

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Michael Martin

Opinion No. 28-13WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Brattleboro Food Co-op

For: Anne M. Noonan  
Commissioner

State File No. DD-52504

**RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

By Motion dated October 29, 2013 Defendant seeks an order under 21 V.S.A. §708 that all workers' compensation benefits paid to Jennifer Dusenbery on account of Claimant's work-related death be forfeited and repaid.

As support for its motion, Defendant alleges the following:

1. Claimant died while working for Defendant on August 9, 2011.
2. According to the sworn statement of Mary Cain, she signed a marriage certificate at the request of Jennifer Dusenbery. However, she was not the officiant of any wedding between Ms. Dusenbery and Claimant.
3. According to Pam McFadden, the Dummerston, Vermont town clerk, under Vermont law a marriage certificate must be signed by the officiant of the marriage ceremony in order to be valid.
4. According to Vermont State Police Detective Trooper Tyson Kinney, his investigation revealed probable cause to show that Ms. Dusenbery fraudulently obtained workers' compensation benefits as a consequence of Claimant's death.
5. According to a June 13, 2013 news article published in the *Brattleboro Reformer*, an arrest warrant has been issued for Ms. Dusenbery based on her receipt of nearly \$70,000.00 in workers' compensation death benefits. The article reports that Ms. Dusenbery allegedly convinced Ms. Cain to sign and back-date a marriage certificate to a time prior to Claimant's death, and then used that document to establish her claim to workers' compensation death benefits as Claimant's spouse.
6. Ms. Dusenbery was paid \$70,535.45 in workers' compensation death benefits as a consequence of Claimant's death.

## **DISCUSSION:**

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).

Vermont's workers' compensation fraud statute, 21 V.S.A. §708, states as follows:

A person who willfully makes a false statement or representation, for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for herself or himself or for any other person, after notice and opportunity for hearing, may be assessed an administrative penalty of not more than \$20,000.00, and shall forfeit all or a portion of any right to compensation under the provisions of this chapter, as determined to be appropriate by the Commissioner after a determination by the Commissioner that the person has willfully made a false statement or representation of a material fact.

Assuming that the allegations leading to the issuance of an arrest warrant against Ms. Dusenbery are in fact true, a strong case for forfeiture under §708 will have been established. Allegations are not facts, however. From the evidence Defendant has produced, the facts are not so clear as to support a finding of either fraud or misrepresentation as a matter of law.

Defendant has failed to submit any evidence establishing that Ms. Dusenbery received proper notice of its motion, furthermore. The fraud statute's specific requirement that "notice and opportunity for hearing" be given before forfeiture can occur imposes a somewhat greater level of formality with respect to service of process than is the case in workers' compensation proceedings generally. This is particularly true where, as here, the target for forfeiture is someone other than the claimant.

Defendant could have attempted service on Ms. Dusenbery under V.R.C.P. 4(e) or (f), but apparently it did not do so. As a consequence, I will not accept her failure to respond to Defendant's motion as evidence that the facts alleged in it are either undisputed or unrefuted.

**ORDER:**

Defendant's Motion for Summary Judgment is hereby **DENIED**.

**DATED** at Montpelier, Vermont this 11<sup>th</sup> day of December 2013.

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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.