

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Richard Jodoin

Opinion No. 01-22WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Gregory Brown d/b/a
Brown's Hardwood Floors, Inc.

For: Michael A. Harrington
Commissioner

State File No. PP-00076

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Claimant, *pro se*
William J. Blake, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant's claim for workers' compensation benefits time-barred as a matter of law by the statute of limitations?

EXHIBITS:

Claimant's Exhibit A:	November 24, 2020 record of Michael Robinson, DPM and June 28, 2018 record of Glenn Lieberman, MD
Claimant's Exhibit B:	July 12, 2021 independent medical examination report of Jonathan Perryman, MD and January 22, 2021 letter from Glenn Lieberman, MD
Claimant's Exhibit C:	Cobb Hill Construction, Inc.'s and Engelberth Construction, Inc.'s jobsite insurance requirements
Claimant's Exhibit D:	Transcript of Claimant's September 28, 2021 deposition ¹
Defendant's Exhibit A:	June 28, 2018 medical record of Glenn Lieberman, MD
Defendant's Exhibit B:	June 13, 2019 medical record of Glenn Lieberman, MD
Defendant's Exhibit C:	September 29, 2020 medical record of Glenn Lieberman, MD
Defendant's Exhibit D:	November 24, 2020 medical record of Michael Robinson, DPM
Defendant's Exhibit E:	Employee's Notice of Injury and Claim for Compensation (Form 5) filed November 2, 2020
Defendant's Exhibit F:	Transcript of Claimant's September 28, 2021 deposition

¹ Although Claimant did not submit his deposition transcript, his Statement of Undisputed Material Facts states: "Please read my sworn deposition in full." *Claimant's Statement of Undisputed Material Facts*, at 1. Defendant has submitted that transcript as Defendant's Exhibit F.

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), and taking judicial notice of all relevant forms contained in the Department's file, there is no genuine issue as to the following material facts:

1. Claimant filed this claim seeking workers' compensation benefits for a foot injury. *Defendant's Statement of Undisputed Material Facts* ("Defendant's Statement"), ¶ 1.
2. Sonny Cilley was the caretaker of an estate in Barnard, Vermont. When Claimant's foot injury took place, Claimant and Mr. Cilley were moving a granite-topped cabinet. The cabinet base broke, and the cabinet fell on Claimant's right foot. *Claimant's Statement of Undisputed Material Facts* ("Claimant's Statement"), ¶ 2; *Claimant's Exhibits A and B*. Claimant went home after the accident and had his wife, who is a surgical nurse, clean his wound and apply ice. *Defendant's Exhibit F*, at 14-16.
3. Claimant first sought treatment for his foot injury on June 28, 2018. At that time, he reported to orthopedic surgeon Glenn Lieberman, MD, that, about a year and a half previously, he dropped a granite countertop on his right foot. Dr. Lieberman administered a lidocaine injection. *Defendant's Statement*, ¶ 1; *Defendant's Exhibit A*; *Defendant's Exhibit F*, at 17.
4. About one year later, on June 13, 2019, Claimant returned to Dr. Lieberman for follow-up treatment. *Defendant's Statement*, ¶ 2; *Defendant's Exhibit B*.
5. About 15 months after that, on September 29, 2020, Claimant saw Dr. Lieberman a third time. *Defendant's Statement*, ¶ 3; *Defendant's Exhibit C*.
6. At a November 24, 2020 office visit, this time with podiatrist Michael Robinson, Claimant provided more specific information as to the date of injury. He stated to Dr. Robinson that the injury occurred on "approximately January 1, 2017." *Defendant's Statement*, ¶ 4; *Defendant's Exhibit D*; *Defendant's Exhibit F*, at 18.
7. However, Claimant did not file a claim for workers' compensation benefits until November 2, 2020, approximately three years and ten months after the injury date. *Defendant's Statement*, ¶ 5; *Defendant's Exhibit E*.
8. Defendant has denied the claim, in part, on the grounds that the claim was filed outside the statute of limitations period. *Defendant's Statement*, ¶ 6.
9. Defendant has also asserted a denial of the claim on the basis that Claimant was not an employee of the alleged employer but rather a self-employed independent contractor. *Defendant's Statement*, ¶ 6. Claimant asserts that the Vermont Department of Labor has determined that he was Defendant's employee, not an independent contractor. *Claimant's Statement*, ¶ 1. Notwithstanding and without waiving this defense, Defendant's present motion for summary judgment seeks dismissal based solely on statute of limitations grounds. *Defendant's Statement*, ¶ 6.

10. In connection with this claim, Claimant gave sworn deposition testimony under oath on September 28, 2021. *Defendant's Statement*, ¶ 7; *Defendant's Exhibit F*.
11. In his deposition, Claimant confirmed that the accident happened as was reported in the medical records: a granite countertop dropped onto his foot. *Defendant's Statement*, ¶ 8; *Defendant's Exhibit F*, at 9-10, 13-15.
12. Claimant explained that the January 1, 2017 date noted in the medical records was an estimate, but that the estimate was "pretty accurate." He knows that the accident happened in January 2017 because it occurred when "kids were on winter break." It was "definitely wintertime" because every time he brought a load of tile to the dumpster, he had to trudge through snow. *Defendant's Statement*, ¶ 9; *Defendant's Exhibit F*, at 17-19. Claimant is "absolutely" sure the accident did not happen as late as May or June of 2017. *Id.*
13. Claimant asked his alleged employer, Gregory Brown, about payment of the medical invoices he had incurred for his treatment, but Mr. Brown was non-responsive. *Defendant's Statement*, ¶ 10; *Defendant's Exhibit F*, at 26-28.
14. Claimant had an initial discussion with Mr. Brown surrounding Dr. Lieberman's first invoice and then another discussion a year later about Dr. Lieberman's second invoice. *Defendant's Statement*, ¶ 10; *Defendant's Exhibit F*, at 21-29. Claimant candidly acknowledged that, despite having several conversations with Mr. Brown about the medical invoicing to no avail: "I didn't do anything about it; no, I didn't." *Defendant's Memorandum of Law*, at 5; *Defendant's Exhibit F*, at 28.
15. By the time of Claimant's third medical visit in September 2020, he and Mr. Brown were no longer on speaking terms. *Defendant's Statement*, ¶ 10; *Defendant's Exhibit F*, at 29.
16. Claimant stopped working for Defendant in May 2020. *Defendant's Statement*, ¶ 10; *Defendant's Exhibit F*, at 29. He provided three reasons for why he stopped working for Defendant, including Mr. Brown's failure to provide him with workers' compensation insurance information. *Claimant's Statement*, ¶ 3; *Defendant's Exhibit F*, at 30-32.
17. Claimant did not file a workers' compensation claim until November 2, 2020. *Defendant's Statement*, ¶ 11; *Defendant's Exhibit E*; *Defendant's Exhibit F*, at 33-35.
18. Defendant filed this summary judgment motion on the statute of limitations issue on December 7, 2021. Claimant filed his response on December 27, 2021.

CONCLUSIONS OF LAW:

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. *Samplid Enterprises*,

Inc. v. First Vermont Bank, 165 Vt. 22, 25 (1996). 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). It 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 this claim is time-barred by the statute of limitations.
3. Claimant alleges that he sustained a work-related injury on or about January 1, 2017 and absolutely no later than April 30, 2017. *See* Finding of Fact No. 12 *supra*. For the purpose of this motion, and taking the facts in the light most favorable to Claimant as the non-moving party, I find that the injury occurred no later than April 30, 2017.
4. Claimant filed his claim for workers' compensation benefits on November 2, 2020. If the injury occurred on or about January 1, 2017, in accord with Claimant's best recollection, he filed his claim three years and ten months after the injury. If the injury occurred as late as April 30, 2017, then he filed the claim three years and six months after the injury. Either way, Defendant contends that the statute of limitations bars the claim as untimely.
5. The time limits imposed by a statute of limitations "represent a balance, affording the opportunity to plaintiffs to develop and present a claim while protecting the legitimate interests of defendants in timely assertion of that claim." *Investment Properties, Inc. v. Lyttle*, 169 Vt. 487, 492 (1999).
6. 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, 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); *Reis v. Ben & Jerry's Homemade, Inc.*, Opinion No. 10-17WC (June 13, 2017).
7. Claimant's cause of action is based on a specific incident during which he alleges that a granite countertop dropped onto his right foot at work, resulting in an immediate foot injury. Unlike some latent injuries, Claimant's foot injury and its relationship to employment were discoverable and apparent the moment he dropped the granite countertop. Thus, his claim accrued on the accident date, and the applicable statute of limitations is the one in effect in 2017.
8. The statute of limitations for Vermont workers' compensation claims is set forth in 21 V.S.A. § 660(a). Effective May 26, 2004, the statute of limitations for initiating a claim for a work-related injury is three years from the date on which the injury and its

relationship to employment were reasonably discoverable and apparent. This three-year statute of limitations was in effect in 2017 and remains in effect today.

9. Claimant's right foot injury and its relationship to employment were discoverable and apparent no later than April 30, 2017. *See* Conclusion of Law No. 3 *supra*.
10. Applying the three-year statute of limitations, I conclude that Claimant had until April 30, 2020, at the latest, to initiate a proceeding for workers' compensation benefits relating to his foot injury.
11. Claimant did not initiate a claim for workers' compensation benefits until November 2, 2020. I therefore conclude as a matter of law that his claim for workers' compensation benefits is time-barred by the statute of limitations.

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's claim for workers' compensation benefits referable to a 2017 right foot injury that he allegedly sustained during employment for Defendant is hereby **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, Vermont, this 6th day of January 2022.

Michael A. Harrington
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.