STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Jonathan Walker	)	State File No. B-26418
	)	
	)	By: Amy Reichard
v.	)	Staff Attorney
	)	
	)	For: Steve Janson
Johnson Fuel Service and	)	Commissioner
CNA Insurance Companies	)	
	)	Opinion No. 07D-99WC

RULING ON DEFENDANT'S MOTION TO DISMISS

APPEARANCES:

Lon T. McClintock, Esq. for Claimant Jonathan Walker
William A. O'Rourke, III, Esq. for Defendants Johnson Fuel Service and CNA Insurance Co.

ISSUE:

Whether the "Stipulation for Payment of Carrier's Lien," which was executed by the parties in April of 1992, bars the claimant's present claim for permanent total disability compensation and ongoing medical benefits.

FINDINGS OF FACT: (for the purpose of this motion only)

1. On May 3, 1989, while in the course of his employment, claimant was severely beaten by an employee of a sub-contractor who was working on the same construction site as claimant. As a result of this attack, claimant sustained serious and extensive injuries.

2. The defendants accepted the claim and began paying claimant temporary total disability compensation ("TTD") as of the date of injury. A Form 21, Agreement for Temporary Total Disability Compensation, was completed by the parties in the summer of 1989 and subsequently approved by the Department in September 1989.

3. On January 10, 1991 claimant commenced a third party action against the perpetrator of the physical assault, as well as several other liable parties. Subsequently, in the spring of 1992, with the consent and participation of the workers' compensation carrier, a settlement was negotiated between claimant and the respective defendants in the third-party suit.

4. Two separate stipulations were entered into by the parties as a result of the settlement.

First, a “Stipulation for Settlement” was executed by the claimant and the defendants of the third-party suit. Second, a “Stipulation for Payment of Carrier’s Lien” was executed between claimant and the workers’ compensation carrier.

5. In the “Stipulation for Settlement,” the parties agreed to a particular distribution of the third-party payment. Of the One Hundred and Thirty-one Thousand Six Hundred and Ninety-nine Dollars and Sixty-nine Cents ($131,699.69) recovery, Seventy-five Thousand Dollars ($75,000) was allocated to claimant, Twenty-six Thousand Four Hundred and Seventy-four Dollars and Thirty-six Cents ($26,474.36) was paid in satisfaction of claimant’s attorney fees and Thirty Thousand Two Hundred and Twenty-five Dollars and Thirty-three Cents ($30,225.33) was disbursed to the workers’ compensation carrier in complete accord and satisfaction of any and all claims and liens.

6. In regards to the “Stipulation for Payment of Carrier’s Lien,” it expressly provided for the following:

    1. Claimant may settle his third-party claim pending in the Bennington Superior Court, Docket No. S0019-91BCC, against defendants M&M Plumbing & Heating, Inc., Dennis McNulty and Steven McNulty, as follows:

        a. Defendants may pay to claimant the sum of One Hundred Thirty-One Thousand Six Hundred and Ninety-nine Dollars and Sixty-nine Cents ($131,699.99).

        b. Of the total settlement paid by said defendants Thirty Thousand Two Hundred and Twenty-Five Dollars and Thirty-three Cents ($30,225.33) shall be paid to the Employer’s worker compensation insurance carrier.

    2. Employer’s worker compensation insurance carrier shall accept said payment, described in Subparagraph (b), in complete satisfaction of its lien for reimbursement of worker compensation benefits paid by it to claimant.

    3. Employer’s worker compensation insurance carrier shall continue to pay worker compensation benefits to claimant without offsetting from said benefits any amounts claimant receives from the settlement of said third-party claim until such time as claimant’s permanent partial disability award is finally determined.

    4. Employer’s worker compensation insurance carrier shall pay claimant’s medical expenses incurred for the treatment of claimant’s work related injuries incurred prior to the date claimant’s permanent partial disability award is finally determined and not thereafter.

    5. Employer’s worker compensation insurance carrier shall pay claimant’s vocational rehabilitation if determined appropriate by stipulation of the parties or if ordered by the Vermont Department of Labor and Industry.

7. As expressed in the wording of the preceding Stipulation, defendants accepted $30,225.33 in complete satisfaction of workers’ compensation benefits already dispersed

to claimant. Moreover, the defendants also agreed to provide claimant with benefits and medical expenses, without claiming their entitlement to a $75,000 future credit until claimant's permanent partial disability is finally determined.

8. On October 29, 1992 the Department was forwarded a copy of the "Stipulation for Payment of Carrier's Lien." However, an official Form 15, Settlement Agreement (Full and Final), was not completed by the parties and filed with this Department and, as such, it was never approved by the Commissioner.

9. During the years following this settlement, the file reflects the parties continued to dispute over the permanency of claimant's impairment. Specifically, claimant asserted that his injury resulted in a permanent total impairment. Conversely, the defendants maintained that claimant was only partially impaired as a result of his work related injury.

10. In fact, on December 16, 1994, based upon their belief that claimant reached medical end result, the defendants filed a Form 27, Notice of Intention to Discontinue Payments, seeking to terminate claimant's TTD benefits. In support of this, defendant relied upon the expert medical opinions of Dr. Lester Collins and Dr. Phillip Osborne.

11. In a January 25, 1995 correspondence directed to both the workers' compensation adjuster and a Department workers' compensation specialist, claimant's attorney officially noted his objection to the Form 27, arguing that the suggested permanency award was grossly unfair. In addition, in explanation of his delayed response, claimant's attorney insisted that he was not forwarded notice of the carrier's intention to discontinue benefits, contending that he only learned of the cessation of benefits through his client.

12. The Form 27 was marked "OK" by "WS," a specialist in the Department's Workers' Compensation Division.

13. Permanent partial disability payments were commenced to claimant on January 2, 1995. Dr. Osborne's medical opinion served as the basis of the award. After examining the claimant and employing the A.M.A. Guides, Fourth Edition, Dr. Osborne determined that the claimant sustained a 19% whole person impairment to the spine and a 7% whole person impairment for closed head injury. The entire 25% whole person impairment was then converted to a 41% spinal impairment.

14. Although a Form 22, Agreement for Permanent Partial Disability Compensation, was completed by defendant and forwarded to the Department, claimant neither accepted nor approved the agreement. Rather, claimant continued to contest the amount of permanency, maintaining that he sustained a permanent total disability.

15. Claimant was paid 135.30 weeks of PPD compensation from January 2, 1995 until the benefits were exhausted on August 5, 1997.

16. In August, 1998, claimant filed a Form 6, Notice and Application for Hearing, with the Department, demanding permanent total disability compensation, as well as ongoing

medical and hospital benefits.

CONCLUSIONS OF LAW:

1. Although not clearly enunciated by defendants, their Motion to Dismiss appears to be based upon either V.R.C.P. 12(b)(6), failure to state a claim upon which relief can be granted or V.R.C.P. 56(c), summary judgment.

2. The purpose of a motion to dismiss for failure to state a claim is to test the law of the claim, not the facts which support it. *Levinsky v. Diamond*, 140 Vt. 595 (1982). A court should not dismiss a cause of action for failure to state a claim upon which relief may be granted unless it appears, beyond doubt, that no circumstances or facts exist which could prove entitlement to relief. *Association of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443 (1985). This type of motion is not favored and rarely granted. *Id.*

3. Pursuant to V.R.C.P. 56(c), summary judgment shall be awarded to the moving party if it can demonstrate that there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. V.R.C.P. 56(c). In evaluating the propriety of the summary judgment motion, the nonmoving party receives the benefit of all reasonable doubts and inferences. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22 (1996); *Murray v. White*, 155 Vt. 621 (1991).

4. Defendant maintains that the "Stipulation for Payment of Carrier's Lien" should act as a bar and preclude claimant from presently asserting a claim for permanent total disability compensation and ongoing medical benefits. However, based upon the manifest procedural requirements of the Department, this argument must fail.

5. Typically, neither a contract, rule, regulation nor any device whatsoever can relieve an employer from its liability as created by the Workers' Compensation Act. *See* 21 V.S.A. § 625; *Fischer v. Grand Union*, Opinion No. 10-98WC (Feb. 13, 1998). However, as codified in 21 V.S.A. § 662(a), there is a statutory exception to this prohibition.

6. Section 662(a) allows a claimant and employer, by agreement, to formulate the terms and conditions of an employer's workers' compensation liability. *See* 21 V.S.A. § 662(a). Once the parties reach this mutual understanding, they must then file a memorandum with the Commissioner, and only upon his approval will the agreement then be held valid and enforceable by this Department. *Id.*; *see also Brown v. E.B. and A.C. Whiting and University of Vermont*, Opinion No. 07-97WC (June 13, 1997).

7. The Workers' Compensation Rules, specifically Rule 17 on Compensation Agreements, provides for the specific form of the memorandum which must be filed with the Commissioner. The Form 15, Settlement Agreement (Full and Final), is utilized to settle a genuine dispute over the compensability of a claim and/or the extent of benefits due a claimant. Moreover, this Rule reiterates that an employer can only be relived of liability for compensation benefits if the agreement is approved by the Commissioner, subject to a finding that the best interests of the claimant are served by the agreement.

8. In addition, the actual wording of Form 15 further recapitulates the requirement for Department approval of a settlement agreement. The form explicitly states that any settlement "shall not be binding or operative unless and until this settlement agreement is approved by the Commissioner of Labor and Industry."

9. The basis for compelling Commissioner approval of settlement agreements is rooted in the foundation of the Workers' Compensation Act itself. The Commissioner's role, as envisioned by the law, is to assure that administration of the Act is both fair and equitable. *See Olgiati v. Luv's Inc.*, Opinion No. 88-81WC (June 24, 1981). Therefore, in satisfaction of this goal, the Department requires Commissioner approval of settlement agreements in order to advance and foster adequate protection of a claimant's rights. *Id.*

10. As amply illustrated by the preceding conclusions of law, without receiving Commissioner approval for a settlement agreement pertaining to a claimant's workers' compensation benefits, the agreement is ineffective and unenforceable within the confines of the workers' compensation system.

11. Accordingly, as applied to the present factual scenario, the "Stipulation for Payment of Carrier's Lien" is invalid. Although a copy of the subject Stipulation was forwarded to this Department, an official Form 15 was neither completed by the parties, filed with the Department nor approved by the Commissioner. Therefore, the Stipulation cannot preclude claimant from seeking permanent total disability compensation.

12. Similarly, since the Stipulation is not enforceable by this Department, the carrier's agreement to waive its right to a future credit to offset claimant's third-party settlement must also be found invalid.

13. The Workers' Compensation Act speaks to settlement procedures and dual liability. Specifically, 21 V.S.A. § 624(e) provides:

> In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his personal representative would be entitled to recover in a civil action. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under this chapter to date of recovery, and the balance shall forthwith be paid to the employee or the employee's dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits. *See* 21 V.S.A. § 624 (e).

14. As a result of the third-party settlement in the instant case, defendants have already collected $30,225.33 for reimbursement of benefits paid to claimant prior to the third-party settlement. In addition to this amount, since the Act provides for the prospective commitment of third party recovery funds to any further workers' compensation amounts

due and payable, the defendants are also entitled to a future credit of $75,000. *See* 21 V.S.A. § 624(e); *Weingart v. Northeast Kingdom Mental Health* Services, Opinion No. 02-99WC (Jan. 8, 1999); *Jennings v. Vermont Department of Public Safety*, Opinion No. 35-95WC (Aug. 3, 1995).

ORDER:

Based upon the foregoing Findings of Fact and Conclusions of Law, it is determined that the "Stipulation for Payment of Carrier's Lien" is invalid. Accordingly, defendants' Motion to Dismiss is PARTIALLY DENIED and it is hereby ordered that:

1. Claimant is permitted to proceed with his claim for permanent total disability;

2. Defendants are entitled to a $75,000 future credit to offset claimant's third-party settlement recovery.

DATED at Montpelier, Vermont, this 16th day of February 1999.

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Steve Janson
Commissioner