

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Dennis Chabot, Senior

Opinion No. 05-20WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Raylar Limited Partnership d/b/a
Howard Johnson Motor Lodge

For: Michael A. Harrington
Interim Commissioner

State File No. KK-408

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Claimant, *pro se*
Richard Windish, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's claim for workers' compensation benefits for alleged work-related asbestosis time-barred as a matter of law?

EXHIBITS:

Defendant's Statement of Undisputed Material Facts filed January 15, 2020

Defendant's Exhibit A: Secretary of State's listing for Raylar Limited Partnership
Defendant's Exhibit B: Secretary of State's listing for Rutland Management, Inc.
Defendant's Exhibit C: Notice of Injury and Claim for Compensation (Form 5) filed
December 22, 2017

Defendant's Exhibit D: December 6, 2018 letter from the Department's Specialist to
Claimant and Hanover Insurance Company

Claimant's Exhibit 1:¹ Claimant's December 7, 2018 revised claim narrative
Claimant's Exhibit P1-P2: Social Security Administration's documentation of Claimant's
wages earned from Defendant in 1989 and 1990
Claimant's Exhibit P3: January 21, 2000 Vermont Department of Health engineer's
letter to the Rutland Howard Johnson Inn concerning asbestos
Claimant's Exhibit P4: Record of OSHA's December 17, 2000 amended penalty for
failure to abate asbestos issued to an unnamed respondent
Claimant's Exhibit P8-9: OSHA's December 6, 1999 referral reports concerning asbestos
at the Rutland Howard Johnson Inn
Claimant's Exhibit P12A: September 13, 2017 medical record from Mark Jacob, MD,
stating a diagnosis of asbestosis

¹ Claimant's first exhibit was unlabeled. I have labeled it Claimant's Exhibit 1.

FINDINGS OF FACT:

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

1. Claimant was an employee of Defendant, the operator of the former Rutland Howard Johnson's Motor Lodge, from 1981 until April or May of 1990. *Defendant's Statement of Undisputed Material Facts ¶¶ 1-2; Claimant's Exhibit 1; Claimant's Exhibit P1-P2.*
2. Claimant was diagnosed with asbestosis on September 13, 2017. *Defendant's Statement of Undisputed Material Facts ¶ 3; Claimant's Exhibit P12A.*
3. On December 22, 2017, Claimant filed a claim for workers' compensation benefits for asbestosis allegedly caused by exposure to asbestos in Defendant's workplace. *Defendant's Statement of Undisputed Material Facts ¶ 4; Defendant's Exhibit C, Notice of Injury and Claim for Compensation (Form 5).*

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.

Filing Deadline Applicable to Claimant's Asbestosis Claim

2. Claimant alleges that his asbestosis was caused by asbestos exposure in Defendant's workplace. He last worked for Defendant in April or May of 1990. *See* Finding of Fact Nos. 1-3 *supra*. Defendant contends that Claimant's claim is time-barred by the Occupational Disease Act's five-year statute of repose.
3. Prior to July 1, 1999, Vermont's Occupational Disease Act was in effect. 21 V.S.A. §§ 1001-1023 (1987) (repealed by 1999, No. 41, § 8(a)(1)). Asbestosis is an occupational disease under the Act. *R.S. v. Burlington Electric Dep't*, Opinion No. 39-06WC (September 21, 2006), citing *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31 (1980); *R.P. v. Vermont Asbestos Group, Inc.*, Opinion No. 02-07WC (January 23, 2007).

4. The Occupational Disease Act specified a statute of repose² for occupational disease claims. The statute of repose provided:

Compensation shall not be payable for disablement by reason of occupational disease unless such disablement results within five years after the last injurious exposure to such disease in the employment....

21 V.S.A. § 1006(a) (1987), as quoted in *Murray v. Luzenac Corp.*, 2003 VT 37, ¶ 4.

5. Effective July 1, 1999, the Vermont Legislature repealed the Occupational Disease Act and merged its provisions into the Vermont Workers' Compensation Act, 21 V.S.A. §§ 601-711. At that time, the Legislature amended 21 V.S.A. § 660 to add a new statute of limitations for occupational disease claims. The amended statute provides that "a claim for occupational disease shall be made within two years of the date the occupational disease is reasonably discoverable and apparent." 21 V.S.A. § 660(b). See also *Workers' Compensation Rule 3.1800*; *Carter v. Fred's Plumbing & Heating, Inc.*, 174 Vt. 572, 574 (2002).
6. The deadline for filing a cause of action is generally the one in effect when the cause of action accrued. *Cavanaugh v. Abbott Labs.*, 145 Vt. 516, 521 (1985).
7. In 2002 the Vermont Supreme Court held that the Occupational Disease Act's five-year statute of repose bars claims for occupational disease compensation when the last injurious exposure to the disease causing agent – e.g., asbestos – occurred more than five years before the statute's repeal on July 1, 1999, unless the claim was brought within that five-year period. *Carter v. Fred's Plumbing & Heating, Inc.*, 174 Vt. 572, 574-75 (2002).
8. The facts of *Carter* are analogous to the instant case. The plaintiff in *Carter* was last exposed to asbestos during his plumbing career in 1981. He was diagnosed with asbestosis in June 1999. He filed his claim on July 7, 1999 and contended that the new statute of limitations governed. However, the Supreme Court found that nothing in the workers' compensation statute implied an intent for the new two-year discovery rule for occupational diseases to apply retroactively. Therefore, his claim was time-barred by the five-year statute of repose in effect at the time his claim accrued. The Court concluded: "Unfortunately for plaintiff, the line was drawn in a manner that does not afford him relief." *Id.* at 575. *Accord Sheltra v. Vermont Asbestos Group*, 2003 VT 22, ¶¶ 3-5.
9. In 2003 the Vermont Supreme Court revisited the issue in *Murray v. Luzenac Corp.*, 2003 VT 37. The claimant in *Murray* was last exposed to an injurious substance in the workplace in September 1994. He was diagnosed with an occupational disease in

² A statute of limitations sets a lawsuit-filing deadline based on when the potential plaintiff was harmed. A statute of repose sets the deadline based on the mere passage of time or the occurrence of a certain event that does not itself cause harm or give rise to a lawsuit. See *P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92, 102 (2d Cir. 2004), citing Calvin W. Corman, *Limitation of Actions*, § 1.1, at 4-5 (1991).

June 2000. In finding that his claim was governed by the two-year discovery rule, the Court relied on the fact that his claim was not *already* barred by the five-year statute of repose when that statute was repealed effective July 1, 1999. The Court wrote:

The paramount issue in this case then is whether 21 V.S.A. § 660(b) applies to claims where the last injurious exposure to an occupational disease occurred prior to July 1, 1999 but the time limitation for such a claim had not yet lapsed under § 1006(a). We hold that it does. . . . [M]any jurisdictions allow parties to take advantage of new or amended statutes which extend the time limitations for the filing of a workers' compensation claim as long as the claim was not time-barred *prior* to the effective date of the new statute or amendment.

Murray, 2003 VT 37, ¶ 5.

10. The significant difference between *Carter* and *Murray* is that the claim in *Carter* was already time-barred before the effective date of the new statute. In contrast, the claim in *Murray* was not yet time-barred on July 1, 1999. Thus, the five-year statute of repose applied in *Carter*, while the two-year discovery rule applied in *Murray*. 2003 VT 37, ¶¶ 6-7. *See also R.P. v. Vermont Asbestos Group, Inc.*, Opinion No. 02-07WC (January 23, 2007) (Commissioner applied the Court's rulings in *Carter* and *Murray* to the claimant's asbestosis claim).

Application of the Statute to Claimant's Claim

11. Here Claimant's last date of alleged injurious exposure to asbestos in the workplace was in April or May 1990. Finding of Fact No. 1 *supra*. Considering the evidence in the light most favorable to him, I find that his last date of exposure was May 31, 1990. Claimant had five years from that date in which to file his claim for benefits under the Occupational Disease Act. 21 V.S.A. § 1006(a). Thus, the last date on which he could have filed his claim under the Act was May 31, 1995. As he did not file a claim by that date, his claim is time-barred by the five-year statute of repose.
12. Under the Court's analysis in *Murray*, the two-year discovery rule effective July 1, 1999 applies to occupational disease claims that were not already time barred by that date. Claimant's claim was time-barred four years earlier. Thus, the two-year discovery rule does not apply to his claim.
13. I therefore conclude that Claimant's claim for benefits for his alleged work-related asbestosis is time-barred by the Occupational Disease Act's five-year statute of repose.

Statutes of Limitations for Certain Civil Actions

14. Claimant urges the Department to disregard the Occupational Disease Act and apply Chapter 23 of Title 12 to his claim for benefits. In particular, he points to 12 V.S.A. §

518, which establishes a three-year discovery rule for ionizing radiation injuries, and 12 V.S.A. § 555, which addresses fraudulent concealment.

15. However, Claimant has not asserted a civil action for an ionizing radiation injury, nor has he asserted any other type of civil action. He has asserted a claim for benefits for an occupational disease. Thus, the applicable deadline for filing his claim is the statute of repose set forth in the Occupational Disease Act. *See* Conclusion of Law Nos. 11-13 *supra*.
16. Further, 12 V.S.A. § 464 provides that the provisions of Chapter 23 “shall not affect an action otherwise specially limited by law.” Claims for workers’ compensation benefits for occupational diseases are specifically limited by the statute of limitations set forth in 21 V.S.A. § 660(b) or the former statute of repose set forth in 21 V.S.A. § 1006(a) (repealed). Thus, any other limitations set forth in Chapter 23 do not apply.
17. I acknowledge that, under the five-year statute of repose, Claimant was required to file his claim for benefits well before he was diagnosed with asbestosis. That situation is likely one reason why the Legislature adopted the two-year discovery rule for occupational diseases in 1999. However, that rule is not retroactive to claims that were already time-barred before its adoption. *See* Conclusion of Law No. 8 *supra*. Thus, as in *Carter*, the line was unfortunately drawn in such a way that Claimant was not afforded relief. *See Carter v. Fred’s Plumbing & Heating, Inc.*, 174 Vt. 572, 575 (2002).

ORDER:

Defendant’s Motion for Summary Judgment is hereby **GRANTED**. Claimant’s claim for workers’ compensation benefits for alleged work-related asbestosis from his employment with Defendant is hereby **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, Vermont, this 25th day of February 2020.

Michael A. Harrington
Interim 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.