Sharon Conant v. Entergy Corp/American International Group (April 28, 2015)

STATE OF VERMONT
DEPARTMENT OF LABOR

Sharon Conant	Opinion No. 10-15WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Entergy Corporation/ American International Group	For: Anne M. Noonan Commissioner
	State File No. FF-61233

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Cristina Rousseau, Esq., for Claimant
Wesley Lawrence, Esq., for Defendant AIG

ISSUE PRESENTED:

Is Defendant entitled as a matter of law to reimbursement or credit for non-occupational disability benefits paid pursuant to its employment contract against temporary disability benefits paid subsequently pursuant to the Department's interim order?

EXHIBITS:

Claimant's Exhibit 1:	List of self-insured employers
Claimant's Exhibit 2:	Summary of wages paid, with supporting paycheck data
Claimant's Exhibit 3:	10/03/2015 check payable to Claimant from The Insurance Company of the State of Pennsylvania
Claimant's Exhibit 4:	Agreement as to Wages, Working Conditions, and Seniority between Entergy Nuclear Vermont Yankee and Local Union No. 300, International Brotherhood of Electrical Workers for the term beginning July 28, 2013 and ending July 26, 2015
Claimant's Exhibit 5:	Chart of benefits owed under occupational disability section of employment contract

Defendant's Exhibit A:	Loss reimbursement endorsement
Defendant's Exhibit B:	Excerpted portions of Agreement as to Wages, Working Conditions, and Seniority between Entergy Nuclear Vermont Yankee and Local Union No. 300, International Brotherhood of Electrical Workers for the term beginning July 28, 2013 and ending July 26, 2015
Defendant's Exhibit C:	Email from Attorney Lawrence to Attorney Rousseau, October 6, 2014
Defendant's Exhibit D:	Letter from Attorney Lawrence to Attorney Rousseau, September 19, 2014
Defendant's Exhibit E:	Spreadsheet of payments made from 3/22/14 through 9/20/14

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Claimant as the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's file relative to this claim.

3. At all times relevant to these proceedings, Defendant was insured for workers' compensation through The Insurance Company of the State of Pennsylvania, a subsidiary of American International Group (AIG).[1] Pursuant to the policy's loss reimbursement endorsement, Defendant was obligated to reimburse AIG for all workers' compensation benefits the latter paid on account of an employee's work-related injury, to the limit of $1,000,000.00 per claim. *Defendant's Exhibit A.*

4. Defendant has not been approved to self-insure for workers' compensation under 21 V.S.A. §687(a)(3) and Workers' Compensation Rule 25. *Claimant's Exhibit 1*.

5. At all times relevant to these proceedings, Claimant was a member of Local Union No. 300, International Brotherhood of Electrical Workers. As such, the terms of her employment contract with Defendant were governed by an "Agreement as to Wages, Working Conditions, and Seniority between Entergy Nuclear Vermont Yankee and Local Union No. 300, International Brotherhood of Electrical Workers" (the "collective bargaining agreement") for the term beginning July 28, 2013 and ending July 26, 2015. *Claimant's Exhibit 4*.

6. The collective bargaining agreement obligates Defendant to provide disability benefits to its employees in the event of either occupational or non-occupational disabilities. These

[1] For clarity's sake and ease of reference, the named employer in this case is referred to herein as Defendant, and its workers' compensation carrier as AIG.

benefits are particularly described in Article XI.D., entitled "Life, Accidental Death and Dismemberment, Medical Including Dental, Workers' Compensation and Other Disability Benefits," *Claimant's Exhibit 4 at p. 38.* For an occupational disability, defined as a physical or mental handicap that "occurred while the employee was doing his/her job and prevents the employee from performing his/her job," the agreement provides as follows:

> Subject to completion of Workers' Compensation forms and procedures, normal wages will be paid to the employee for the first work week of an occupational disability.
>
> After the first week of occupational injury has been paid, subject to the approval of the employee's department Supervisor/Manager and the Human Resources Department, full normal wages will be paid:
>
> - less Workers' Compensation benefits.
> - for whichever occurs first:
>
> i. a period equaling two weeks for each completed year of continuous service dating from the employee's original employment by either the Company or a present or former affiliated company; or
>
> ii. for the length of the occupational disability.
>
> - Workers' Compensation benefits will be paid after the period described above.

Claimant's Exhibit 4 at Article XI.D.1.a, p. 39

7. For a non-occupational disability, defined as a physical or mental handicap that "does not occur on the job and is for longer than five (5) consecutive days and prevents the employee from performing his/her job," the agreement provides three stages of benefits: (1) continued full salary for five days or until accrued "continuance of full salary days"[2] are exhausted, whichever is longer, followed by (2) a short-term disability benefit equal to 60 percent of the employee's weekly salary for up to twelve months, and then (3) a long-term disability benefit.[3] *Claimant's Exhibit 4 at Article XI.D.1.b., pp. 39-40.*

8. The collective bargaining agreement excused the employer from making any wage or salary payments, for either occupational or non-occupational disabilities, in cases where the employee's disability resulted from "the neglect or refusal of such employee to observe the [employer's] established safety rules or regulations if such employee has previously been warned in writing." At its discretion, the employer also could withhold payment of wages or salary during periods of occupational or non-occupational disability from employees "who engage in work other than for [the employer] or its affiliates." *Claimant's Exhibit 4 at Article VIII.D.2 and 3, p. 42.*

9. On March 14, 2014, Defendant filed a First Report of Injury (Form 1) regarding a right ankle injury that Claimant alleged to have suffered while at work on February 5, 2014. On April 14, 2014 AIG denied the claim on the grounds that the injury had occurred as a result of a non-work-related incident approximately one month earlier, and therefore was not causally related to her employment.

10. With her claim for workers' compensation benefits denied, Defendant commenced payment of salary continuance and short-term disability benefits in accordance with the "non-occupational disabilities" section of the collective bargaining agreement, *see* Finding of Fact No. 7 *supra.* In all, Defendant paid a total of $24,927.75 in accrued continuance of full salary days and short-term disability benefits covering the pay periods from March 9, 2014 through August 23, 2014.[4] From this amount, Defendant withheld taxes totaling $2,562.38 and other deductions totaling $7,841.21, for a net payout to Claimant of $14,524.16. *Claimant's Exhibit 2.*

11. Claimant appealed AIG's denial of her claim for workers' compensation benefits on June 2, 2014. Upon examining the medical evidence and following an informal conference,

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[2] The collective bargaining agreement erroneously cites Article XI.C.1.a as the reference for hours accrued under the Salary Continuance Program. The parties agree that the appropriate reference is to Article XI.E.1.a. According to that provision, continuance of full salary days (essentially, sick leave or absence days) are credited annually on the employee's employment anniversary date at the rate of 40 hours for each full year of employment. *Claimant's Exhibit 4 at Article XI.E.1.a, p. 42.* Unlike vacation days, which accrue at a different rate depending on the employee's years of service, credit for continuance of full salary days cannot be accumulated from year to year. *Claimant's Exhibit 4 at Article VIII.A, pp. 24-25.*

[3] Short-term disability benefits were apparently self-funded by the employer; long-term disability benefits were paid according to a "summary plan description." *Claimant's Exhibit 4 at Article VIII.D.1.b.ii and iii, p. 40.*

[4] Defendant initially charged a portion of this amount, totaling $3,786.77 and representing 98 hours, to Claimant's accrued vacation time. Later, it credited the vacation leave back to her and allocated the payments to short-term disability instead.

the Department's workers' compensation specialist determined that the denial was not reasonably supported. On September 16, 2014 she issued an interim order directing AIG to pay temporary total disability benefits retroactive to March 7, 2014, the date on which Claimant began losing time from work as a consequence of her injury.

12. Through its attorney, AIG seasonably requested a stay of the interim order. While the request was pending, and before the Department's specialist had occasion to rule on it, on October 3, 2014 AIG issued payment to Claimant in the amount of $34,980.00, representing 30 weeks of retroactive temporary total disability benefits (dating back to March 7, 2014) at a weekly compensation rate of $1,166.00. *Defendant's Exhibit D; Claimant's Exhibits 3 and 5*.

13. Considering both the salary continuance and short-term disability benefits she received directly from Defendant and the temporary total disability benefits that AIG paid, AIG now asserts that Claimant has been paid twice for the same period of temporary total disability. It thus seeks an order either (a) requiring Claimant to reimburse Defendant for the gross amount of its salary continuance and short-term disability payments, totaling $24,927.75; or (b) allowing AIG to claim an offset in that amount against any future permanent partial disability benefits to which she might otherwise be entitled.

DISCUSSION:

1. Summary judgment is proper when "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, after giving the benefit of all reasonable doubts and inferences to the opposing party." *State v. Delaney*, 157 Vt. 247, 252 (1991). To prevail on a motion for summary judgment, the facts must be "clear, undisputed or unrefuted." *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979); *A.M. v. Laraway Youth and Family Services*, Opinion No. 43-08WC (October 30, 2008).

2. The issue raised by AIG's motion for summary judgment concerns an employer's rights and responsibilities when, having denied an employee's claim for workers' compensation benefits, it makes payment of non-occupational disability benefits to him or her as required by its employment contract. Should the commissioner order reimbursement or credit for the amounts so paid if later the employer is deemed responsible for wage replacement benefits under the Workers' Compensation Act?

3. The Vermont Supreme Court considered a similar issue in *Yustin v. Department of Public Safety*, 2011 VT 20. In that case, the State of Vermont, a self-insured employer, initially denied the claimant's claim for workers' compensation benefits on the grounds that his injury was not compensable. The claimant appealed the denial and in the meantime used accumulated employer-funded sick leave to receive full wages during the period that he was unable to work. Later, the commissioner issued an interim order rejecting the denial and ordering that temporary total disability benefits be paid. Rather than demanding repayment of the sick leave wages and issuing a new check, to comply with the order the State simply netted out the difference, and restored the claimant's sick leave by the amount of workers' compensation benefits it now owed. It did so in accordance with a provision in its personnel policy and procedures manual, which specifically authorized this reimbursement mechanism under the circumstances.

4. On appeal to the Supreme Court, the claimant asserted that the State was obligated by law to issue separate payment for the workers' compensation benefits it had been ordered to pay, and that the commissioner should not have allowed it to offset them against the sick leave wages he previously had received. The Court disagreed, and by a 3-2 majority affirmed the commissioner's determination that the State had acted appropriately. "The workers' compensation statute bothers not over what account the money comes from," the Court stated, "so long as it comes from the employer." *Id.* at ¶10.

5. An important component of the Court's reasoning in *Yustin* was that the employer's action – crediting itself for sick leave wages paid while at the same time restoring to the claimant the sick leave hours he had used – was "entirely consistent with the compensatory purpose" of the Workers' Compensation Act. *Id.* at ¶6. Allowing an offset in such situations "serve[s] the salutary purpose of encouraging continued payment to the employee for the period of time that his or her claim is being considered while preventing a double recovery in the event that the claim is ultimately allowed." *Id.* at ¶7.

6. As evidence of the statute's "clear and strong policy against the double recovery of benefits," the Court referenced both §624(e), pertaining to an employer's right to reimbursement from third-party damages collected by the employee, and §643a, allowing the commissioner to order repayment of benefits paid pursuant to an erroneously rejected discontinuance. Additional support, perhaps even more relevant to the circumstances in both *Yustin* and the present case, can be found in §642, which requires that the date of an employee's accident be counted as the first day of temporary total disability "*unless the employee received full wages for that day."* (Emphasis supplied).

7. Two other statutory provisions, §§651 and 693, endorse the public policy against double recovery even more explicitly. Section 693 protects the employee's right to make a claim for workers' compensation benefits directly against the employer's workers' compensation insurance carrier, but then provides as follows:

> However, the payment in whole or in part of such compensation by either the employer or the insurance carrier shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid.

Section 651, entitled "Voluntary payments," provides:

> Payments made by an employer or his or her insurer to an injured worker during the period of his or her 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.

8. Considered together, §693 prohibits a claimant from being paid twice for the same benefit – once from the employer and once from its insurance carrier. And if, having already received a wage replacement benefit from one, the claimant subsequently receives payment of the same benefit from the other, under §651 the latter payment becomes one "which, by the provisions of this chapter, [was] not due and payable when made," and thereby subject to an offset, in the commissioner's discretion, against any benefits still owed.[5]

9. The language of §651 clearly allows for an offset in situations where a claimant receives payments that ultimately are deemed not to have been owed, but makes no provision whatsoever for reimbursement. Nor has Defendant identified any other statutory basis to support its claim for such relief. Absent specific authorization in the statute, I conclude as a matter of law that reimbursement is not an available remedy.

[5] Although the Supreme Court decried the lack of any express provision in Vermont's workers' compensation law authorizing an offset against an employee's compensation award for sick leave or other wages paid during the disability period, *Id.* at ¶8, one of the cases it cited in support construed a statute with language virtually identical to that contained in §651. *See Freel v. Foster Forbes Glass Co.*, 449 N.E.2d 1148, 1151 (Ind.Ct.App. 1983).

10. In accordance with the precedent set in *Yustin*, I conclude as a matter of law that AIG is entitled to offset any temporary total disability benefits it paid for weeks during which Claimant also received payment from Defendant for her accrued continuance of full salary days against any workers' compensation indemnity payments to which she may yet become entitled.[6] However, also in accordance with the directive established in *Yustin*, *id.* at ¶10, in order to claim the credit Defendant must essentially "undo" the transaction by which its salary continuance payments were made, by crediting back to Claimant the sick leave hours she used, making the appropriate tax withholding adjustments and reimbursing any other deductions that would not have been due had her workers' compensation claim been accepted *ab initio*.[7]

11. I am unwilling to extend the offset to include the short-term disability benefits Defendant paid, however. As noted above, Finding of Fact No. 8 *supra*, the collective bargaining agreement imposes two important contingencies on an employee's entitlement to these benefits – first, that the employee's disability not have been due to a safety violation about which he or she previously had been warned, and second, that the employee not be working concurrently for another employer. With its reference to negligence as a barrier to recovery, the first contingency in particular raises issues that are foreign to the workers' compensation scheme. When they arise, these issues are best resolved in the context of the agreement's grievance and dispute resolution system, *Claimant's Exhibit 4 at Article IX, p. 27*, not in the context of a workers' compensation proceeding.

12. To summarize, in accordance with the Supreme Court's ruling in *Yustin*, I conclude as a matter of law that AIG may claim an offset for the sick leave benefits Claimant received against any future workers' compensation indemnity benefits to which she may become entitled. However, I am unwilling to extend the Court's ruling to allow for an offset of short-term disability benefits. As to those, I conclude that Defendant's recourse lies not with the Commissioner, but rather with the grievance and dispute resolution provisions of the collective bargaining agreement.

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[6] Prior decisions have established that the credit allowed by §651 applies only to compensation benefits paid directly to the claimant, and not to medical, vocational rehabilitation or other benefits payable on his or her behalf. *Knoff v. Josef Knoff Illuminating*, Opinion No. 13-11WC (June 2, 2011), citing *Felion v. NSK Corporation*, Opinion No. 10-11WC (May 2, 2011); *see also, Bishop v. Town of Barre*, 140 Vt. 564, 579 (1982) (validating the commissioner's authority to allow an offset to be taken against permanent partial disability benefits).

[7] Defendant also may be obligated to pay Claimant the wages to which she was entitled under the occupational disability section of the collective bargaining agreement, *see* Finding of Fact No. 6 *supra, Claimant's Exhibit 4 at Article XI.D.1.a, p. 39.* This is a matter beyond my jurisdiction, however.

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED IN PART** and **DENIED IN PART**, as follows:

1. Provided that Defendant (a) effectuates credit back to Claimant for the sick leave hours she used; (b) makes all appropriate adjustments to credit back tax withholding and other deductions associated with those hours; and (c) issues payment for any other benefits to which she is entitled under *Article XI.D.1.a* of the collective bargaining agreement, AIG shall be entitled to an offset for the gross amount of the sick leave payments Defendant made against any future workers' compensation indemnity benefits to which she may become entitled.

2. AIG shall not be entitled to an offset for any short-term disability benefits paid to Claimant under *Article XI.D.1.b.ii* of the collective bargaining agreement.

DATED at Montpelier, Vermont this 28th day of April 2015.

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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.