

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Paul Reis

Opinion No. 10-17WC

v.

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

Ben & Jerry's Homemade, Inc.

For: Lindsay H. Kurrle
Commissioner

State File No. JJ-00204

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Claimant, *pro se*
David A. Berman, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant's claim for workers' compensation benefits time-barred as a matter of law by the statute of limitations and/or the doctrine of laches?
2. Is Defendant entitled to dismissal of Claimant's claim under Vermont Rule of Civil Procedure 41(b)(2) for failure to prosecute?

EXHIBITS:

Claimant's Exhibit 1:	Unsworn statement from James Smolnik, March 17, 2017
Claimant's Exhibit 2:	Excerpt from Claimant's neuropsychological assessment by an unidentified doctor
Claimant's Exhibit 3:	Excerpt from a <i>Vermont-NEA Today</i> article entitled "NEA Honors Vermont Migrant Workers"
Claimant's Exhibit 4:	"To Whom It May Concern" letter from therapist Maggie Comparetta, June 30, 2003 ¹
Defendant's Exhibit A:	Claimant's timeline
Defendant's Exhibit B:	Letter from Defendant to small claims court, February 3, 1997
Defendant's Exhibit C:	Defendant's supplemental answer to small claims complaint
Defendant's Exhibit D:	Notice of Injury and Claim for Compensation (Form 5)

¹ Although Claimant did not include this letter in his response to the Summary Judgment Motion, he attached a copy to his Notice of Injury and Claim for Compensation. Given Claimant's *pro se* status and the relatively informal nature of the formal hearing process under Workers' Compensation Rule 17.1100, I have taken this letter into consideration and have identified it as Claimant's Exhibit 4, as permitted by V.R.Civ.P. 56(c)(3). See *Vohnoutka v. Ronnie's Cycle Sales of Bennington, Inc.*, Opinion No. 01-16WC (January 25, 2016), n. 1.

FINDINGS OF FACT:

As a preliminary matter, Claimant has failed to file a statement controverting Defendant's Statement of Undisputed Material Facts. Vermont Rule of Civil Procedure 56(c)(2) provides that a party disputing any facts in the moving party's statement must support his assertion by filing a separate statement of undisputed material facts or a separate statement of disputed facts. If the party fails to do so, the court may consider the fact undisputed for purposes of the motion. V.R.Civ.P. 56(e)(2). With no controverting statement from Claimant here, Defendant's Statement of Undisputed Material Facts is taken as true for purposes of this motion. *Webb v. LeClair*, 2007 VT 65; *T.A. v. Ann Johnston and Charlotte Rancourt d/b/a Karma Farm*, Opinion No. 05S-07WC (September 12, 2007).

Considering the evidence in the light most favorable to Claimant as the non-moving party and giving him the benefit of all reasonable doubts and inferences, *State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following facts:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act. *Defendant's Statement of Undisputed Material Facts* ¶¶ 1-2.
2. Judicial notice is taken of all forms and correspondence in the Department's file relating to this claim.

The Claim

3. Claimant alleges that on January 10, 1994, a coworker struck him with a wooden paddle, causing him to have sore buttocks for two weeks. He further alleges a low back injury and a recurrence of childhood post-traumatic stress disorder. *Defendant's Statement of Undisputed Material Facts* ¶ 3; *Defendant's Exhibits A and D*.
4. Claimant also alleges that coworkers made a variety of harassing statements to him during his employment with Defendant. *Defendant's Statement of Undisputed Material Facts* ¶ 4; *Defendant's Exhibit A*.
5. Claimant quit his employment on or about April 29, 1995. *Defendant's Statement of Undisputed Material Facts* ¶ 5; *Defendant's Exhibit A*.
6. In 1996 Claimant brought an action against Defendant in small claims court, alleging unpaid wages and benefits from his past employment relationship with Defendant. *Defendant's Statement of Undisputed Material Facts* ¶ 6; *Defendant's Exhibits B and C*. It does not appear that he made allegations about the alleged paddle incident in his small claims complaint. *Defendant's Statement of Undisputed Material Facts* ¶ 7; *Defendant's Exhibit C*.

7. Claimant made additional allegations verbally against Defendant during the small claims hearing on January 7, 1997. Those allegations are not detailed on the record, but Claimant represented in correspondence to the Department that he made Defendant aware of the alleged paddle incident and his injuries during the small claims hearing. *Claimant's letter to Specialist Landis dated November 16, 2016; Defendant's Statement of Undisputed Material Facts ¶ 8; Defendant's Exhibits B and C.* In response, Defendant wrote a letter to the court dated February 3, 1997, recounting that Claimant had described during the hearing various injustices that had allegedly taken place while he was Defendant's employee. *Defendant's Exhibit B.* Taking the facts in the light most favorable to Claimant, I infer that he told Defendant about the alleged paddle incident and at least some of his alleged injuries at the January 7, 1997 hearing.
8. Defendant investigated Claimant's allegations at that time, but was unable to substantiate them. *Defendant's Statement of Undisputed Material Facts ¶¶ 9-10; Defendant's Exhibit B.*
9. As set forth in Finding of Fact No. 3 *supra*, Claimant asserts that he sustained a low back injury in the alleged January 1994 paddle incident. More specifically, he alleges that in 1999 he began medical treatment for a low back injury related to the paddle incident. *Claimant's pretrial disclosure filed on March 14, 2017.*²
10. As set forth in Finding of Fact No. 3 *supra*, Claimant alleges that he also suffered a recurrence of post-traumatic stress disorder from the paddle incident. He asserts that on January 10, 1994 and again on October 27, 1994, he contacted mental health services for treatment of emotional distress resulting from the incident. *Defendant's Exhibit D.* Later, in June 2003, Claimant saw a doctor or therapist who diagnosed him with a recurrence of childhood post-traumatic stress disorder. *Claimant's Exhibit 4; Claimant's pretrial disclosure filed on March 14, 2017; Defendant's Exhibit D.* Claimant further asserts that his therapist told him in June 2003 that the alleged paddle incident triggered his childhood post-traumatic stress disorder. *Claimant's pretrial disclosure filed on March 14, 2017.*
11. On September 23, 2016, Claimant filed a Notice of Injury and Claim for Compensation (Form 5) in which he sought workers' compensation benefits for a low back injury and post-traumatic stress disorder based on the alleged January 10, 1994 paddle incident. *Defendant's Statement of Undisputed Material Facts ¶ 12; Defendant's Exhibit D.*

Procedural History

12. On October 13, 2016, Defendant filed a Denial of Workers' Compensation Benefits (Form 2), denying the entire claim on various grounds, including that the statute of limitations had run on the claim. Claimant contested the denial on November 18, 2016.

² Claimant's pretrial disclosure is not a sworn affidavit. Nevertheless, given his *pro se* status and the relatively informal nature of workers' compensation proceedings, I have considered the statements he made in his pretrial disclosure as additional evidence relevant to this Motion for Summary Judgment.

13. On December 6, 2016, the Department's specialist concluded that Defendant's denial was reasonably supported because the statute of limitations barred the claim. On February 21, 2017, Claimant requested a hearing.
14. On March 22, 2017, the Department held a pretrial conference, during which Defendant's counsel indicated his intent to file a Motion for Summary Judgment. The administrative law judge explained that process to Claimant during the conference and advised him that he would have 30 days to file a response.
15. On March 31, 2017, Defendant filed its Motion for Summary Judgment. On May 11, 2017, Claimant filed his response, consisting of three documents, *Claimant's Exhibits 1, 2 and 3*. Exhibit 1 is an unsworn statement from James Smolnik, alleging that he was subjected to the "guess the weight" game by fellow employees when he worked for Defendant in 1993. Exhibit 2 consists of excerpts from an undated neuropsychological assessment of Claimant. Exhibit 3 is an excerpt of an article from *Vermont NEA-Today* magazine about Migrant Justice, a non-profit migrant farmworker advocacy group. The article refers to Vermont farmworkers "calling on [Defendant] to take responsibility for farm workers' rights abuses." Claimant's exhibits do not controvert any of the material facts set forth in Defendant's Statement of Undisputed Material Facts, nor do they have any relevance to the statute of limitations or laches issues.

CONCLUSIONS OF LAW:

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 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, 48 (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, 428 (1979). Summary judgment is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.
2. Defendant here seeks summary judgment on the grounds that Claimant's claim is time-barred by either the statute of limitations or the doctrine of laches. In the alternative, Defendant requests dismissal of the claim under Vermont Rule of Civil Procedure 41(b)(2) for failure to prosecute.

Statute of Limitations

3. Claimant alleges that a work-related injury occurred on January 10, 1994. However, he did not file his claim for workers' compensation benefits until September 23, 2016, more than 22 years later. Defendant contends that the statute of limitations bars the claim as untimely.

4. The purpose of a statute of limitations is to prevent fraudulent or stale claims from being brought when the evidence to support the claim may be lost or unavailable. *Miller v. Cersosimo Lumber Co.*, Opinion No. 55-96WC (October 5, 1996), citing *Law's Administrator v. Culver*, 121 Vt. 285, 287 (1959). To determine whether a statute of limitations bars Claimant's claim, it is necessary to determine which statute of limitations applies.

Accrual Date

5. The statute of limitations that applies to a particular cause of action is the one in effect when the cause of action accrues. *Carter v. Fred's Plumbing & Heating, Inc.*, 174 Vt. 572 (2002), citing *Cavanaugh v. Abbott Labs.*, 145 Vt. 516, 521 (1985). For workers' compensation claims under Vermont law, a cause of action accrues, or begins to run, from the moment when both the injury and its relationship to employment become reasonably discoverable and apparent. *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 446 (1985); *Dunroe v. Monro Muffler Brake, Inc.*, Opinion 17-15WC (July 23, 2015).
6. Claimant's cause of action here is based on an alleged physical attack by a coworker on January 10, 1994. Claimant alleges that the attack caused both physical and psychological injuries. The alleged physical injuries include buttocks pain and a low back injury. Although buttocks pain would have been immediately apparent, a low back injury might not have been reasonably discoverable and apparent until sometime later.
7. As set forth in Finding of Fact No. 9 *supra*, Claimant alleges that he began medical treatment for a low back injury related to the 1994 paddle incident sometime in 1999. Accordingly, if Claimant's cause of action for his low back injury did not accrue at the time of the alleged paddle incident, it would have accrued by December 31, 1999 at the latest.
8. As set forth in Finding of Fact No. 10 *supra*, Claimant also alleges a psychological injury stemming from the January 10, 1994 paddle incident. He contacted mental health services for treatment on January 10, 1994 and October 27, 1994, and accordingly the psychological injury was probably reasonably discoverable and apparent at that time. However, the record does not reflect a diagnosis of post-traumatic stress disorder related to employment until June of 2003. Accordingly, by June 30, 2003, Claimant's alleged post-traumatic stress disorder and its relationship to his employment were reasonably discoverable and apparent. Taking the evidence in the light most favorable to Claimant, if his claim for a psychological injury did not accrue on the date of the alleged paddle incident, then it most certainly accrued by June 30, 2003 at the latest.

Statute of Limitations for Workers' Compensation Claims

9. In January 1994, Vermont's Workers' Compensation Act did not specify the statute of limitations applicable to compensation claims, but it included two notice provisions:

Section 656 of the statute provided in relevant part as follows:

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 happening thereof, and unless a claim for compensation with respect to an injury has been made within six months after the date of the injury[.]

Section 660 of the statute provided in relevant part as follows:

A notice given under the provisions of sections 656 and 657 of this title 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 his injury thereby. Want of or delay in giving such notice, or in making such claim, shall not be a bar to proceedings under the provisions of this chapter, 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.

10. As neither §656 nor §660 set forth the statute of limitations for bringing a claim in January 1994, the statute of limitations for workers' compensation claims at that time was the six-year statute applicable to all contract actions. 12 V.S.A. §511; *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 445 (1985). Accordingly, if Claimant's workers' compensation claim accrued at the time of the alleged paddle incident, then the six-year statute of limitations for contract actions applies.
11. Effective July 1, 1994, the Vermont legislature amended §660 to expressly incorporate the six-year statute of limitations. Thus, if Claimant's claim for a low back injury did not accrue until December 31, 1999, or if his claim for post-traumatic stress disorder did not accrue until June 30, 2003, then the amended version of §660 would apply.³ In either case, whether by statute or at common law, the limitations period applicable to his claim is six years.

³ The legislature amended 21 V.S.A. §660 again, effective May 26, 2004, to change the statute of limitations for initiating a claim for a work-related injury from six years to three years from the date of injury. That amendment has no bearing on the pending claim, as Claimant's cause of action accrued before the effective date of the 2004 amendment.

Application of the Statute of Limitations to Claimant's Claim

12. Claimant alleges both physical and psychological injuries from the paddle incident. Taking the evidence in the light most favorable to him as the non-moving party, the alleged low back injury was reasonably discoverable and apparent no later than December 31, 1999. Conclusion of Law No. 7 *supra*. Applying the six-year statute of limitations, I conclude that he had until December 31, 2005 within which to initiate a proceeding for workers' compensation benefits relating to that injury.
13. Again taking the evidence in the light most favorable to Claimant, his alleged post-traumatic stress disorder injury and its relationship to employment were reasonably discoverable and apparent no later than June 30, 2003. Conclusion of Law No. 8 *supra*. Applying the six-year statute of limitations, I conclude that he had until June 30, 2009 within which to initiate a proceeding for workers' compensation benefits relating to that injury.
14. Claimant did not initiate proceedings for workers' compensation benefits until September 23, 2016, however. I therefore conclude as a matter of law that his claim for workers' compensation benefits, based either on his alleged physical injury or on his psychological one, is time-barred by the six-year statute of limitations.

Doctrine of Laches

15. Defendant contends that if Claimant's claim were not barred by the statute of limitations, it would certainly be precluded under the doctrine of laches.
16. Laches is an equitable remedy that bars a claim where the claimant fails to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right. *In re Town Highway No. 20 of the Town of Georgia*, 2003 VT 76 ¶16, citing *Stamato v. Quazzo*, 139 Vt. 155, 157 (1980). Thus, for the doctrine of laches to apply, there must be both delay and prejudice to the adverse party.
17. Laches is an affirmative defense, and the burden of proof is on the party who relies upon it. *Stone v. Blake*, 118 Vt. 424, 428 (1955). Accordingly, for Defendant to establish laches in this matter, it must prove that Claimant failed to bring his claim for an unreasonable and unexplained time period and that the delay has been prejudicial.
18. Claimant here waited more than 22 years to bring his claim for workers' compensation benefits stemming from an alleged January 10, 1994 workplace incident. His delay is both manifestly unreasonable and unexplained by any evidence in the record.

19. In its legal memorandum, Defendant contends that the delay has been prejudicial to its defense as follows:

Over the course of twenty-two years, memories have faded, witnesses have moved, documents have been lost, and records have been destroyed. Defendant cannot go back and question or investigate the circumstances underlying Claimant's allegations. Defendant cannot even obtain medical records generated at or around the time of the alleged injury. Defendant is left with Claimant's allegations and little else.

Defendant's Memorandum of Law in Support of its Motion for Summary Judgment, at 6.

20. The prejudice Defendant describes is typical when an adverse party sits on his or her rights for an unreasonable time. For example, in *Bienvenue v. Sandra Kuc d/b/a Vermonsters Daycare Center*, Opinion No. 23-15WC (October 15, 2015), the claimant alleged a 2011 work-related injury. She filed her claim in a timely manner, but withdrew it before the hearing. In 2015, she sought to file her claim again. Citing *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979), the Commissioner wrote:

For both the parties and the fact-finder, the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *Id.* These concerns are especially relevant in cases where, as here, the most basic facts underlying a claimant's claim for workers' compensation benefits, including where and when the alleged injury occurred, who witnessed it and what if any disability resulted, have been hotly contested from the beginning.

Bienvenue v. Sandra Kuc d/b/a Vermonsters Daycare Ctr., Opinion No. 23-15WC (October 15, 2015).

21. Here, although Defendant's representations of the prejudice stemming from Claimant's delay are not supported by an affidavit or other evidence, given the passage of more than two decades since the alleged workplace incident, it is reasonable to assume that its ability to defend has been impeded as a result. Accordingly, I conclude as a matter of law that Claimant's claim is barred by the doctrine of laches.

Failure to Prosecute

22. Finally, Defendant contends that Claimant's claim should be dismissed based on his failure to prosecute, as provided in Rule 41(b)(2) of the Vermont Rules of Civil Procedure. The Rules of Civil Procedure apply to workers' compensation proceedings insofar as they do not defeat the informal nature of the proceedings. *Workers' Compensation Rule 17.1100*.

23. Rule 41 of the Vermont Rules of Civil Procedure is entitled "Dismissal of Actions." Rule 41(b)(2) provides as follows:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

24. Defendant contends that Claimant's claim should be dismissed with prejudice because he failed to prosecute it for 22 years, causing prejudice to Defendant's ability to investigate and defend against it. To determine whether Rule 41(b)(2) applies, it is necessary to determine what constitutes a failure to prosecute under the rule.
25. The Reporter's Notes to Rule 41(b)(2) provide that a defendant "may move for dismissal for plaintiff's failure to prosecute his action." More generally, Rule 41(b) provides for dismissal of actions pending on the court docket under a variety of circumstances, including when an action has been pending for two years and has appeared on a trial list; when the plaintiff has failed to apply for a default judgment after all defendants have failed to defend; or when service has not been made on any defendant after six months. V.R.Civ.P. 41(b)(1). Together, the Rule's language and context imply its purpose is to prevent cases from languishing on the court's docket. It is not intended to address the specific circumstance at issue here, that is, a plaintiff who unreasonably delays filing a claim in the first place.
26. Claimant here waited more than 22 years from the date of the alleged workplace incident to initiate an action for workers' compensation benefits. Since initiating his claim, however, he has continued to prosecute it. On November 18, 2016, he contested Defendant's denial of his claim; on February 21, 2017, he requested a hearing; and on May 11, 2017, he opposed Defendant's Motion for Summary Judgment. From these actions, I conclude that from the date when he filed it forward, he has appropriately prosecuted his claim. Dismissal under V.R.Civ.P. 41(b)(2) is therefore not warranted.

Summary

27. I conclude as a matter of law that Claimant's claim for workers' compensation benefits is barred by both the statute of limitations and the doctrine of laches.
28. I conclude as a matter of law that Claimant's workers' compensation claim is not subject to dismissal for failure to prosecute under V.R.Civ.P. 41(b)(2).

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's claim for workers' compensation benefits referable to injuries he allegedly suffered in the course and scope of his employment for Defendant on or about January 10, 1994 is hereby **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, Vermont, this 13th day of June, 2017.

Lindsay H. Kurrle
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.