

**STATE OF VERMONT
DEPARTMENT OF LABOR**

David Felion

Opinion No. 10-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

NSK Corporation

For: Anne M. Noonan
Commissioner

State File No. Z-00213

RULING ON DEFENDANT'S MOTION FOR CREDIT/OFFSET

Pursuant to 21 V.S.A. §651, Defendant moves for a credit or offset against future workers' compensation benefits owed to Claimant. The motion stems from Defendant's error in prematurely applying a cost of living increase to Claimant's compensation rate, and then carrying that error forward through subsequent years.¹ The resulting overpayment totaled \$3,791.12.

Defendant now seeks approval to offset the amount it overpaid from any future workers' compensation benefits it might owe. It characterizes its error as "excusable oversight," which even the Department failed to detect and correct.

Claimant acknowledges that he was overpaid, but argues that because the error resulted from Defendant's carelessness, it should not be allowed to recoup the loss. Claimant also asserts that he lacks the ability to repay the overpaid benefits, and that requiring him to do so would cause him undeserved financial hardship.

The applicable statutory provision, 21 V.S.A. §651, states:

§651. – Voluntary payments

Payments made by an employer or his insurer to an injured worker during the period of his disability . . . which, by the provisions of this chapter, were not due and payable when made, may, subject to the approval of the commissioner, be deducted from the amount to be paid as compensation.

¹ Claimant's injury occurred on July 10, 2007. According to 21 V.S.A. §650(d), his compensation rate should not have been adjusted for cost of living until July 1, 2008. Defendant's adjuster mistakenly adjusted it retroactively to July 1, 2007, however, and the Department failed to catch the error.

Based on the circumstances presented here, I conclude that it is appropriate to allow the offset Defendant seeks. Defendant's error did not evidence such a degree of careless or negligent claims handling practices as to disqualify it from receiving an offset, *cf. Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999), particularly in light of the fact that the Department also failed to detect the mistake. Rather, it is the type of error that the statute grants the commissioner discretion to correct. *See Bishop v. Town of Barre*, 140 Vt. 564, 579 (1982).

As for Claimant's claim of financial hardship, I am confident that the offset can be structured in such a way as to ease its negative impact. I note, first of all, that what Defendant is seeking is all that the statute allows – an offset against future benefits, not direct reimbursement from Claimant himself. If no future compensation is owed, the overpayment will not be recoverable.

Even if Claimant's pending claim for permanent total disability benefits is resolved in his favor, furthermore, I expect it will be possible to spread the offset over whatever period of time is both manageable for him and reasonable for Defendant. In this way, Defendant can recoup its overpayment without forcing Claimant to endure some number of weeks without any indemnity check at all.

For clarity's sake, finally, I note that Defendant's right to offset is limited to whatever indemnity benefits might be owed Claimant; it does not extend to medical, vocational rehabilitation or other benefits that might be payable on his behalf. I derive this limitation from the language of §651, which allows a deduction only from "the amount to be paid as compensation," not from the value of services or supplies that might be provided.

Defendant's Motion for Credit/Offset against Future Workers' Compensation Benefits due to Claimant is hereby **GRANTED**.

DATED at Montpelier, Vermont this 29th day of April 2011.

Anne M. Noonan
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.