

In *Reynolds v. Company*, 81 N.H. 421, 128 A. 329 (1925), the trial court admitted testimony that the defendants could have used a chain to prevent the accident in question. This court affirmed, and noted, "[t]his evidence was not offered to prove that the defendants were negligent in not having this wagon equipped with a chain, but to contradict a witness of the defendants that a chain could not be used on the wagon as claimed by the plaintiff." *Id.* at 425, 128 A. at 331.

█ In the present case, the defendant offered testimony to show that parking the truck off the roadway was not feasible. The court should have allowed the plaintiff to present rebuttal evidence of the defendant's subsequent practice of parking off the road at other locations. The importance of allowing the plaintiff to prove feasibility of alternative measures sufficiently counterbalances the policy against admission of subsequent remedial measures. *See Smith v. Company*, 83 N.H. 439, 450-51, 144 A. 57, 63 (1928). Therefore, it was error for the trial court to exclude evidence that the defendant had begun parking his trucks off the road following the collision.

The directed verdict for the defendant is reversed and the case is remanded for a new trial.

Reversed and remanded.

JOHNSON, J., did not sit; the others concurred.

Belknap
No. 84-480

WILLIAM R. BUYER

v.

ABUNDANT LIFE FARM, INC.

October 24, 1985

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Gray, Wendell & Clark, of Manchester (*Grenville Clark, III*, on the brief and orally), for the plaintiff.

Devine, Millimet, Stahl & Branch P.A., of Manchester (*Donald E. Gardner* on the brief and orally), for the defendant.

BATCHELDER, J. The plaintiff, William Buyer, appeals from the deputy labor commissioner's denial of his claim for workers' compensation. The Superior Court (*Cann, J.*) found that the appeal was not filed within the thirty-day limitation period set out in RSA 281:37 and granted the defendant's motion to dismiss. We reverse.

The plaintiff injured his back on August 18, 1980, while working for the defendant, Abundant Life Farm, Inc. He received workers' compensation from that date until July 19, 1981, when the department of labor discontinued his benefits because he had returned to work. The plaintiff admits that he was employed several times after being injured, but alleges that because of his continuing back pain he was unable to hold any of these jobs for more than three months.

In October 1983 the plaintiff requested that the labor department restore his benefits. A hearing was held, and on January 26, 1984, the deputy labor commissioner issued his decision denying the claim. The rationale for this decision was cryptic. Although the labor department file contains several medical reports from physicians, some of which support the plaintiff's case, the deputy labor commissioner determined that there were "no medical reports submitted which would substantiate the claimant's claim for disability."

On February 21, 1984, the plaintiff's attorney requested a reconsideration of the decision. Noting that the decision "appear[ed] to be based, at least in part, upon a lack of recent medical reports substantiating the claim," the attorney attached to his request an additional medical report dated February 14, 1984. In this report, Dr. H. Taylor Caswell, an orthopedic surgeon and the plaintiff's treating physician, reiterated his opinion that the pulp of one of the plaintiff's intervertebral disks had herniated, that the plaintiff required

myelography, and that he probably would be unable to work until he received treatment.

The deputy labor commissioner responded by letter dated February 27, 1984. He stated that he could not grant the request for reconsideration and advised the plaintiff's attorney that if he was dissatisfied he should appeal the decision to the superior court pursuant to RSA 281:37.

The plaintiff filed an appeal in the superior court on March 2, 1984. The defendant moved to dismiss, contending that the plaintiff had failed to comply with the thirty-day limitation period. The plaintiff objected to this motion on the ground that the deputy labor commissioner's decision had not become final until February 27, 1984, when the labor department denied the plaintiff's request for reconsideration, and that the thirty-day limitation period had begun to run on that day. The plaintiff petitioned in the alternative for the right to appeal under RSA 281:42, which permits parties in workers' compensation cases to file late appeals if they are prevented from filing within the thirty-day limitation period through "mistake, accident, or misfortune." The trial court ruled against the plaintiff on both counts, and this appeal followed.

We must decide what effect, if any, a request for reconsideration has on the running of the thirty-day limitation period set forth in RSA 281:37. Our task is rendered more difficult by the fact that it is unclear what the practice of the labor commissioner is with respect to entertaining reconsideration requests. RSA 281:37 contains no provision for such requests. The labor department's regulations likewise do not specify any means by which an aggrieved party in a workers' compensation case may seek to reopen the matter following a decision by the commissioner. See N.H. ADMIN. R., Lab. ch. 200. Nonetheless, workers' compensation practitioners seem to make reconsideration requests with some frequency. See *Ryan v. Perini Power Constructors*, 126 N.H. 171, 489 A.2d 137 (1985); *Taylor v. Davidson Rubber Co.*, 122 N.H. 428, 445 A.2d 1119 (1982). The labor department apparently has not adhered to a consistent policy in this regard.

The nature of the deputy labor commissioner's decision denying the claim further confuses matters. Although the plaintiff submitted medical evidence, the deputy commissioner apparently neglected to consider it. The plaintiff's attorney construed the decision as an implicit invitation to submit additional evidence clarifying his position. Under these narrow circumstances, the plaintiff can hardly be faulted for attempting to ensure that his administrative remedies were exhausted before pursuing a de novo trial before the superior court.

