

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Normand Frechette

Opinion No. 09-23WC

v.

By: Stephen W. Brown
Administrative Law Judge

Green Mountain Transit

For: Michael A. Harrington
Commissioner

State File No. PP-60618

OPINION AND ORDER

Hearing held via Microsoft Teams on September 9, 2022

Record closed on October 21, 2022

APPEARANCES:

Christopher McVeigh, Esq., for Claimant

Jennifer K. Moore, Esq., for Defendant

ISSUES PRESENTED:

- 1) Is Claimant's claim for bilateral carpal tunnel syndrome barred by the statute of limitations and/or the equitable doctrine of laches?
- 2) If not, did Claimant's bilateral carpal tunnel syndrome arise out of and in the course of his employment with Defendant?

EXHIBITS:

Joint Exhibit

Joint Medical Exhibit ("JME")

Defendant's Exhibit A:

Curriculum vitae of Verne Backus, MD

Defendant's Exhibit B:

Claimant's Injury Report, dated February 14, 2017

Defendant's Exhibit C:

Denial of Workers' Compensation Benefits (Form 2), dated April 12, 2017

Defendant's Exhibit D:

Transcript of Claimant's Recorded Statement, dated April 13, 2021

FINDINGS OF FACT:

1. I take judicial notice of all relevant forms and correspondence in the Department's file for this claim.

The Parties

2. Defendant is a public transit service providing passenger bus services in the Greater Burlington, Vermont area, as well as other parts of Vermont.
3. Claimant is a 76-year-old man originally from Waterville, Quebec, who currently resides in Island Pond, Vermont. He began driving for a living in Canada at the age of eighteen and has a history of multiple workplace injuries over the course of his driving career, including during his employment as a bus driver with Defendant.

Claimant's Occupational History and Prior Workplace Injuries

4. In 1973, while Claimant was driving in Canada, a car pulled out in front of him. He did not have power steering at that time and rolled into an embankment as a result of an evasive maneuver. He underwent multiple surgeries as a result, including to his right wrist, and spent over one year in the hospital. He eventually recovered from his injuries and resumed his professional driving career, passing physical examinations required to retain his Canadian commercial driver's license.
5. Claimant moved to the United States in 1992, initially to Ticonderoga, New York, where he drove a charter bus and provided park maintenance services. He then moved to Vermont in 1999 and began working for Defendant as a bus driver in October 2000.
6. In March 2012, while driving for Defendant, he experienced another accident. He was stopped at a traffic light when a drunk driver struck his bus twice: the first strike occurred at a speed exceeding 80 miles per hour, causing the bus to bounce across an intersection; the drunk driver then struck the bus again on the other side. Claimant drove the bus back to the Defendant's shop after that accident and filled out an incident report. He experienced a concussion, whiplash, and shoulder injuries as a result of the accident. Defendant accepted that injury as a compensable workers' compensation claim and paid benefits accordingly. Claimant missed nearly one year from work due to his 2012 injury.

Complaints of Hand Pain and Numbness Beginning in 2013; Initiation of Workers' Compensation Claim in 2017

7. Since the beginning of his career driving buses for Defendant in 2000, Claimant has felt vibrations through the buses' steering wheels, especially when traversing potholes. He mostly drives in and around Burlington, Vermont, whose roads he credibly described as being quite rough with relatively few smooth segments.

8. When he first began working for Defendant, some buses had padded steering wheels, which significantly dampened the vibrations, but the padded steering wheels were eliminated in approximately 2002 or 2003. Other than the change in steering wheels, Claimants physical duties while working for Defendant have remained relatively unchanged since 2000.
9. On June 17, 2013, Claimant saw George White, MD, for an independent medical examination (“IME”) relating to his accepted 2012 injury. During that IME, Claimant reported, among other things, that he had been experiencing pain and numbness in his hands that interrupted his sleep approximately three or four times per week. (JME 5). He endorsed similar symptoms multiple times over the next four years. (E.g., JME 11, 16, 30).
10. However, the first time he ever sought medical care for those complaints was on February 13, 2017, when he presented to Burlington Clear Choice Urgent Care. There, his providers diagnosed him with carpal tunnel syndrome (CTS), gave him wrist braces, and referred him to orthopedics and for EMG studies. (JME 36-40).
11. Claimant filed a First Report of Injury (Form 1) the next day, asserting that his CTS was work related. At the formal hearing, Claimant confirmed that he attributed his symptoms to driving buses without padded steering wheels.

Defendant’s Unchallenged Denial of the 2017 Workers’ Compensation Claim

12. On April 12, 2017, Defendant filed a Denial of Workers’ Compensation Benefits (Form 2), denying liability for Claimant’s claim for bilateral CTS on the ground that it did not arise out of and in the course of his employment. Specifically, it stated that “[p]er the medical records received your symptoms have been present for a significant amount of time and there is no objective evidence causally related [sic] your diagnosis to work.” Importantly, Claimant did not appeal Defendant’s denial, even though his symptoms persisted, and he continued to seek medical treatment for CTS.
13. On August 10, 2018, Claimant saw hand surgeon Seth Frenzen, MD, reporting a year-long history of symptoms that he attributed to his bus driving (JME 62). Dr. Frenzen administered an injection in Claimant’s left wrist during that visit.
14. Additionally, on November 15, 2019, Claimant injured his left shoulder at work while pulling an emergency brake, and was thereafter out of work for approximately one year. (JME 69). His treatment notes following that injury document ongoing CTS symptoms. (E.g., JME 71, 72, 124, 127).
15. In October 2020, while Claimant remained out of work, he told his physical therapist that his left-hand numbness had been worsening (JME 131-133), and by the end of that month, his physical therapy notes listed hand numbness and tingling as his primary complaint. (JME 139).

16. In response to these complaints, Claimant's shoulder surgeon John Lawlis, MD, referred him for EMG studies on his left wrist (JME 164), which revealed that he suffered from moderate to severe median neuropathy in his left wrist. (JME 207).
17. On April 2, 2021, Claimant again visited Dr. Frenzen, who recommended surgery for his CTS. (JME 217).

New Workers' Compensation Claim Asserted in April 2021

18. One week after Dr. Frenzen recommended surgery, on April 9, 2021, Claimant filed a second workers' compensation claim for bilateral CTS, despite having never contested the denial of his 2017 claim. Defendant denied liability for the second CTS claim in its entirety.
19. This time, unlike in 2017, Claimant appealed the denial. That appeal led to a referral to the formal hearing docket and a formal hearing on both the applicability of the statute of limitations and the causal relationship between Claimant's employment and his bilateral CTS.
20. Claimant underwent surgery for his left-sided CTS on September 9, 2021. (JME 245). In February 2022, he underwent EMG studies of his right wrist, which revealed moderate CTS on that side as well. (JME 292).

Expert Medical Testimony

21. At the formal hearing, both parties presented expert medical evidence concerning the causal relationship between Claimant's employment with Defendant and his development of bilateral CTS.
22. Claimant presented board-certified orthopedic surgeon Victor Gennaro, DO, who performed an independent medical examination ("IME") of Claimant in July 2021 and concluded that although CTS is generally multifactorial in origin, Claimant's CTS was most likely related to his long history of bus driving, specifically his repetitive gripping of the steering wheel.
23. Defendant presented board-certified occupational and environmental medicine physician Verne Backus, MD, who performed an IME in January 2022. He agreed with Dr. Gennaro that CTS is generally understood to be multifactorial in origin, and that occupational activities can certainly affect the risk profile of developing this condition. However, unlike Dr. Gennaro, Dr. Backus could not conclude from Claimant's description of his posture, movement patterns, and forces experienced while driving Defendant's buses that Claimant's bus driving caused or aggravated his bilateral CTS.

CONCLUSIONS OF LAW:

This Claim is Barred by the Statute of Limitations

1. Under Vermont law, a workers' compensation claim "may not be commenced after three years from the date of injury." 21 V.S.A. § 660(a). The "date of injury" for the purpose of this statute of limitations is the point in time "when the injury, and its relationship to employment, is reasonably discoverable and apparent." Workers' Compensation Rule 2.1510; *see also Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 447 (1985).

Date of Accrual

2. A litigant "need not have an airtight case before the limitations period begins to run," but merely "should have obtained information sufficient to put a reasonable person on notice that a particular defendant may have been liable" for his or her injuries. *Rodrigue v. Valco Enterprises*, 169 Vt. 539, 540-41 (1999); *Stoddard v. Northeast Rebuilders*, Opinion No. 30SJ-03WC (July 8, 2003). Additionally, actual knowledge of a claim's accrual is not necessary for a limitations period to begin; inquiry notice is sufficient. *See Jadallah v. Town of Fairfax*, 2018 VT 34, ¶ 17. Such notice exists once the claimant knows of the "facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery." *Id.*
3. That said, for the limitations period to begin to run, an injured worker must have "something to claim," such as medical bills or lost time, because in many cases "the injury itself does not exist in compensable degree during the claims period." *Hartman, supra*, 146 Vt. at 446; *Deuso v. Shelburne Limestone Corp.*, Opinion No. 13-18WC (September 14, 2018).
4. In this case, although Claimant reported symptoms consistent with CTS beginning in 2013, there is no evidence that he sought treatment for, or lost work because of, that condition until he sought medical treatment at Clear Choice on February 13, 2017.
5. Thus, although he had notice of his injury and its relationship to work in 2013, he had nothing to claim until February 13, 2017, when he in fact did assert a workers' compensation claim. Therefore, for limitations purposes, his claim accrued on February 13, 2017.

Effect of 2017 Claim on Limitations Analysis of 2021 Claim

6. Based on the accrual date of February 13, 2017, the workers' compensation claim that Claimant filed the very next day was timely.
7. However, Defendant denied liability for that claim in its entirety, and Claimant never appealed that denial. Additionally, Claimant continued receiving medical treatment for CTS thereafter, and there is no evidence that he ever sought payment from Defendant for that treatment until 2021, when Dr. Frenzen recommended surgery.

8. The Department previously analyzed the statute of limitations as applied to a claim that the claimant initiates but then does not challenge the employer's denial for multiple years in *Bienvenue v. Sandra Kuc d/b/a Vermonsters Daycare Center*, Opinion No. 23-15WC (October 14, 2015). In *Bienvenue*, the claimant alleged that a coworker fell on her and knocked her over, causing injuries to her low back and left knee. She filed a timely workers' compensation claim two months later. The employer denied the claim based on factual disputes concerning the claimant's version of events, and she initially appealed that denial, resulting in a referral to the formal hearing docket. However, after the case had been referred to the formal hearing docket, she withdrew her appeal, and the Department canceled a previously-scheduled pretrial conference. Three years later, the claimant sought to reinstitute her claim.
9. The Department in *Bienvenue* granted summary judgment in favor of the employer, concluding that the employee had failed to timely pursue her claim. Specifically, it held that withdrawing her hearing request operated as a voluntary dismissal of her appeal, and that although such a dismissal was without prejudice, it left the parties in the same position as they would have been in had she never filed a claim at all. As such, her earlier assertion of a timely claim did not toll the statute of limitations. Holding otherwise, the Department noted, would allow a claimant to "voluntarily dismiss and then renew his or her claim in perpetuity." *Id.*¹
10. It is true that the Claimant here, unlike the claimant in *Bienvenue*, never appealed Defendant's 2017 denial, and thus, there was no appeal for him to withdraw. However, like the situation in *Bienvenue*, Claimant's decision not to challenge Defendant's denial left the parties in the same posture as they would have found themselves had Claimant never filed a claim. That situation persisted for four years, longer than the applicable limitations period.
11. Thus, it makes little sense to analyze this case differently from *Bienvenue* with respect to the tolling of the limitations period. As Defendant persuasively notes, doing so would unfairly "put a claimant that took affirmative action to pursue an appeal before withdrawing it in a worse position than the one that took no action in pursuit of an appeal at all." See Defendant's Proposed Conclusion of Law No. 8.

¹ For reasons not pertinent to the present decision, however, the Department's dismissal of the claim in *Bienvenue* did not ultimately rest upon limitations grounds; although the filing of her claim in 2011 did not toll her limitations period, the claimant's medical providers in that case did submit medical bills to Defendant for payment in 2013, which the defendant denied. The Department held that those medical bills constituted sufficient evidence of a claim on the employee's behalf to toll the statute of limitations. However, the Department ultimately dismissed the claim based upon the equitable doctrine of laches. In this case, unlike *Bienvenue*, there is no evidence of any comparable demand for payment within the three years after Defendant's denial that might toll the limitations period.

The 2021 Claim is Neither a Timely Appeal of Defendant's 2017 Denial nor a Claim for Specific Benefits within his 2017 Claim

12. Claimant correctly notes that there is no specific deadline in the Workers' Compensation Act or Rules for a claimant to file an appeal of an employer's denial, and that while a three-year limitations period applies to workers' compensation claims as a whole, a demand for specific benefits within a timely-filed claim may be asserted within six years of a claimant's knowledge of that benefit. *Hoisington v. Ingersoll Electric*, Opinion No. 52-09WC (December 28, 2009).
13. From these premises, Claimant advocates for an implicit six-year window within which to appeal an employer's denial. From there, he contends that his 2021 claim was essentially a timely appeal of Defendant's 2017 denial and a request for specific benefits within his 2017 claim.
14. I find these arguments unpersuasive. For the reasons developed in *Bienvenue, supra*, an employee with a fully denied claim and no pending appeal is in the same functional position as one who never filed a claim. Thus, if the entire limitations period passes with no action, the statute of limitations should bar the claim just as it would had it never been filed.
15. Here, Defendant's denial sat unappealed for nearly four years, well in excess of the limitations period to institute a claim in the first place. During that time, Claimant never sought any benefits related to his CTS, even though he continued to receive care for that condition.
16. At some point, an employer must be able to continue going about its affairs without devoting resources to the preservation of evidence relevant to a claim that no one is pursuing. These are the concerns that justify statutes of limitations in the first place. The longer a denial sits unappealed, the more reasonable an employer's reliance becomes on the employee's lack of pursuit of a claim. To allow Claimant's 2021 claim to evade the limitations defense by treating it as a long delayed yet somehow still timely appeal of the 2017 denial would render the statute of limitations ineffective to carry out its reason for existence in the context of abandoned claims.²
17. I conclude that Claimant's assertion of a workers' compensation claim for bilateral CTS in 2017 did not toll the statute of limitations because Defendant denied that claim and Claimant left that denial unchallenged for more than the three-year limitations period. Therefore, this claim became time-barred on February 14, 2020, before he filed his 2021 claim for the same condition.

² There may well be a period of inaction much shorter than three years that would justify the application of equitable principles such as *laches* to render an appeal untimely, but in cases like this one, where a denial sat for the entire limitations period unchallenged, deeming such an appeal untimely under the statute of limitations should not be controversial.

All Other Issues Immaterial

18. Because the statute of limitations resolves this entire case, I need not consider the equitable doctrine of laches or the comparative persuasiveness of the parties' expert medical testimony.

ORDER:

Based on the foregoing findings of fact and conclusions of law, this claim is **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, Vermont this 22nd day of March 2023.

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.