

S. M. v. Cersosimo Lumber

(June 12, 2006)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

S. M.

Opinion No. 27-06WC

v.

By: Margaret A. Mangan  
Hearing Officer

Cersosimo Lumber

For: Thomas W. Douse  
Acting Commissioner

State File No. T-53186

**RULINGS ON DEFENDANT'S RENEWED MOTION TO  
DISMISS/MOTION TO RECONSIDER**

On November 16, 2005 Defendant, by and through its attorney, Eric A. Johnson, Esq., filed two motions. First, a motion for a dismissal of Claimant's pending workers' compensation claim with prejudice and, second, a motion to order forfeiture of Claimant's workers' compensation benefits. On December 28, 2005 the Staff Attorney for Workers' Compensation denied the motion to dismiss, but granted the motion to order forfeiture of Claimant's benefits to the extent of \$4,291.20. Defendant now renews its motion to dismiss with prejudice. Claimant has yet to oppose this motion. Attempts to reach Claimant, by phone, mail and certified mail, have failed. It is not possible to determine if he has moved, is in some way incapacitated or is resisting efforts to reach him.

Background

Claimant was an employee of Defendant Cersosimo Lumber. On March 14, 2003, Claimant suffered a work related injury to his right foot. As a result of this injury, Claimant ceased working for Defendant. Claimant then received temporary total disability benefits beginning March 15, 2003. Dr. McLarney released Claimant for work on August 26, 2003. Claimant's benefits were discontinued the following day when he failed to return to work for Defendant.

In May 2004, Defendant informed the Department that Claimant had, in fact, been employed for C & S Wholesale Grocers since May 2003. Claimant had provided in deposition that he was actually unemployed until his temporary total disability benefits ceased in August 2003. Defendant then submitted a Form 27 to discontinue all benefits based on Claimant's fraudulent misrepresentation of his employment with C & S Wholesale Grocers. The Department investigated and confirmed Defendant's allegations that Claimant willfully misrepresented his ability to work while receiving temporary total disability benefits.

The Department issued a Final Order on January 21, 2005. The Order provided that Claimant must repay \$4,291.00 to the insurance carrier and \$1,000 for an administrative penalty. If Claimant failed to repay then he would be subject to forfeiture of future benefits up to this amount. Defendant moved for a motion to enforce benefits and a motion to dismiss with prejudice. The Department's Staff Attorney granted the motion to enforce benefits of \$4,291.00 because Claimant committed fraud in regard to his temporary total disability benefits. However, the motion to dismiss was denied. Defendant has moved to reconsider the motion to dismiss. Presently, Claimant has not offered any form of payment and has not responded to the Department's attempts to communicate with him.

### Motion to Dismiss

The Workers' Compensation Act (the Act) provides that an employee who willfully makes a false statement or representation for the purpose of obtaining worker's compensation shall forfeit all or a portion of his right to any of these benefits at the discretion of the commissioner. 21 V.S.A. § 708(a).

The Act, having benevolent objectives is remedial in nature and must be given liberal construction; no injured employee should be excluded from coverage under the Act unless the law clearly intends such exclusion or termination of benefits. *Montgomery v. Brinver Corp.*, 142 Vt. 461 (1983).

Defendant seeks a motion to dismiss Claimant's pending workers' compensation benefits with prejudice. Defendant contends that not only did Claimant breach his duty to report any and all earnings to Defendant, but Claimant also willfully made material representations regarding his employment status. Defendant relies on *Butler v Huttig Building Products*, 175 Vt. 326 (2003). In *Butler*, the Vermont Supreme Court held that all benefits are subject to forfeiture for fraud. *Id* at 328. Thus, Defendant asserts that Claimant should be required to forfeit all benefits, including his future benefits.

The Court in *Butler* also ruled that the termination of workers' compensation benefits, including permanent disability benefits, must be proportionate to Claimant's fraud. *Id*. In this case, there is no finding of medical end result once Claimant's temporary total disability had ended. It is unknown whether or not he would be eligible for permanent benefits. Therefore, it would be inconsistent with *Butler* to dismiss with prejudice for *all* of Claimants benefits, specifically permanent benefits, when his fraudulent misrepresentation was related merely to temporary benefits. *Id*.

However, I have no trouble dismissing this case, but only without prejudice to Claimant. The Department has attempted to contact Claimant on several occasions. These efforts have been unsuccessful. We find it in the best interest of the parties to dismiss without prejudice, solely on our inability to communicate with the Claimant and his failure to inform the Department of his whereabouts.

Claimant's benefits regarding temporary benefits have been forfeited to the extent of \$4,291.20 to which he was not truly entitled. Claimant's permanent benefits have not been terminated on the basis that they are disproportionate to the fraud committed by Claimant. Claimant must pay his debt. If Claimant fails to pay, he will forfeit a portion of future benefits, including permanent disability benefits, up to the amount of \$4,291.20 pursuant to V.S.A. § 708(a).

Accordingly,

1. Defendant's Motion to Dismiss with prejudice is hereby DENIED.
2. Defendant's Motion to Dismiss without prejudice is hereby GRANTED.
3. Claimant is ordered to pay \$4,291.20 to Defendant OR Claimant will forfeit a portion of future benefits up to the amount of \$4,291.20.

Dated at Montpelier, Vermont this 12<sup>th</sup> day of June 2006.

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Thomas W. Douse  
Acting Commissioner