W. B. v. GE Transportation (February 26, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

W. B.

v.

GE Transportation Co.

Opinion No. 10-08WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. X-59241

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Claimant, *pro se*
John Valente, Esq., for Defendant

ISSUE PRESENTED:

Whether the evidence establishes as a matter of law that Claimant made material misrepresentations in violation of 21 V.S.A. §708 such as to warrant termination of his workers' compensation benefits.

FINDINGS OF FACT:

As stated in Defendant's Motion for Summary Judgment, to which Claimant did not respond, the undisputed facts are as follows:

1. Claimant in this matter is William Bartlett, date of birth July 6, 1954, who lives at 21 Elm Street, Center Rutland, VT 05736.

2. On or about February 24, 2006 Claimant was employed at General Electric Transportation Company ("GE") in Rutland, Vermont as a Machine/Process Set Up 2.

3. Claimant was employed at GE beginning on December 28, 1989.

4. Claimant claims to have been injured on February 24, 2006 at 12:15 PM when according to the First Report of Injury he was performing his regular duties when he strained his left arm.

5. Claimant subsequently received medical treatment for his left shoulder, which included several surgeries.

6. On September 26, 2006 Claimant was released to light duty by Dr. Boynton with restrictions limiting lifting to 2 to 5 pounds and to a height of the navel. Exhibit 1. Defendant was not able to provide Claimant with light duty employment.

7. On November 8, 2006 Claimant made a recorded statement to Yvonne Richard of Sedgwick Claims Management, workers' compensation insurer for GE. Exhibit 2.

8. In his November 8, 2006 recorded statement, when asked about his current work status Claimant stated he was not working. Exhibit 2 at page 11. Claimant stated that he was currently cleared for light duty work with limitations that he could only lift between 2 and 5 pounds, with lifting limited to the height of his navel.

9. Due to his work restrictions, Claimant was unable to obtain work with GE. In addition to his inability to obtain work with GE, Claimant also stated that he was no longer able to continue his DJ work for his company, known as Wild Bill's DJ Service. Exhibit 2 at page 11.

10. On October 26, 2006 Yvonne Richard of Sedgwick Claims Management contacted Case In Point Investigations requesting that surveillance be conducted on Claimant.

11. On Friday, November 3, 2006 and Friday, November 17, 2006 surveillance was conducted and Claimant was found to be working at the Red Moon Saloon in Rutland, Vermont. Exhibit 3, Surveillance Report; Exhibit 4, Photograph of Claimant and Affidavit of Accuracy by Mimi Canty; Exhibit 5, Surveillance DVD.

CONCLUSIONS OF LAW:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *See Samlid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *See State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979).

2. Vermont Rule of Civil Procedure 56(c)(2) requires that the party against whom a motion for summary judgment is filed must controvert the moving party's statement of undisputed material facts. If it fails to do so, then all of the material facts set forth in the moving party's statement will be deemed to be admitted.

3. It is questionable whether the exhibits filed in support of Defendant's motion are sufficient to establish that Claimant was working on the dates alleged. By themselves, they do not show that Claimant was "doing his management job," as the surveillance report states, nor that he exceeded his work restrictions in the course of any of the activities presented on the surveillance DVD. There also is no documentation that Claimant was paid wages for his time at the Red Moon Saloon, either on the nights he was videotaped or at any other relevant time. Had Claimant provided any evidence to

refute Defendant's conclusion that his activities on the nights he was videotaped amounted to "working," as Defendant alleged, it is possible that Defendant's motion might fail.

4. Claimant failed to provide any such evidence, however, or to respond in any way to Defendant's motion. Having failed to do so, V.R.C.P. 56(c)(2) requires that I consider Claimant to have admitted Defendant's statement of material facts as true. This includes Defendant's conclusory statement that Claimant "was found to be working at the Red Moon Saloon" on the dates in question. I find, therefore, that he was.

5. I find that Claimant's tacit admission that he was working on November 3, 2006 justifies the termination of his temporary total disability benefits on that date. I presume from that admission that Claimant successfully returned to work and therefore his period of total disability had ended. 21 V.S.A. §642.

6. I decline to find that Claimant's failure to refute Defendant's allegations forms an adequate basis for concluding that he made a willfully false statement or misrepresentation of material fact in violation of 21 V.S.A. §708. Therefore, I decline to order that Claimant forfeit his right to further workers' compensation benefits. Claimant is left to his proof as to these.

ORDER:

Defendant's Motion for Summary Judgment is **GRANTED** as to the fact that Claimant was working on November 3 and November 17, 2006 but **DENIED** as to whether Claimant made a willfully false statement or misrepresentation in violation of 21 V.S.A. §708. Claimant's temporary total disability benefits shall be deemed to have terminated on November 3, 2006. Claimant is left to his proof as to his entitlement to additional workers' compensation benefits.

DATED at Montpelier, Vermont this 26th day of February 2008.

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Patricia Moulton Powden
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.