *Claimant's deposition at 16-19.*

3. Claimant's primary work station is at the sales counter, although he also spends a "fair amount" of time in the shop area, where he assists the service technicians with such tasks as retrieving, mounting and balancing tires. *Claimant's deposition at 20-21, 65.* The work environment in the shop area is dusty and dirty. In addition, depending on the season, as many as 5,000 new tires might be stored on site, and these emit an unpleasant odor of rubber and petroleum products. *Claimant's deposition at 44-45, 64.*

4. Claimant has suffered from shortness of breath at least since 2004. *Claimant's deposition at 36.* At some point, he was diagnosed with chronic obstructive pulmonary disease (COPD), for which he has treated with Dr. Mar, a specialist in pulmonary medicine, since the fall of 2008. *Claimant's deposition at 37; Defendant's Exhibit B.*

5. As to the relationship between Claimant's work environment and his COPD, Dr. Mar's November 6, 2008 office note states: "The patient states that his work environment is very dusty, which may be exacerbating his COPD and nasal polyps." *Defendant's Exhibit B.* Dr. Mar stated his opinion in stronger terms in his May 6, 2009 note, *Defendant's Exhibit C*, as follows:

> The patient is a 46-year-old white male with a history of COPD and chronic rhinosinusitis with nasal polyposis, last seen 04/08/2009. At that time, his COPD was not well-controlled due to his work environment and being exposed to rubber and auto chemical fumes.
>
> . . .
>
> Impression: 1. Chronic obstructive pulmonary disease with probable asthmatic component, still not well controlled since the patient is using his Proventil HFA at least 3-4 times a week for rescue therapy. Again, I feel that his exposure to the rubber and auto chemical fumes at his work environment is exacerbating his chronic obstructive pulmonary disease.

6. At Claimant's request, *Claimant's deposition at 51,* Dr. Mar stated his opinion as to the relationship between Claimant's COPD and his work in a letter dated May 6, 2009 and addressed "To Whom It May Concern," *Defendant's Exhibit D,* as follows:

> [Claimant] has a history of chronic obstructive pulmonary disease with probable asthmatic component to it. . . . I strongly feel that his work environment, with exposure to rubber fumes/dust and auto chemical fumes/dust is exacerbating his COPD and causing it to be difficult to manage his lung illness. Exposure to the rubber and auto chemical fumes/dust is detrimental to his health due to his lung disease. Further exposure to these elements will progressively worsen his lung function which can be permanent. It is therefore essential for maintaining [Claimant's] health that he avoids future exposure to these dust/fumes.

7. When asked at his deposition for what purpose he requested Dr. Mar's letter, Claimant responded, "Down the road I thought there might be a claim." However, he did not take action at the time "as far as sending it up the chain [of command]," or otherwise sharing a copy of it with anyone at Tire Warehouse. Instead, at around the same time that he solicited the letter, he retained an attorney.[1] *Claimant's deposition at 51-53.*

8. Aside from obtaining copies of his medical records, to Claimant's knowledge his attorney took no action to pursue his claim. Instead, at some point in 2010 he went "radio silent." *Claimant's deposition at 56-57.*

[1] This reference, as well as those in the following two findings, is to Claimant's prior attorney, not his current one.

9. Although neither he nor his attorney formally presented Defendant with a claim for benefits in conjunction with Dr. Mar's 2009 letter, Claimant recalled two occasions in 2010 when he discussed his medical condition with his supervisors. As to the first conversation, which occurred in April 2010 during a lunch meeting with Mr. Roderick, Claimant testified as follows, *Claimant's deposition at 54-55*:

> A: For whatever reason we were having lunch, and [Mr. Roderick] was talking about diseases that are chronic, and that's when I mentioned to him at that seating, "What do you think the "C" stands for in chronic obstructive pulmonary disease that I have?" Those were the words.
>
> Q [by Attorney Blake]: That was it? That was the sum of the conversation?
>
> A: He goes, "You have that? What causes it? You know, it's usually from smoking."
>
> Q: Right. Did you say anything to Mr. Roderick about that you felt that the work environment there at Tire Warehouse may be part of the problem or did you not get into that with him?
>
> A: I didn't get into it deeply.
>
> Q: Did you get into it at all?
>
> A: He goes, "What do you think caused it?" And at that time we were at the Midway Diner, directly across the street from Tire Warehouse, and I pointed across the street. So yes, he knows.

10. As to the second conversation, Claimant testified as follows, *Claimant's deposition at 70-71*:

> Q [by Attorney Gallivan]: Did you have any other conversations with any other supervisors about your condition and it being work related?
>
> A: The only other one I had with an executive at the company was with Bobby Schlosser, who was the zone manager in charge of all of the Tire Warehouse stores.
>
> Q: And what is Bobby's role compared to Mr. Roderick?
>
> A: He is the next step up the ladder in command.
>
> Q: Okay. And tell us about the conversation you had with Mr. Schlosser?

A: Okay. It was in 2010. It would have to have been April or the very beginning of May because it was right after income taxes. They gave me a bonus check; and then they figured out that there was some kind of accounting error; and they wanted me to repay the bonus check, which was around $10,000. And I told Mr. Schlosser, I said, "Isn't that a coincidence. That's what my medication costs if I didn't have health insurance."

And Mr. Schlosser asked me, "Is it work related?"
And I said, "Yes, it is."

Q: Was there any further conversation about that?

A: No, there was not.

11. Claimant did not take further action to pursue his claim until May 2014. On May 2, 2014 Defendant filed a First Report of Injury (Form 1) with the Department.[2] The First Report describes the injury as a "respiratory disorder (gases, fumes, chemical, etc.)" involving the lungs, with an accident date of April 30, 2014. It further reports, "EE states that fumes/dust over the tire [sic] resulted in COPD."

12. Defendant filed its denial of Claimant's claim on May 12, 2014, citing, *inter alia*, the two-year statute of limitations for occupational disease claims, 21 V.S.A. §660(b) as a defense. Claimant's current attorney appealed the denial by letter dated May 28, 2014.

13. Claimant has not lost any time from work as a consequence of his COPD. *Claimant's deposition at 57.*

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

2. Defendant here seeks summary judgment in its favor on the grounds that Claimant's claim is barred as a matter of law by the applicable statute of limitations, 21 V.S.A. §660(b). Claimant asserts that his claim is not time-barred, first because his occupational exposure is ongoing, and second, because Defendant had knowledge of it well prior to the date when he filed his claim for benefits, such that 21 V.S.A. §660(a) excuses any tardiness in his filing.

[2] Presumably this action came about as a result of Claimant's prompting, though neither the record nor the Department's file clearly reflects this.

3. Vermont's workers' compensation statute contains both a notice requirement and a statute of limitations. The notice requirement is stated in 21 V.S.A. §656, as follows:

> (a) A proceeding under the provisions of this chapter for compensation shall not be maintained unless a notice of the injury has been given to the employer as soon as practicable after the injury occurred, and unless a claim for compensation with respect to an injury has been made within six months after the date of the injury; . . .
>
> (b) The date of injury, or in the case of occupational disease, the date of injurious exposure shall be the point in time when the injury or disease, and its relationship to the employment is reasonably discoverable and apparent.

4. The statute of limitations is stated in §660:

> (a) A notice given under the provisions of this chapter shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature, or cause of the injury, or otherwise, unless it is shown that the employer was in fact misled to the injury as a result of the inaccuracy. Want of or delay in giving notice, or in making a claim, shall not be a bar to proceedings under the provisions of this chapter, if it is shown that the employer, the employer's agent, or representative had knowledge of the accident or that the employer has not been prejudiced by the delay or want of notice. Proceedings 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. . . .
>
> (b) Notwithstanding subsection (a) of this section, a claim for occupational disease shall be made within two years of the date the occupational disease is reasonably discoverable and apparent.

5. Claimant here has characterized his injury as an occupational disease, which the statute, 21 V.S.A. §601(23), defines as:

> a disease that results from causes and conditions characteristic of and peculiar to a particular trade, occupation, process or employment, and to which an employee is not ordinarily subjected or exposed outside or away from the employment and arises out of and in the course of the employment."

6. Claimant asserts that his COPD qualifies as an occupational disease, but he has presented no evidence from which I might conclude that the condition is one that "results from causes and conditions characteristic of and peculiar to" employment in the automotive tire industry. *Compare Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 36 (1980) (evidence established that exposure to paint fumes while working in poorly ventilated area was unusual in carpentry trade, therefore aggravation of pulmonary disease not properly characterized as an occupational disease) *and Stoddard v. Northeast Rebuilders*, Opinion No. 30SJ-03WC (July 8, 2003) (secretary's exposure to fumes not peculiar to secretarial employment, therefore claim for benefits not classifiable as occupational disease) *with Gaudreault v. Granite Industries of Vermont*, Opinion No. 22-04WC (July 13, 2004) (silicosis contracted as a consequence of work in the granite industry properly characterized as occupational disease). Even in the context of summary judgment, it is still Claimant's burden to supply sufficient evidence to at least establish a *prima facie* case in support of his hypothesis, *Richards v. Nowicki*, 172 Vt. 142, 150 (2001), citing *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990) (opponent of summary judgment cannot rely upon conjecture or speculation), and this he has failed to do.

7. In fact, the distinction Claimant seeks to draw may not matter. Unless he can establish a legal or factual basis for tolling either the two-year limitations period mandated by §660(b) or the three-year period applicable to work-related injuries generally under §660(a), his claim is time-barred.

8. To fully understand Claimant's argument for tolling the occupational disease limitations period, some history is relevant. Prior to 1999, the statute of limitations for occupational diseases required that a claim for benefits could not be made more than five years after the "last injurious exposure to such disease in the employment." *Carter v. Fred's Plumbing & Heating, Inc.*, 174 Vt. 572, 574 (2002), citing 21 V.S.A. §1006(a) (1987). By imposing a five-year window on an injured worker's ability to obtain compensation once he or she ceased working, the statute imposed a substantive limitation on claimants whose diseases remained latent and undiscovered for some years thereafter. *Id.*

9. When §1006(a) was repealed and replaced with the current §660(b) in 1999, the legislature's intent was to "dramatically expand[]" the statute's coverage. Rather than imposing an arbitrary deadline based solely on when the worker's harmful exposure ceased, by relying instead on a "reasonable discovery" standard the current statute of limitations provides a remedy more in keeping with the statute's "humanitarian purpose." *Id.*

10. Claimant asserts that the statute's coverage should be expanded even further, however. He argues that because his COPD is continuously aggravated as a consequence of his work-related exposure to fumes and other irritants, with every day that he works a new claim for benefits arises, and with it a new limitations period. In this he analogizes to claims for sexual harassment in the workplace, whereby each day an individual is harassed, a new incident is deemed to have occurred. *See, e.g., National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) (hostile work environment claim is actionable as unlawful employment practice so long as any act contributing to it occurs within the applicable filing period).

11. In effect, by his analogy Claimant seeks to combine the "last injurious exposure" aspect of the repealed statute of limitations with the "reasonably discoverable and apparent" component of the current statute. Notwithstanding the legislature's remedial intent, the statutory language is clear on its face, however, and therefore leaves no room for interpretation. *Carter, supra* (citations omitted). When read together, sections 656(b) and 660 specifically establish a single event – the moment when both the injury and its relationship to employment are reasonably discoverable and apparent – as the trigger date for the applicable notice and limitations periods. And unlike a claim for sexual harassment, in which an employer's actionable conduct can begin anew each day, logically the moment when an injured worker realizes that his injury or condition is in fact work-related can only occur once.

12. To determine when the statute of limitations began to run in the claim before me now, therefore, the only date that matters is the date when Claimant's COPD, and its relationship to his employment at Tire Warehouse, became reasonably discoverable and apparent. 21 V.S.A. §656(b); *see Longe v. Boise Cascade Corp.*, 171 Vt. 214, 219 (2000) (applying reasonable discovery rule to both notice and claim provisions of §656 and to statute of limitations under §660); *see also, Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443 (1985). [3]

13. The undisputed evidence establishes that Claimant's condition, and its relationship to his employment, was reasonably discoverable and apparent at least as of May 6, 2009, when he solicited Dr. Mar's "To Whom It May Concern" letter. Claimant acknowledged that his purpose in doing so was for use in conjunction with a possible claim for benefits against his employer. When, at around the same time, he retained an attorney, his motive became that much more firmly established. Even considering the evidence in the light most favorable to him, I can only conclude from these facts that Claimant had reasonably recognized "the nature, seriousness and work connection" of his condition by that date, so as to start both the notice period and the statute of limitations clock running. *Hartman, supra* at 446.

[3] Though decided prior to the addition of §656(b), the *Hartman* Court concluded that it was appropriate to imply a "reasonable discovery" rule into the statute, recognizing "almost complete judicial agreement" in states with similar statutes at the time. *Id.* at 447.

14. With May 6, 2009 as the established date of injury, the statute of limitations for making a claim for benefits on account of a "work-related injury" subject to §660(a) expired on May 6, 2012. If characterized as an occupational disease claim, under §660(b) the limitations period expired even sooner, on May 6, 2011. Under either characterization, as Claimant did not assert a claim for benefits until on or about May 2, 2014, I conclude that his claim is time-barred as a matter of law.

15. As a final argument against summary judgment, Claimant asserts that his conversations with Mr. Roderick and Mr. Schlosser in 2010 raise factual issues regarding whether Defendant had sufficient knowledge of his condition as to excuse his failure to make a timely claim and negate Defendant's statute of limitations defense. In this, Claimant cites to §660(a).

16. Claimant's reliance on §660(a) is misplaced. The equitable tolling provision contained therein applies only to the six-month limitations period for filing a notice of injury and claim for compensation under §656. It does not in any way excuse an injured worker from taking affirmative action to protect his or her rights before the statute of limitations expires. *Longe, supra* at 200 (claim for specific benefits time-barred notwithstanding employer's knowledge of underlying accident); *see Smiley v. State of Vermont*, 2015 VT 42, ¶29. For that reason, it does not matter whether or when Defendant became aware that Claimant's COPD might have been caused or aggravated by his work; Claimant still was obligated to initiate a claim for benefits within the applicable limitations period provided for in §660.

17. To summarize, even considering the evidence in the light most favorable to Claimant, I conclude that both his condition and its relationship to his employment were reasonably discoverable and apparent at least as of May 6, 2009. Whether characterized as a personal injury by accident or as an occupational disease, a claim for benefits filed in 2014 was already time-barred under §660. There being no genuine issues of material fact, Defendant is entitled to judgment in its favor as a matter of law.

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's claim for workers' compensation benefits causally related to his chronic obstructive pulmonary disease is hereby **DENIED**.

DATED at Montpelier, Vermont this 23rd day of July 2015.

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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.