Pamela McGinness v. OWL International (April 4, 2012)

STATE OF VERMONT
DEPARTMENT OF LABOR

Pamela McGinness	Opinion No. 11-12WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
OWL International	For: Anne M. Noonan Commissioner
	State File No. Y-02436

RULING ON DEFENDANT'S MOTION FOR CREDIT/OFFSET

Defendant seeks a credit or offset pursuant to 21 V.S.A. §651 against future indemnity benefits payable to Claimant on account of various temporary disability benefit overpayments. Claimant opposes the motion on the grounds that to the extent any overpayments occurred (which she disputes at least in part), the circumstances do not justify an offset.

The facts are substantially undisputed. Claimant suffered a work-related injury on January 21, 2005, which Defendant accepted as compensable. Some two years later, on May 31, 2007 Claimant became disabled from working, and Defendant commenced paying temporary total disability benefits accordingly.

Aside from a brief gap between August 12, 2007 and August 28, 2007, from May 31, 2007 through January 22, 2008 Defendant paid Claimant weekly temporary total disability benefits. The amount it paid was based on (a) Claimant's Wage Statement (Form 25), which documented her entitlement to the minimum compensation rate (initially $325.00 weekly, updated to $338.00 weekly as of July 1, 2007); plus (b) an additional $20.00 weekly as compensation for two dependents. In listing these dependents on her Certificate of Dependency (Form 10/10S), Claimant specifically noted their relationship to her as her grandchildren.

By letter dated January 11, 2008 Claimant's attorney informed Defendant's workers' compensation insurance adjuster that Claimant's two dependents had moved out of her home and were no longer dependent upon her for support. The attorney thus advised that Claimant's weekly compensation rate needed to be adjusted downward by $20.00, to $338.00. Defendant did so, effective January 22, 2008.

From January 22, 2008 through June 30, 2010 Defendant paid Claimant weekly temporary total disability benefits at the minimum compensation rate (as adjusted annually), without adding any amount for dependency benefits. For the benefit years beginning on July 1, 2008 and July 1, 2009 the Notices of Change in Compensation Rate (Form 28's) that Defendant filed with the Department correctly omitted any additional compensation for dependents.

For reasons that are not apparent, for the July 1, 2010 benefit year Defendant once again began adding $20.00 in dependency benefits to Claimant's weekly compensation rate. This was reflected on the Form 28 that the Department approved on July 30, 2010.[1] Thereafter, from July 1, 2010 through April 5, 2011, Defendant's weekly temporary total disability payments to Claimant included $20.00 weekly in dependency benefits.

On March 28, 2011 the Department approved Defendant's Notice of Intention to Discontinue Payments (Form 27), terminating Claimant's temporary total disability benefits effective March 12, 2011. Notwithstanding its approved discontinuance, however, Defendant continued to pay temporary total disability benefits through April 5, 2011.

Defendant now seeks an offset or credit against future indemnity benefits based on two alleged overpayments. First, it asserts that it mistakenly paid dependency benefits on behalf of Claimant's grandchildren when according to its reading of the workers' compensation statute no such benefits were due. Defendant calculates the total amount of this overpayment to be $1,477.00. Second, it asserts that it mistakenly paid temporary total disability benefits beyond the effective date of the Department's approved discontinuance. Defendant calculates this overpayment (not including dependency benefits) to be $1,332.14. The total amount of the credit Defendant seeks, therefore, is $2,809.14.

DISCUSSION:

With the commissioner's approval, Vermont's workers' compensation statute authorizes a credit or offset against future indemnity benefits in situations where an employer has made payments that "by the provisions of this chapter, were not due and payable when made." 21 V.S.A. §651. With respect to Defendant's claim as to overpaid dependency benefits, therefore, the first question I must consider is whether Vermont's workers' compensation statute requires such payments to be made or not.

The statute mandates that a claimant's compensation rate for temporary total disability must include an additional $10.00 per week "for each dependent child who is unmarried and under the age of 21 years. . . ." 21 V.S.A. §642.

[1] Claimant has attached to his memorandum in opposition a second Form 28 for the July 1, 2010 benefit year that does not list any additional dependency benefits. The form was signed by Defendant's adjuster, but never approved by the Department. In fact, from reviewing the Department's file there is no evidence that the Department ever received it.

The statute's general definitions section contains separate definitions for both "child" and "grandchild," as follows:

> §601. Definitions
>
> *Unless the context otherwise requires*, words and phrases used in this chapter shall be construed as follows:
>
> (2) "Child" includes a stepchild, adopted child, posthumous child and an acknowledged illegitimate child, but does not include a married child unless dependent.
>
> . . .
>
> (5) "Grandchild" includes a child of an adopted child and a child of a stepchild, but does not include a stepchild of a child, a stepchild of a stepchild, a stepchild of an adopted child, or a married grandchild unless dependent.

21 V.S.A. §601 (emphasis added).

Defendant correctly observes that while the statute specifically identifies grandchildren as potential recipients of death benefits under §§634 and 635, it makes no such reference to grandchildren with respect to the dependency benefits mandated under §642. Relying on the general rule of statutory construction by which the legislature is presumed to act "advisedly" when it includes particular language in one section of a statute but omits it in another, *In re Munson Earth Moving Corp.*, 169 Vt. 455, 465 (1999), Defendant asserts that here, the legislature must have intended only for children to qualify for dependency benefits under §642, not grandchildren.

Canons of statutory construction such as the one to which Defendant refers – that "the expression of one thing is the exclusion of another"[2] – "are routinely discarded when they do not further a statute's remedial purposes." *Clymer v. Webster*, 156 Vt. 614, 625 (1991). Such maxims are aids to construction, not hard rules. *In re Appeal of Electronic Industries Alliance*, 2005 VT 111, ¶9. In interpreting the language of a statute, the better approach is to give effect to the Legislature's intent, by considering "the whole statute, its effects and consequences, and the reason and spirit of the law." *Laumann v. Department of Public Safety*, 2004 VT 60, ¶7.

Considered from this perspective, the language of §642 evidences the legislature's primary intention, which is to assist an injured worker to continue caring for his or her dependents during a period of temporary total disability. The context in which the term "dependent child" is used, therefore, requires greater emphasis on the first word, and less on the second. Such an interpretation is more in keeping with the statute's remedial nature and liberal construction. *Montgomery v. Brinver Corp.*, 142 Vt. 461 (1983), citing *Herbert v. Layman*, 125 Vt. 481 (1966).

[2] In Latin, *"expressio unis est exclusio alterius."*

I conclude that considered in context, the language of §642 includes dependent grandchildren as an appropriate basis for calculating an injured worker's entitlement to dependency benefits. I therefore conclude that Defendant did not overpay Claimant by including her dependent grandchildren in its temporary total disability payments.

By recommencing its payment of dependency benefits long after having been notified that Claimant's dependents no longer lived with her, beginning on July 1, 2010 Defendant did overpay Claimant, however. Its decision to do so defies explanation and evidences a degree of careless and negligent claims handling that I cannot condone. *See, e.g., Blais v. Church of Jesus Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999). I will not approve any offset or credit on account of these overpayments, therefore.

I will allow Defendant to take an offset or credit on account of its overpayment from March 12, 2011 through April 5, 2011. This overpayment encompassed a period of three weeks and four days after Defendant's discontinuance of benefits became effective. Measured from the date upon which the Department's approval was issued, however, it extended for only eight days. I presume that even claimants would consider it preferable for a workers' compensation insurance carrier to assume the risk of issuing a small overpayment if the alternative is to risk terminating benefits prematurely. That it be given an opportunity under §651 to recoup such an overpayment is a fair trade-off, one that adequately protects both parties' interests.

Including dependency benefits, I calculate the amount of Defendant's overpayment from March 12, 2011 through April 5, 2011 to be $1,403.57. I conclude that Defendant is entitled to a credit or offset in that amount against future workers' compensation indemnity benefits payable on account of Claimant's January 21, 2005 work-related injury.

ORDER:

Defendant's Motion for Credit/Offset is hereby **GRANTED in part and DENIED in part**. Defendant is awarded a credit or offset totaling $1,403.57 against future workers' compensation indemnity benefits payable on account of Claimant's January 21, 2005 work-related injury.

DATED at Montpelier, Vermont this 4th day of April 2012.

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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.