STATE OF VERMONT
DEPARTMENT OF LABOR

Franjo Baric

v.

Velan Valve Corp.

Opinion No. 21-10WC

By: Sal Spinosa, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. Y-58658

RULING ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

ATTORNEYS:

Joseph O'Hara, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant precluded as a matter of law from asserting his right to a higher average weekly wage and compensation rate than the one stated in a previously signed and approved Agreement for Temporary Total Disability Compensation?

FINDINGS OF FACT:

The following facts are undisputed:

1. On January 23, 2007 Claimant suffered a work-related injury to his right hand and wrist. Defendant accepted the claim and paid workers' compensation benefits accordingly.

2. On February 13, 2007 Defendant's investigator interviewed Claimant as to the facts surrounding his injury. According to the investigator's affidavit, among the questions he asked was whether Claimant was concurrently employed at the time of his injury. Claimant replied that he was not.

3. Thereafter, Defendant prepared an Agreement for Temporary Total Disability Compensation (Form 21) for Claimant's review and signature. Claimant, who was unrepresented at the time, signed the Form 21 on February 22, 2007. The Department approved the form on March 12, 2007.

4. According to the Form 21, Claimant's average weekly wage at the time of his injury was $1,099.13. This yielded a weekly compensation rate (including one dependent) of $742.75. Both of these amounts were calculated solely on the basis of Claimant's wages from Defendant.

5. Late in 2009 Claimant revealed for the first time that on the date of his injury he had been concurrently employed by another employer, Loso Professional Janitorial Services, Inc. (hereinafter "Loso"). Claimant testified in his deposition that he had been confused at the time of his injury as to why his Loso employment would have had any bearing on an injury he suffered while in Defendant's employ; presumably this is why he did not advise Defendant's investigator of it initially.

6. According to Loso's payroll summary, Claimant's average weekly wage for the twelve weeks prior to his January 24, 2007 injury was $420.00. Had this amount been added to his average weekly wage from Defendant's employment, the total would have been $1,519.13. This would have yielded an initial compensation rate (including one dependent) of $1,022.80, a difference of $280.05 weekly.

7. Claimant received weekly temporary total disability payments from January 24, 2007 until November 16, 2008 when the Department approved Defendant's discontinuance on end medical result grounds.

DISCUSSION:

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 a judgment in its favor as a matter of law. *Samplid 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. *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. Realty of Vermont*, 137 Vt. 425 (1979).

2. The issue here is whether Claimant is precluded as a matter of law from modifying a duly signed and approved Form 21. Claimant asserts that the average weekly wage and compensation rate stated in the Form 21 did not include his wages from concurrent employment and therefore were calculated incorrectly. Defendant concedes that this is true, but argues that Claimant is bound by the terms of the Form 21 nevertheless.

3. According to 21 V.S.A. §650(a),

> If the injured employee is employed in the concurrent service of more than one insured employer . . . the total earnings from the several insured employers . . . shall be combined in determining the employee's average weekly wages . . .

4. There is no question but that had Claimant informed Defendant's investigator in February 2007 that he was concurrently employed, Defendant would have been obligated, in accordance with §650(a), to include those wages in its average weekly wage calculation.

5. The issue, then, is whether Defendant should be relieved of what is a clearly stated statutory obligation to include concurrent employment wages by virtue of the fact that the parties executed, and the Department approved, a Form 21 that did not account for them. According to Workers' Compensation Rule 17.0000, which applies to various compensation agreements, including the Form 21,

> Once executed by the parties and approved by the Division, these forms shall become binding agreements and absent evidence of fraud or material mistake of fact the parties shall be deemed to have waived their right to contest the material portions thereof.

6. There is no evidence of, nor does either party argue, fraud. There is, however, evidence of a material mistake of fact.

7. Defendant claims that there was no mistake of fact here sufficient to undermine the Form 21, because clearly Claimant could not have been mistaken about the fact of his own concurrent employment. Applying basic contract law, "For such a mistake to exist, it must be mutual." *Lushima v. Cathedral Square Corp,* Op. No. 38-09WC (September 29, 2009), citing *Maglin v. Tschannerl,* 174 Vt. 39 (2002). Defendant argues that as it was the only one misinformed about the facts, the mistake was unilateral, not mutual.

8. Defendant's analysis focuses on the wrong fact, however. The "material portions" of the Form 21 at issue here were the dollar amounts representing Claimant's statutorily determined average weekly wage and compensation rate. Though at the time they executed the Form 21 both parties believed these amounts had been accurately calculated, as it turns out both parties were mistaken. This, therefore, was their mutual mistake of fact.

9. It is true, as Defendant points out, that compensation agreements ordinarily should be given the binding effect to which all duly executed contracts are entitled. Finality is a necessary component of any bargained-for agreement, including those that arise in the workers' compensation context. Where, as here, the parties' mutual mistake of fact strikes at the heart of the agreement, however, equity requires that it be undone. To do otherwise would deny Claimant the right to a clearly defined statutory benefit and provide Defendant with an unjustified windfall.

ORDER:

Defendant's Motion for Partial Summary Judgment is **DENIED**. Claimant's Motion for Partial Summary Judgment is **GRANTED.** Defendant is hereby **ORDERED** to recalculate Claimant's average weekly wage and compensation rate to include his wages from concurrent employment and to make whatever retroactive payments are necessary in accordance therewith.

DATED at Montpelier, Vermont this _____ day of June 2010.

_____
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.