STATE OF VERMONT
DEPARTMENT OF LABOR

Daniel Bushey	Opinion No. 24-22WC
v.	By: Beth A. DeBernardi Administrative Law Judge
RBC Capital Markets, LLC	For: Michael A. Harrington Commissioner
	State File No. BB-50030

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Thomas C. Nuovo, Esq., for Claimant
David A. Grebe, 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?

2. Is Claimant's claim barred as a matter of law by the doctrine of laches?

3. Is Defendant entitled to dismissal of Claimant's claim under Vermont Rule of Civil Procedure 41(b)(2) for failure to prosecute?

4. Does the doctrine of collateral estoppel bar Claimant from asserting that he sustained an injury arising out of and in the course of his employment with Defendant?

EXHIBITS:

Defendant's Exhibit 1:	Claimant's September 2019 deposition transcript (excerpts)
Defendant's Exhibit 2:	August 12, 2009 medical record of Dr. McLellan
Defendant's Exhibit 3:	Dr. McLellan's November 2018 deposition transcript
Defendant's Exhibit 4:	November 15, 2020 medical record of Dr. McLellan
Defendant's Exhibit 5:	April 2022 formal hearing docket referral memorandum
Defendant's Exhibit 6:	May 2012 federal court counterclaim against Defendant
Defendant's Exhibit 7:	October 2012 referral of the federal action to FINRA for arbitration and January 2016 notice of dismissal of the federal action with prejudice based on FINRA's arbitration decision
Claimant's Exhibit A:	First Report of Injury (Form 1) filed July 1, 2009
Claimant's Exhibit B:	Notice of Injury and Claim for Compensation (Form 5) filed July 5, 2016

Claimant's Exhibit C:	Notice of Injury and Claim for Compensation (Form 5) filed August 18, 2017
Claimant's Exhibit D:	FINRA's October 2015 arbitration award
Claimant's Exhibit E:	December 10, 2014 FINRA arbitration transcript, volume 4
Claimant's Exhibit F:	Dr. McLellan's November 2018 deposition transcript
Claimant's Exhibit G:	Dr. McLellan's November 1, 2018 medical record
Claimant's Exhibit H:	November 30, 2017 Social Security Administration determination of disability
Claimant's Exhibit I:	June 2016 functional capacity evaluation of Gregory Morneau
Claimant's Exhibit J:	August 2016 opinion letter of Dr. McLellan
Claimant's Exhibit K:	Claimant's September 2019 deposition transcript
Claimant's Exhibit L:	October 2016 Neurology Headache Clinic consultation record
Claimant's Exhibit M:	Summary of Dr. McLellan's expected testimony
Claimant's Exhibit N:	December 2020 deposition of Dr. Backus
Claimant's Exhibit O:	Article by Christopher Andrews titled "Neurological and Neuropsychological Consequences of Electrical and Lightning Shock: Review and Theories of Causation"
Claimant's Exhibit P:	Christopher Andrews' opinion concerning Dr. Backus' opinion
Claimant's Exhibit Q:	December 11, 2014 FINRA arbitration transcript, volume 5

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 and records contained in the Department's claim file, I find the following material facts:

Claimant's Employment with Defendant, Work in the Manchester Office Building, and Diagnosis with Sick Building Syndrome in 2009

1. Claimant began working for Defendant in the summer of 2008 as a registered stockbroker and office manager. *Defendant's Statement of Undisputed Material Facts* ("*Defendant's Statement*"), ¶ 1; *Exhibit 1* (Claimant's Deposition), at 6:13-15; *Exhibit 6*, at 2.

2. Defendant opened a new office in Manchester, Vermont, in February 2009, and Claimant began working in the new office at that time. *Defendant's Statement*, ¶ 2; *Exhibit 1*, at 8:23-24.

3. Claimant testified that, immediately upon the opening of the Manchester office, "the entire office was inundated with – I'll be polite and say the smell of sulfur." *Defendant's Statement*, ¶ 3; *Exhibit 1*, at 9:4-6.

4. Claimant testified that within two weeks of moving into the Manchester office, coworkers were complaining of headaches. *Exhibit 1*, at 10:21-22. He further testified that "unfortunately, gradually I started getting headaches and started feeling, you know, funny and, you know, gradually everybody in the office was starting to complain about it. . . . [E]verybody was complaining about being sick." *Exhibit 1*, at

11:15-21. Claimant testified that "people kept getting sick. I kept getting sicker and sicker." *Exhibit 1*, at 12:8-9. He also recalled that his headache complaints began in March 2009, *Exhibit 1*, at 17:21-23, but he initially related his headaches to "stress and overwork." *Exhibit K* (Claimant's Deposition), at 18:8-11. *Defendant's Statement*, ¶ 4; *Claimant's Response to Defendant's Statement* ("*Claimant's Response*"), ¶ 4.

5. Claimant testified that Defendant closed the office several times shortly after the staff complained, in order to remediate the ventilation. *Defendant's Statement*, ¶ 5; *Exhibit 1*, 12:10-13.

6. Claimant testified that, at the latest, within two months of entering the Manchester office, he developed the following symptoms: headaches, forgetfulness, sleeping all the time, sick, irritation, metallic taste in mouth, loss of taste, loss of smell, bloody noses, breathing difficulties, vertigo, dizziness, sores in mouth, brain fog, difficulties focusing/lack of concentration, imbalance, tinnitus, development of tremor in right hand, short-term memory loss, and inability to read. *Defendant's Statement*, ¶ 6; *Exhibit K*, at 20:25-31:22. Despite these symptoms, Claimant was able to continue working until August 2015.[1] *Claimant's Response*, ¶ 6; *Exhibit K*, at 5:22-24.

7. Claimant testified that he experienced all these symptoms in 2009 while he was working in Defendant's Manchester office. *Exhibit 1*, at 31:15-17. He further testified that there are no symptoms related to his alleged Manchester office exposure injury that he did not experience within the first six months of his employment in Manchester, beginning in February 2009. *Exhibit 1*, at 31:18-22. *See Defendant's Statement*, ¶ 7.

8. On July 1, 2009, Defendant filed a First Report of Injury (Form 1) with an alleged injury date of May 9, 2009, stating that Claimant "first noticed signs of symptoms on May 9th – breathing diffi/Employee suffering side effects from po [*sic*]." *Defendant's Statement*, ¶ 10; *Claimant's Response*, ¶ 10; *Exhibit A*. Form 1 also stated: "No Physical Injury (glasses, contact lenses, artificial appliance)" and "No Physical Injury (ie. mental disorder)." *Exhibit A*.

9. Claimant began treatment with occupational and environmental medicine physician Robert McLellan, MD, on August 12, 2009. He presented with complaints of nasal and eye burning and neurocognitive concerns, including confusion. Dr. McLellan diagnosed Claimant with "sick building syndrome." *Defendant's Statement*, ¶ 8; *Exhibits 2 and 3*.

10. Claimant continued his treatment with Dr. McLellan. On November 15, 2010, he reported nasal burning, dysnomia and neurocognitive complaints in association with environmental exposures. *Defendant's Statement*, ¶ 9; *Exhibit 4*. These

[1] Claimant stopped working in Defendant's Manchester office and began working for Defendant from home in the summer of 2009. He then relocated to Florida to continue his work for Defendant in December 2009. He left his employment with Defendant in the fall of 2010 and began working for Stifel Financial on November 1, 2010. *Exhibit 6*; *Exhibit K*, at 6:7-12; *Exhibit B*, at 2. Claimant stopped working for Stifel Financial in August 2015. *Exhibit K*, at 5:17-24.

neurocognitive complaints are the subject of Claimant's present workers' compensation claim before the Department. *Defendant's Statement*, ¶ 9; *Exhibit 4.*

11. Although neither party included information about Claimant's medical bills in their respective statements, the specialist's formal docket referral memorandum states: "At the informal conference held on 3/11/2021, the Insurer indicated the claim was treated as a medical only; and no denials filed." *Exhibit 5*, at 1; *see also Claimant's Statement of Additional Undisputed Material Facts* ("*Claimant's Additional Statement*"), ¶ 15. Considering the evidence in the light most favorable to Claimant as the non-moving party, for purposes of this motion, I infer that Defendant paid medical bills related to Claimant's alleged workplace injury.

The 2011 Federal Lawsuit Between the Parties, the 2014 FINRA Arbitration, and Claimant's Lawsuit Against Metropolitan Life Insurance Company

12. In 2011, Defendant sued Claimant in federal court for breach of a 2008 promissory note. On May 14, 2012, Claimant filed a counterclaim against Defendant in the federal court action, including a claim for "breach of duty for failure to provide Bushey with a safe workplace environment."[2] *Exhibit 6*. The facts and the alleged injuries germane to this particular count of Claimant's counterclaim are substantially the same as those brought before the Department of Labor in the present claim for workers' compensation benefits. *Defendant's Statement*, ¶ 12; *Claimant's Response*, ¶ 12; *Claimant's Additional Statement*, ¶ 16; *Exhibit 6; Exhibit D.*

13. In October 2012, Claimant and Defendant agreed to submit all the claims asserted in the federal lawsuit to the FINRA Dispute Resolution Panel ("FINRA") for arbitration. *Defendant's Statement*, ¶ 13.

14. Dr. McLellan testified at the arbitration hearing on December 10, 2014 that he was unable to form a diagnosis as to the exact factors causing Claimant's complaints. *Exhibit E*, at 465:11-16. Dr. McLellan also testified that he could not relate Claimant's current condition to his 2009 workplace exposure to a reasonable degree of medical certainty at that time. *Id.,* at 470:19 - 471:3; *Claimant's Additional Statement*, ¶ 17. FINRA did not immediately issue its decision at the conclusion of the arbitration. *Exhibit D.*

15. In May 2015, Defendant opposed Claimant's counterclaim for an unsafe workplace environment on the grounds that Vermont law prohibited him from filing such a claim in the FINRA arbitration. Accordingly, on July 6, 2015, Claimant voluntarily withdrew this count. *Claimant's Additional Statement*, ¶ 18; *Exhibit D*, at 4.

16. On October 12, 2015, the FINRA arbitrators issued their decision. They found in Defendant's favor on the promissory note claim and in Claimant's favor on a

---

[2] Claimant's federal counterclaim also included counts for intentional disruption of an existing contractual relationship, constructive discharge of employee due to intolerable working conditions tantamount to dismissal, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and a request for punitive damages. *Defendant's Statement*, ¶ 12, footnote 1; *Exhibit 6.*

retaliation counterclaim. The arbitrators denied Claimant's remaining counterclaims. *Exhibit D*. On January 14, 2016, the parties filed a notice of dismissal with prejudice in the federal court case based on the arbitrated resolution. *Exhibit* 7; *Defendant's Statement*, ¶ 13; *Claimant's Response*, ¶ 13.

17. After the FINRA arbitration, Claimant filed an action in federal court against his disability insurance carrier, Metropolitan Life, to enforce the payment of disability benefits under the policy. *Defendant's Statement*, ¶ 14.

Claimant's Filing of a Claim for Permanent Total Disability Benefits under the Vermont Workers' Compensation Statute on July 5, 2016

18. Claimant filed a Notice of Injury and Claim for Compensation (Form 5) with the Department of Labor on July 5, 2016, alleging a neurological cognitive injury.[3] *Claimant's Response*, ¶ 11; *Claimant's Additional Statement*, ¶ 19; *Exhibit B*. Form 5 states that Claimant is seeking permanent total disability benefits. *Exhibit B*.

19. The last time Claimant worked was in August 2015. *Claimant's Additional Statement*, ¶ 23; *Exhibit K*, at 5:22-24.

20. In June 2016, Certified Work Capacity Evaluator Gregory Morneau performed a functional capacity evaluation of Claimant and concluded that he did not have a work capacity at that time. *Claimant's Additional Statement*, ¶ 21; *Exhibit I*, at 5.

21. In a letter dated August 22, 2016, Dr. McLellan adopted Mr. Morneau's findings and wrote:

> Cognitively [Claimant] presents with deficits with recall, working memory, short term memory, focused attention, selective attention, shifting attention, visual spatial abilities, which in [turn] limits all areas of executive function. . . . He does not have the attention or memory abilities to perform a repetitive one step task or complete it with accuracy and will be unable to use feedback such as from a supervisor to modify his performance.

Exhibit J; *Claimant's Additional Statement*, ¶ 22.

Claimant's Filing of a Claim for Permanent Total Disability Benefits under the Vermont Workers' Compensation Statute on August 18, 2017

22. Claimant filed another Notice of Injury and Claim for Compensation (Form 5) for permanent total disability benefits on August 18, 2017. *Exhibit C*. This Form 5 lists the "machine or tool involved" as "defective HVAC system involving air handling and ventilation of new office space." *Exhibit C*; *Defendant's Statement*, ¶¶ 10-11; *Claimant's Response*, ¶ 11. This Form 5 further states that Claimant's "symptoms

---

[3] The original date stamp on Form 5 in the Department's file confirms this filing date.

began as upper respiratory complaints and headaches and has progressed to neuro-cognitive disability." *Exhibit C.*

23. Thereafter, on September 8, 2017, Claimant filed a Notice and Application for Hearing (Form 6) on his permanent total disability claim. *Defendant's Statement*, ¶ 11; *Exhibit 5. See also Claimant's September 8, 2017 Form* 6.[4]

24. On November 30, 2017, the Social Security Administration's Office of Disability Adjudication and Review issued a determination that Claimant was totally disabled from work under the standards applicable to social security disability claims as of August 1, 2015. *Claimant's Additional Statement*, ¶ 26; *Exhibit H.*

25. In his November 2018 deposition, Dr. McLellan testified that he had diagnosed Claimant with Environmental Intolerance. *Exhibit F* (Dr. McLellan's Deposition), at 13:1-21. This testimony was consistent with the medical record of his November 1, 2018 examination of Claimant. *Exhibit G. Claimant's Additional Statement*, ¶ 20.

26. Dr. McLellan testified in his deposition:

> Environmental intolerance is, in my view, a diagnosis of exclusion, meaning that we've looked for every other potential explanation of what might be going on and have not been able to identify another specific condition. So, for example, we pursued the possibility he could have a seizure disorder or that he might have an atypical migraine.

Exhibit F, at 22:4-10. Dr. McLellan further testified that those other possible conditions were ruled out. *Id.*, at 22:11-13. *See also Exhibit L,* at 7 (Dr. Nye's October 26, 2016 report ruling out migraines as the cause of Claimant's symptoms); *Claimant's Additional Statement*, ¶¶ 24, 27.

27. According to Dr. McLellan, the culmination of Claimant's workplace exposure back in 2009 and subsequent sequelae of events triggered by those initial exposures caused him to become totally disabled in 2015. *Claimant's Additional Statement*, ¶ 28. In his November 2018 deposition, Dr. McLellan further testified as follows:

> Q. And do you have an understanding as to why he stopped working out of his home as a stockbroker back in the 2015 timeframe?
>
> A. So he was having multiple ongoing episodes. He had been to the emergency department in the context of that arbitration hearing that we talked about. And, I mean, that was essentially what he said, was leading to increasing dysfunction and his inability to do his job as he was usually able to do it.

[4] I take judicial notice of this form in the Department's file.

> Q. So in the 2015 time frame, the cumulative effect of those exposures led him to being unable to work in any capacity?
>
> A. Correct.

Exhibit F, at 56:1-13; *Claimant's Additional Statement*, ¶ 28.

28. Claimant's Additional Statement includes several paragraphs setting forth Dr. Backus' competing opinion as to the cause of Claimant's medical condition. As the relative persuasiveness of the experts' opinions is not material to this motion, I have omitted those paragraphs from this decision. *Claimant's Additional Statement*, ¶¶ 29-31.

CONCLUSIONS OF LAW:

Summary Judgment Standard

1. To prevail on a summary judgment motion, 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). 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.

Statute of Limitations for a Work-Related Injury

2. Defendant first contends that the statute of limitations bars this workers' compensation claim as untimely. The statute of limitations for initiating a claim for a work-related injury is three years from the date of injury. 21 V.S.A. § 660(a). The date of injury is the date on which the injury and its relationship to employment were 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).

3. Claimant alleges that he sustained an injury while working in Defendant's Manchester office. He began work there in February 2009 and began to experience headaches in March 2009. Although he initially attributed his headaches to stress and overwork, he reported an alleged environmental exposure injury to Defendant on or before May 9, 2009. On July 1, 2009, Defendant filed a First Report of Injury (Form 1), describing Claimant's injury as "No Physical Injury (ie. mental disorder)."[5] Thereafter, Claimant

[5] Defendant contends that Claimant did not file any claim for "cognitive" issues until August 2017. However, the term "mental disorder," specifically as opposed to a physical injury, is consistent with a cognitive complaint.

sought medical treatment for his symptoms and was diagnosed with "sick building syndrome" on August 12, 2009.

4. Generally, the date by which an injury has become reasonably discoverable and apparent is a question of fact, but it may be determined as a matter of law when the evidence is sufficiently clear. *Pelletier v. Pelletier Plumbing & Heating, P.C.*, Opinion No. 23-22WC (November 17, 2022), citing *Smiley v. State of Vermont*, Opinion No. 15-13WC (June 3, 2013), *aff'd*, 2015 VT 42.

5. Notably, it is not necessary for an injured worker to have an "airtight case" before the limitations period begins to run. Rather, the injured worker should have obtained enough information to put a reasonable person on notice that a particular defendant might be liable for his or her injuries. *Smiley v. State of Vermont*, *supra*, citing *Rodrigue v. Valco Enterprises, Inc.*, 169 Vt. 539, 540-41 (1999) (applying the reasonable discovery rule in a dram shop action). The injured worker may then use the limitations period to investigate and pursue the cause of action. *Rodrigue*, 169 Vt. at 541. *See also Holmes v. James Gold, D.D.S.*, Opinion No. 31-00WC (October 2, 2000) (holding that where claimant sought treatment in 1994 for a hand and wrist condition related to work, but her physician testified that he had no basis to diagnose her with carpal tunnel syndrome at that time, "her injury was reasonably discoverable and apparent" in 1994, regardless of the precise diagnosis).

6. In this case, based on the chronology set forth in Conclusion of Law No. 3 *supra*, Claimant's cause of action for a workers' compensation claim likely accrued by May 9, 2009, when he reported his symptoms to Defendant and related those symptoms to his employment. Further, Claimant's diagnosis of sick building syndrome on August 12, 2009 removes any doubt that his alleged injury and its relationship to employment were reasonably discoverable and apparent on that date. Taking the facts in the light most favorable to Claimant as the non-moving party, I conclude that he had three years from August 12, 2009 in which to initiate a claim for a work-related injury.

7. Claimant notified Defendant of his alleged work-related injury on or before May 9, 2009. Thereafter, Defendant filed a First Report of Injury and accepted the claim as a "medical only" claim. Further, Defendant never filed a denial of the claim. *See* Finding of Fact No. 11 *supra*. Accordingly, for purposes of this motion, I conclude that Claimant initiated a claim for an alleged workplace injury well within the three-year statute of limitations set forth in 21 V.S.A. § 660(a).

Statute of Limitations for a Permanent Total Disability Claim

8. In addition to the three-year statute of limitations for initiating a claim for a work-related injury, the Vermont statute provides as follows: "This section shall not be construed to limit subsequent claims for benefits stemming from a timely filed work-related injury claim." 21 V.S.A. § 660(a). Although the statute does not specify the time limit for a subsequent claim for a specific benefit, the Commissioner has determined that such claims shall be filed within six years of the date on which they accrue. *See Hoisington v. Ingersoll Electric*, Opinion No. 52-09WC (December 28,

2009) (applying the six-year contract statute of limitations to claims for specific benefits). In August 2015, this six-year statute of limitations was incorporated into Workers' Compensation Rule 3.1700.

9. Defendant here contends that Claimant missed the six-year statute of limitations for asserting his claim for odd lot permanent total disability benefits under 21 V.S.A. § 644(b)[6] because he did not file a claim for his "known cognitive deficits" within six years of his diagnosis date with sick building syndrome on August 12, 2009.

10. As set forth above, Claimant timely initiated a claim for a work-related injury in 2009. *See* Conclusion of Law No. 7 *supra.* However, there is no evidence that he was totally disabled from work, much less permanently so, in 2009. Claimant had six years from the date his claim for *permanent total disability benefits accrued*, which is separate from the date on which his entire claim accrued, in which to assert a claim for those specific benefits. 21 V.S.A. § 660(a); Workers' Compensation Rule 3.1700.

11. A claim for permanent total disability benefits cannot accrue until it becomes reasonably apparent, both medically and vocationally, that as a result of the work injury, the claimant most likely will never be able to return to regular gainful employment. *Labbe v. Lunenberg Fire Dist. #2*, Opinion No. 25-13WC (November 25, 2013), citing *Hoisington v. Ingersoll Electric*, Opinion No. 52-09WC (December 28, 2009) and *K.T. v. Specialty Paperboard*, Opinion No. 33-05WC (June 24, 2005). Until such a time, any claim for permanent total disability benefits would be premature, and the statute of limitations would not start to run.

12. Claimant here continued to work until August 2015. Thus, his claim for odd lot permanent total disability benefits under 21 V.S.A. § 644(b) would not have been reasonably discoverable and apparent until that date, at the earliest. Counting six years from August 2015, Claimant would have had until at least August 2021 to assert his claim for permanent total disability benefits, if not later.

13. Claimant asserted his claim for permanent total disability benefits on July 5, 2016, when he filed a Notice of Injury and Claim for Compensation with the Department. He reasserted his claim for those benefits on August 18, 2017, when he filed another Notice of Injury and Claim for Compensation. Applying either date, Claimant's claim for permanent total disability was filed well within six years of the accrual date, which was no earlier than August 2015.

14. Accordingly, I conclude that Claimant timely filed his claim for permanent total disability benefits and that his claim for such benefits is not barred by the statute of limitations as a matter of law.

---

[6] There is no evidence or allegation here that Claimant suffered any of the permanently and totally disabling injuries enumerated in 21 V.S.A. § 644(a).

<u>Doctrine of Laches</u>

15. Defendant next contends that Claimant's claim is precluded under the doctrine of laches. 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). Laches is an affirmative defense, and the burden of proof is on the party who asserts 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 assert his claim for an unreasonable and unexplained time period and that the delay has been prejudicial.

16. Claimant initiated his claim for a work-related injury in May 2009, just several months after he sustained the alleged injury. Accordingly, I conclude that Defendant has failed to establish, as a matter of law, any unreasonable and unexplained delay, nor any prejudice arising from this time frame.

17. As to his specific claim for permanent total disability benefits, Claimant's claim did not accrue until he stopped working in August 2015, at the earliest. Thereafter, he filed his claim for permanent total disability benefits in July 2016 and August 2017. Again, I find that Defendant has failed to establish any unreasonable and unexplained delay as a matter of law.

18. The second element of a laches defense is prejudice to the defendant. In *Reis v. Ben & Jerry's Homemade, Inc.*, Opinion No. 10-17WC (June 13, 2017), the claimant alleged that he was injured in a workplace assault 22 years before filing his claim for workers' compensation benefits. The Commissioner found that the claim was precluded by the doctrine of laches, as the passage of time seriously prejudiced the defendant's ability to defend the claim. The Commissioner noted that, with the passage of time, memories fade, witnesses move, and documents are lost or destroyed, leaving the defendant with little more than the claimant's allegations.

19. The same cannot be said here. Defendant knew about Claimant's alleged workplace injury on May 9, 2009 and accepted it as a medical only claim. Thereafter, the parties engaged in federal court proceedings concerning Claimant's allegation that Defendant failed to provide him with a safe work environment and that he was disabled from work as a result. Accordingly, Defendant had both motivation and opportunity to secure evidence relevant to Claimant's allegations about his health and his workplace.

20. Defendant specifically alleges that it is prejudiced by Dr. McLellan's retirement. However, it has not explained how the retirement is prejudicial. There is no evidence in the record as to whether Dr. McLellan is willing to make himself available as a witness post-retirement, nor whether the parties intend to offer his testimony via preservation deposition. Further, there is no evidence as to whether Claimant intends to engage a different expert witness. In short, there is no evidence that Dr. McLellan's retirement unreasonably prejudices Defendant's ability to defend this claim.

21. Accordingly, I conclude that Claimant's filing of his claim for permanent total disability benefits in 2016 and 2017 did not manifest either unreasonable and unexplained delay, nor did it prejudice Defendant's ability to defend the claim. Therefore, Defendant has failed to establish that Claimant's claim is barred by the equitable doctrine of laches as a matter of law.

Failure to Prosecute

22. Defendant next contends that Claimant's claim should be dismissed for failure to prosecute under the Vermont Rules of Civil Procedure. Those rules apply to workers' compensation claims insofar as they do not defeat the informal nature of the proceedings. Workers' Compensation Rule 17.1100.

23. V.R.Civ.P. 41(b)(2) provides that, upon motion of the defendant, a case may be dismissed for failure of the plaintiff to prosecute. V.R.Civ.P. 41(b)(3) provides that, unless the court otherwise specifies in its dismissal order, such a dismissal shall be an adjudication on the merits. For example, in *Holmes v. Northeast Tool*, Opinion No. 25-05WC (April 27, 2005), the Department dismissed a claim with prejudice after the claimant allowed his claim to "slumber" on the docket for two separate periods of four years each without any acceptable explanation for the inactivity.

24. Here, Claimant timely filed his claim for permanent total disability benefits in July 2016 and August 2017. In September 2017, he filed a Notice and Application for Hearing (Form 6) and requested an informal level conference. *See Exhibit 5*. The specialist scheduled an informal conference, but the parties did not attend. Rather, on November 27, 2017, the parties filed a Stipulation *jointly* requesting that the Department put the informal conference on hold pending resolution of Claimant's lawsuit against Metropolitan Life in federal court. Although the record does not reveal the progress of that lawsuit, on February 5, 2021, Claimant requested that the Department schedule the informal conference in his workers' compensation claim. The specialist held the informal conference on March 11, 2021 and a status conference on April 13, 2022. Her referral memorandum also notes that, in the interim, the parties mediated the workers' compensation claim but failed to resolve it. *See generally Exhibit 5*. The specialist referred the parties' dispute to the formal docket on April 28, 2022, and Defendant filed this summary judgment motion on August 17, 2022. Claimant timely responded to the motion.

25. Given that Defendant expressly and jointly stipulated to the delay about which it now complains, I find its position difficult to fathom. After the agreed upon delay, Claimant resumed the prosecution of his claim by asking the specialist to schedule the informal conference, and the parties engaged in mediation. I cannot find on these facts that Claimant failed to prosecute his claim. Accordingly, I conclude that dismissal of this workers' compensation claim under V.R.Civ.P. 41(b)(2) for failure to prosecute is not warranted.

Collateral Estoppel

26. Finally, based on the FINRA arbitration decision in the federal court action between the parties, Defendant raises the doctrine of collateral estoppel as a bar to imposing liability for workers' compensation benefits here.

27. The doctrine of collateral estoppel, or issue preclusion, prevents a party from relitigating an issue that was "necessarily and essentially determined" in a prior action between the same parties. *American Trucking Ass'ns, Inc. v. Conway*, 152 Vt. 363, 369 (1989). For the doctrine to apply, the following criteria must be met: (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair. *Trepanier v. Getting Organized, Inc*., 155 Vt. 259, 265 (1990). *See also Touchette v. Telescope Casual Furniture Co.*, Opinion No. 01-12WC (January 11, 2012).

28. Claimant here asserted several counterclaims against Defendant in federal court, including one for breach of duty to provide a safe work environment. That counterclaim included similar allegations about the facts and injuries as those alleged in this workers' compensation claim. The federal court claims between the parties were referred in their entirety to FINRA for arbitration, and FINRA conducted the arbitration in December 2014. In May 2015, Defendant filed an opposition to Claimant's safe work environment claim in the FINRA arbitration, contending that Vermont law did not permit a claim for personal injury or workers' compensation benefits to be maintained as a counterclaim in a FINRA proceeding. In July 2015, Claimant voluntarily withdrew his claim for breach of duty to provide a safe work environment. FINRA then issued an arbitration award on the remaining claims between the parties in October 2015. *See generally Exhibit D.*

29. Applying the criteria for collateral estoppel to the facts here, I find that several of the criteria have not been met. First, the issue raised in the FINRA arbitration was not the same as the issue raised in this workers' compensation claim. In the FINRA matter, Claimant filed a cause of action for breach of duty to provide a safe work environment. Although there is factual overlap between the bases for that claim and the workers' compensation claim, the two claims are not the same. All Claimant has to establish in a workers' compensation claim is that he sustained an injury by accident arising out of and in the course of his employment. 21 V.S.A. § 618. A compensable workers' compensation injury need not involve an unsafe workplace nor any negligence on the part of the employer. Thus, a court could find that an employer did not breach a duty to provide a safe workplace but that, nevertheless, an employee sustained a compensable injury under the workers' compensation statute. *See, e.g., Owen v. Bombardier Corp*., Opinion No. 01SJ-99WC (January 4, 1999) (issues presented to the Department in workers' compensation matters are based upon the requirements and standards of a specialized forum and differ from the presentation of the claimant's injury in her civil jury trial). I therefore conclude that Defendant has

failed to establish that the issue in the two proceedings was the same, as required by the third criterion for collateral estoppel.

30. Next, Claimant's unsafe workplace claim was not finally resolved by a judgment on the merits in the FINRA arbitration. Rather, that claim was voluntarily dismissed by Claimant in July 2015, prior to issuance of the arbitration decision in October 2015. If Claimant's claim for an unsafe work environment was a compulsory counterclaim whose dismissal would operate as a decision on the merits, Defendant has failed to allege that. Moreover, Defendant contended in the FINRA proceeding that the arbitration was not a proper forum to decide that claim. *Exhibit D*, at 3. Accordingly, I conclude that Defendant has not established that the issue was resolved by a final judgment on the merits in the first proceeding, as required by the second criterion for collateral estoppel.

31. Finally, collateral estoppel requires that applying the doctrine in the latter case be "fair." Defendant here has offered no facts concerning the evidentiary standards or procedures used in FINRA arbitrations. Further, the issues in the two proceedings are not the same, and Claimant voluntarily dismissed the relevant cause of action prior to the decision on the merits being rendered. Under all these circumstances, I conclude that Defendant has not established that the application of collateral estoppel here would be fair, as required by the fifth criterion.

32. For collateral estoppel to apply, all five criteria must be met. On the record before me, Defendant has failed to establish several criteria. Accordingly, taking the facts in the light most favorable to Claimant as the non-moving party, I conclude that Defendant has failed to establish that this workers' compensation claim is collaterally estopped by the either the FINRA arbitration decision or by the parties' federal lawsuit as a matter of law.

ORDER:

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

DATED at Montpelier, Vermont, this 28th day of November 2022.

Michael A. Harrington
Commissioner