

VIRGINIA:  
IN THE WORKERS' COMPENSATION COMMISSION

02/02/2009

GREGORY DEMETRIUS DAUGHTRY, Claimant

Opinion by DUDLEY  
Commissioner

v. VWC File No. 215-19-40

BOAR'S HEAD PROVISIONS COMPANY, INC., Employer  
AMERICAN ZURICH INSURANCE COMPANY, Insurer

Gregory Demetrius Daughtry  
Claimant, *Pro Se*.  
(Priority Mail)

Charles F. Midkiff, Esquire  
Midkiff, Muncie and Ross, P.C.  
for the Defendants.  
(Priority Mail)

REVIEW on the record by Commissioner Diamond, Commissioner Dudley, and Commissioner Williams at Richmond, Virginia.

The claimant requests Review of the Deputy Commissioner's June 4, 2008, Opinion finding that he did not timely file his claim for permanent partial disability benefits and that it is barred by the statute of limitations. After Review, we reverse and remand.

The Deputy Commissioner thoroughly and accurately summarized the evidence and testimony in this case, and we will repeat it to the extent necessary in this Opinion. The claimant sustained a compensable torn ligament in his left leg on April 21, 2003. On November 20, 2003, an Award Order was entered for temporary total disability benefits beginning April 28, 2003, and medical benefits. The parties agreed to a Stipulated Order on April 14, 2005, which included: (1) payment for the claimant's knee arthroscopy with ACL reconstruction; (2) termination of temporary total disability benefits effective November 6, 2003, based on his refusal of selective

employment; and (3) payment of disability benefits for the period the claimant was disabled from the knee surgery, as long as he filed a claim for those benefits within the statute of limitations. He did not file a claim, and temporary total disability benefits were last paid on November 6, 2003.

The claimant underwent left knee surgery on May 24, 2005, and the employer voluntarily paid temporary total disability benefits from May 24 through October 10, 2005. No claim was filed for that period of disability benefits, and no award was entered. On May 24, 2007, the claimant filed a claim for 20-percent permanent partial impairment to his left leg.

The Deputy Commissioner found that the voluntary payment of temporary total disability benefits did not toll the applicable statute of limitations. The claimant was last paid disability benefits by award on November 6, 2003, and he filed his permanent partial disability claim on May 24, 2007. We disagree.

Virginia Code § 65.2-708 provides, in part, that:

Upon its own motion or upon the application of any party in interest, on the ground of a change in condition, the Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this title, and shall immediately send to the parties a copy of the award. . . . No such review shall be made after twenty-four months from the last day for which compensation was paid, pursuant to an award under this title, . . .

Unlike the statute of limitations in Code § 65.2-601 governing an original claim, the limitation provision in § 65.2-708 pertains to a change-in-condition claim, is not jurisdictional, and can be waived.

In Binswanger Glass Co. v. Wallace, 214 Va. 70, 197 S.E.2d 191 (1973), we held that the time limitation prescribed in [Virginia

Code § 65.2-708] for review of an award on the ground of a change in condition was not jurisdictional and could be waived, but again stated that the time limitation of [Code § 65.2-601] for filing an original claim is jurisdictional.

Barksdale v. H. O. Engen, Inc. 218 Va. 496, 497, 237 S.E.2d 794, 795 (1977).

In the instant case, the claimant agreed to stipulations while represented by counsel before the statute of limitations in § 65.2-708 expired. The stipulations provided for the payment of temporary total disability benefits, if he timely filed the appropriate claim. The employer voluntarily paid the disability benefits without a claim. The claimant relied upon these acts to his detriment. He was paid for his time off from work and did not communicate with the employer or insurer about the payments. We find that the voluntary payments made by the employer pursuant to the agreement of the parties constituted a waiver of the statute of limitations in Virginia Code § 65.2-708.

Accordingly, the Opinion below is REVERSED and REMANDED for determination of the claimant's permanent partial disability.

This matter is hereby removed from the Review docket.

#### APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within 30 days of receipt.

cc: Boar's Head Provisions Company, Inc., Employer  
American Zurich Insurance Company, Insurer