

VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

08/01/2006

BARRY J. HURST, Claimant

Opinion by TARR
Commissioner

v. VWC File No. 212-19-14

UNIVERSITY OF VIRGINIA HEALTH SYSTEM, Employer
MANAGED CARE INNOVATIONS, LLC, Insurer

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REVIEW on the record before Commissioner Tarr, Commissioner Diamond and Commissioner Dudley at Richmond, Virginia.

The claimant requests Review of the Deputy Commissioner's November 7, 2005, Opinion dismissing his claim, finding it was not timely filed. We AFFIRM.

The claimant, Barry J. Hurst, injured his lower back on October 30, 2002, while working as a charge nurse for the University of Virginia Health System. His claim was accepted, agreements were submitted, and the Commission entered an Award for disability benefits. Benefits under the Award were last paid on January 19, 2003.

On October 15, 2003, the claimant filed a change in condition claim. In response to the question on the claim form, “[w]hat specific benefits are you seeking,” the claimant wrote, “[n]one at this time.” The claimant also left blank all the spaces on the form that related to any specific benefits that he was seeking. No action was taken on this claim.

On July 5, 2005, the claimant filed another claim. In the section on the form that asked for the specific benefits sought, he marked that he was seeking compensation for partial wage loss from June 1, 2005, to the present and payment for specific and future medical costs. On July 29, 2005, the claimant, now represented by present counsel, filed another claim. This claim sought temporary total benefits from October 30, 2002, temporary partial benefits from October 30, 2002, lifetime medical costs and compensation for permanent disability.

At the hearing, claimant’s counsel withdrew from active consideration the request for permanent disability benefits. He also clarified that the claimant was seeking temporary total benefits from December 15 through 21, 2004, and June 1 through August 23, 2005. The employer did not dispute disability but defended on the grounds that the only claim that was filed within the two-year period for filing a change in condition claim, the October 15, 2003, claim, was invalid because it was speculative.

The Deputy Commissioner dismissed all claims, finding that the October 15, 2003, claim was a premature speculative filing and that the July 5 and July 29, 2005, claims were filed after the statute of limitations ran on January 20, 2005. He retained jurisdiction over the claim for permanent partial disability benefits.

We agree with the Deputy Commissioner that the October 15, 2003, claim was speculative. This claim, by its own terms, sought no benefits. Even if we were to look beyond the

actual words used by the claimant in describing his claim, the claim is still speculative and premature because the claim was filed one and one-half years before the first period of disability claimed (temporary total disability benefits for one week in December 2004).

Unlike an original claim filed under Rule 1.1, where a claimant's filing "should" contain information, Rule 1.2 mandates that change in condition claims "must" state the change in condition relied upon. *See Massey Builders v. Colgan*, 36 Va. App. 496, 553 S.E.2d 146 (2001). Here, the only change in condition asserted within the statute of limitations was "none."

We further find that the October 2003 filing was not void but voidable, that is, unless dismissed, the claim could be reformed by a timely amendment. However, neither of the later claims was timely—they were filed almost six and seven months after the statute of limitations ran.

Moreover, the untimely, post-statute of limitations claims cannot relate back to the October 2003 claim because they alleged new causes of action. As we said in Glenn v. Staunton Manor, VWC File No. 187-33-01 (Feb. 2, 2000):

We find the August 5, 1998, claim does not relate back to the May 11, 1998, claim. The Commission in Ashley v. Westmoreland Coal Company, 70 O.I.C. 58 (1991), acknowledged that "the ends of justice should never be sacrificed to mere form, or by too rigid adherence to technical rules of practice....[However], an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs." The Commission further reported that

If the amendment sets up no new cause of action or claim and makes no new demands, but simply varies and expands the original cause of action, the amendment relates back to the commencement of the action and stops the running of the statute as of that date; but an amendment which introduces a new or different cause of action or makes a new or different demand does not relate back, and the statute continues to run till the date of amendment.

Id., citing Burks Pleading and Practice, 4th Edition, § 235(2) Amendment of Pleadings; and Michie's Jurisprudence, Vol. 1B, § 72 Amendments. Thus, an amendment may be allowed, "so long as the correction does not produce a new and different claim." Id.

The July 5, 2005, claim and the July 29, 2005, claim cannot relate back because they raised a new and different cause of action than the October 2003 claim. The later claims for the first time alleged disability.

Our decision is not inconsistent with the holding in Hospice Choice v. O'Quin, 42 Va. App. 598, 593 S.E.2d 554 (2004). In O'Quin, the claimant filed a timely claim and received a medical only award. Three days before the two-year change in condition statute of limitations ran out, he filed another claim, seeking temporary total disability benefits for one day. After the two-year statute ran, the claimant filed several amendments, asserting several periods of total disability, totaling twenty-three days.

The Full Commission held the claims O'Quin filed after the statute of limitations ended related back to the claim he asserted before the statute ran out. The Court of Appeals affirmed, noting that the first claim for one day's disability, while less than the waiting period, was sufficient to invoke the Commission's jurisdiction. The Court of Appeals further held the second claim did not create a new cause of action but expanded the cause of action previously claimed. Here, unlike O'Quin, the timely claim did not allege any disability. A claim for disability only was raised after the statute of limitations expired.

For these reasons, the Opinion below is AFFIRMED.

This matter is hereby removed from the Review docket.

APPEAL

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

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