STATE OF VERMONT
DEPARTMENT OF LABOR

Amy Chadbourne

v.

Walmart Associates, Inc.

Opinion No. 24-15WC

By: Phyllis Phillips, Esq.
Administrative Law Judge

For: Anne M. Noonan
Commissioner

State File No. FF-50025

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq. for Claimant
Marion Ferguson, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant barred as a matter of law from asserting a claim for workers' compensation benefits arising out of her June 7, 2013 injury?

EXHIBITS:

Claimant's Exhibit 1:	Release and Stipulation for Lump-Sum Settlement, August 2, 2011
Claimant's Exhibit 2:	General Release, Voluntary Resignation and Waiver of Claims, August 2, 2011
Claimant's Exhibit 3:	Affidavit of Claimant, August 2, 2011
Claimant's Exhibit 4:	Denial of Workers' Compensation Benefits by Employer or Carrier (Form 2), 7/2/13 (with attachments)
Claimant's Exhibit 5:	Interim Order of Partial Benefits, June 27, 2014
Claimant's Exhibit 6:	Referral to Formal Hearing Docket, June 27, 2014
Claimant's Exhibit 7:	Dr. Binter report, 10/28/14
Claimant's Exhibit 8:	Dr. Lazar office notes, 6/11/2013 – 6/25/2013
Defendant's Exhibit 1:	Patient Information Sheet and History, 9/22/2010
Defendant's Exhibit 2:	Dr. Trimble office note, August 20, 2009
Defendant's Exhibit 3:	Dr. Trimble office note, 10/28/10
Defendant's Exhibit 4:	Dr. Trimble office note, 6/16/11
Defendant's Exhibit 5:	Dave Wooley, PA-C office note, July 25, 2011

Defendant's Exhibit 6:	Release and Stipulation for Lump-Sum Settlement, August 2, 2011
Defendant's Exhibit 7:	General Release, Voluntary Resignation and Waiver of Claims, August 2, 2011
Defendant's Exhibit 8:	Affidavit of Claimant, August 2, 2011
Defendant's Exhibit 9:	Employer First Report of Injury (Form 1), 6/28/2013
Defendant's Exhibit 10:	Certification of Health Care Provider for Associate's Serious Health Condition, 5/24/13
Defendant's Exhibit 11:	Certification of Health Care Provider for Associate's Serious Health Condition, 6/18/13
Defendant's Exhibit 12:	Dr. Lazar office note, 6/11/2013 – 6/25/2013
Defendant's Exhibit 13:	Denial of Workers' Compensation Benefits by Employer or Carrier (Form 2), 7/2/13
Defendant's Exhibit 14:	Letter from Attorney Ferguson, February 18, 2014
Defendant's Exhibit 15:	Referral to Formal Hearing Docket, June 27, 2014
Defendant's Exhibit 16:	Interim Order of Partial Benefits, June 27, 2014
Defendant's Exhibit 17:	Dr. Binter report, 10/28/14
Defendant's Exhibit 18:	Medical records, 3/21/90 – 10/28/14

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. Claimant allegedly suffered an injury to her lower back while employed at Defendant's store #1297 in Chiefland, Florida on August 27, 2010. Specifically, she complained of low back pain after reaching to retrieve an item from a top shelf. *Defendant's Exhibit 1*.

4. Claimant has a prior history of low back pain dating back to the 1990's. Medical records indicate that as of August 20, 2009 she was "on medical leave" from Walmart as a consequence of ongoing low back and right leg pain. An August 2009 MRI scan revealed a right-sided L5-S1 disc herniation. In October 2009 she underwent surgery to decompress and remove disc fragments at that level. *Defendant's Exhibits 2 and 18 (#2, Operative Report 10/29/09)*.

5. For her August 2010 injury, Claimant treated with Dr. Trimble, the osteopathic physician who had treated her in 2009. Dr. Trimble diagnosed low back pain. *Defendant's Exhibit 3.* As of June 16, 2011 he determined that she had reached

an end medical result, at least from a surgical perspective, with a five percent whole person permanent impairment using Florida guidelines. Notwithstanding his end medical result determination, Dr. Trimble recommended that Claimant be transferred to a pain management specialist for further treatment. *Defendant's Exhibit 4.*

6. On July 25, 2011 Claimant was released to return to work without restrictions. At the time she reported only minimal low back pain – a one on a zero-to-ten pain scale – and was instructed to follow up on an as-need basis. *Defendant's Exhibit 5.*

7. On August 2, 2011 Claimant executed three documents to memorialize the settlement of her claim for workers' compensation benefits arising out of her August 27, 2010 alleged work injury. The first document, which was entitled "Release and Stipulation for Lump-Sum Settlement of All Claims Made Pursuant to F.S. 440.20(11)(c), (d) & (e) 2003," (the "Release"), *Defendant's Exhibit 6*, was executed by both Claimant and "Counsel for Employer/Carrier." Its caption specified the date of the accident ["D/A"] as August 27, 2010, and identified the employer as "Wal-Mart #1297," located in Chiefland, Florida. Paragraph 2 of the document further described the incident as follows:

> **DESCRIPTION OF ACCIDENT** – On 8/27/2010, the employee Amy B. Chadbourne, hereinafter designated as the claimant, contends she was injured by accident as contemplated under F.S. 440.02(1) arising out of and in the course of employment with the employer, Wal-Mart #1297 in Levy County, Florida, when retrieving an item from top shelf injuring her lower back.

8. In Paragraph 5 of the Release, Claimant made the following acknowledgments:

> That the undersigned Employee/Claimant accepts and assumes all risk, chance or hazard that said injuries . . . are now or may subsequently become greater, more numerous or more extensive than is now known, anticipated or expected; and the undersigned Employee/Claimant agrees that this release applies to injuries . . . of every kind and character which have arisen, or which may hereafter arise, even though now unknown, unanticipated or unexpected. The Employee/Claimant acknowledges that she may or may not be at maximum medical improvement but, nonetheless, desires to go forward with this final settlement. The Employee/Claimant specifically agrees that she will be barred in the future from raising the issue of maximum medical improvement as a basis for questioning or moving to set aside this agreement. The undersigned Employee/Claimant hereby acknowledges and agrees to accept full responsibility for all future medical benefits, expenses and other costs.

9. Paragraph 6 of the Release stated the terms of the parties' settlement agreement, as follows:

> **SETTLEMENT AMOUNT AND DISCHARGE FROM LIABILITY FOR FUTURE COMPENSATION AND MEDICAL BENEFITS** – In consideration of the full and complete discharge of the employer/carrier from any further liability whatsoever under Florida Statutes, Chapter 440 as hereinafter further set forth, . . . the employer/carrier will pay to the claimant $20,000.00, in . . . full satisfaction of the obligation or liability to pay all benefits of whatever kind or classification available under the Florida Workers' Compensation Law including, but not limited to, future medical benefits, monetary compensation as contemplated under Section 440.15, Florida Statutes, impairment benefits, death benefits, attorney's fees, past medical benefits, and rehabilitation benefits under Section 440.49 Florida Statutes . . . on account of the alleged accident . . . referenced herein. . . . Upon receipt of the lump sum, the employer/carrier will be forever released and discharged from the obligation or liability to pay any and all benefits of whatever kind or classification payable under the Florida Workers' Compensation Law.

10. Elsewhere in the Release, Claimant relinquished the right to have a judge hear and decide any unresolved disputes involving her right to benefits, with the following exception: "The judge will only retain the authority to hear and decide any issues involving disputes regarding this agreement," as permitted under Florida's workers' compensation statute. *Defendant's Exhibit 6 at Paragraph 8.*

11. Paragraph 11 of the Release provided:

> This settlement represents a settlement of any and all claims or actions that may arise out of the injuries . . . referenced herein as well as any other claims or actions that may arise or may have arisen out of the Employee/Claimant's employment with Wal-Mart #1297, whether or not disclosed by the claimant herein or otherwise specified herein.

12. In Paragraph 13 of the Release, Claimant agreed to "forever discharge and release the Employer/Carrier from all further liability to the Claimant for all benefits available of whatever kind or classification including, but not limited to, future medical benefits, compensation for disability under **Section 440.15, Florida Statutes**, impairment benefits, past medical benefits, attorney's fees, costs,

interest, death benefits, and rehabilitation benefits due under the Florida Workers' Compensation Law. . . ." (emphasis in original).

13. In Paragraph 14 of the Release, Claimant relinquished her right to future medical benefits, as follows:

> **FUTURE MEDICAL CARE CLOSED** – As provided under F.S. 440.20(11)(c), (d) & (e), the lump sum payable herein will fully discharge and satisfy the Employer/Carrier/Servicing Agent's liability to provide future remedial and palliative medical care under F.S. 440.13 and 440.134, including, but not limited to, follow-up examinations, pain medication, diagnostic testing, attendant care and surgery. The Employer/Carrier/Servicing Agent shall no longer be liable for any medical benefits resulting from the alleged injuries . . . arising out of or in connection with the accident, occurrence, incident, exposure or event referenced herein. Any further/future medical expenses will be the sole responsibility of the Employee/Claimant. The Employee/Claimant agrees to notify her treating physicians that she is now alone fully financially responsible for any and all medical care and treatment. . . . The Employee/Claimant stipulates and agrees that she has determined that the amount of money being proposed to settle her claim for future medical treatment is reasonable and adequate to meet the Employee/Claimant's future medical needs, in connection with the accident, occurrence, incident, exposure or event referenced herein.

14. The second document Claimant executed to memorialize the terms of her August 2, 2011 settlement was entitled "General Release, Voluntary Resignation and Waiver of Claims," (the "General Release"), *Defendant's Exhibit 7*. The caption for this document identified both the employer – "Wal-Mart #1297," located in Chiefland, Florida – and the date of accident [D/A] – 8/27/2010 – in the same fashion as the Release had. In the General Release, Claimant again acknowledged that her receipt of the lump sum amount "constitutes full satisfaction of the [Employer/Carrier's] obligation and liability to pay all benefits of whatever kind or classification available under Chapter 440, the Florida Workers' Compensation Law . . .". *Id. at Paragraph (a).*

15. Elsewhere in the General Release, Claimant acknowledged that she had "remised, released and forever discharged . . . Wal-Mart #1297, and its Carrier, Sedgwick/CMS" from "any and all claims, demands and liabilities whatsoever . . ., more specifically on account of, but not limited to, any matters in any way relating to or stemming from my employment with Wal-Mart #1297, including, but not limited to, the incidents which occurred on 8/27/2010, and all circumstances relating thereto . . .". *Defendant's Exhibit 7 at Paragraph (b).*

16. The final document Claimant executed in relation to her August 2, 2011 settlement was entitled "Affidavit of Claimant," *Defendant's Exhibit 8*. Again, the caption for this document identified both the employer and the date of accident in exactly the same terms as both the Release and the General Release had. In it, Claimant represented that she fully understood the matters covered by the settlement documents she had signed, and also that she had had "my rights and obligations under the Florida Workers' Compensation Act fully explained to me . . ." Paragraph 7 of the Affidavit further provided:

> That in settling all of my Workers' Compensation Claims, I understand that my rights to receive medical benefits from the Employer/Carrier shall be closed and extinguished forever, within the Florida Workers' Compensation Act, and that I can never again ask for compensation (money) benefits nor can I ask for a modification of any Orders that might have been previously entered in my case.

17. Paragraph 8 of the Affidavit stated:

> I further understand and agree that by settling my workers' compensation claims, that I do forever discharge and release the Employer/Carrier from all further liability to me for all benefits available of whatever kind of classification including, but not limited to, future medical benefits, compensation for disability under **Section 440.15, Florida Statutes**, impairment benefits, past medical benefits, attorney's fees, costs, penalties, interest, death benefits, and rehabilitation benefits due under the Florida Workers' Compensation Law upon payment of the lump-sum herein provided which shall not be subject to modification under **F.S. 440.28** or any other provision of Chapter 440 (emphasis in original).

18. On or about October 2011, Claimant moved from Florida to Vermont, and began working at Defendant's Berlin, Vermont store. From March through June 2012 she treated for a sacral fracture and resulting lumbosacral pain following a slip and fall on an icy driveway. *Defendant's Exhibit 18 (#7, office notes 3/1/12-6/28/12)*. Thereafter, she was released to return to work without restrictions. *Id.*

19. Claimant next treated for an episode of low back pain in mid-March 2013, after having slipped while getting out of her truck at home on March 13, 2013. *Defendant's Exhibit 18 (#7, office note 3/18/13)*. Treatment consisted of anti-inflammatory medications, physical therapy and a lumbar epidural steroid injection. *Id. (#7, office notes 3/18/13-4/24/13; #9, treatment notes 4/10/13-5/14/13; #13, encounter dates 5/6/13-5/9/13).*

20. Claimant's primary care provider, Dr. Borie, disabled her from working on account of her March 13, 2013 injury until on or about May 24, 2013. *Defendant's Exhibit 18 (#7, office notes 3/18/13-5/24/13).* On that date Dr. Lazar, another primary care provider, completed a certification in support of Claimant's request for FMLA leave, in which she identified the diagnosis as "low back pain - degenerative disc disease L3-4, L5-S1," and the resulting symptoms as "low back pain and intermittent pain radiating down legs." Dr. Lazar further indicated that the condition had commenced on March 16, 2013 and that its probable duration was "ongoing." *Defendant's Exhibit 10.* Shortly thereafter, on May 30, 2013 Dr. Lazar released Claimant to return to work with a restriction against lifting more than 25 pounds. *Defendant's Exhibit 18 (#7, telephone message 5/30/13).*

21. On or about June 7, 2013 Defendant filed an Employer First Report of Injury (Form 1), in which it reported that Claimant allegedly had suffered a work-related injury, identified as "muscle soreness/back-lower," on that date when she "lifted product to bring to register" at its Berlin, Vermont store. *Defendant's Exhibit 9*.

22. On June 11, 2013 Claimant presented to Dr. Lazar, who reported the following "history of present illness," *Defendant's Exhibit 12*:

> The patient is a 48-year-old patient of Dr. Borie, who has been struggling with a low back pain, having undergone facet joint injection at DHMC on 05/09/2013. She had returned to work and was doing reasonably well, but on 06/07/2013, she lifted a 50 inch flat screen television and since that time has had increased low back pain with radiation down her right leg."

Dr. Lazar diagnosed Claimant with "a recurrent low back pain status post heavy lifting injury at work," and determined that she was unable to work pending her next evaluation in two weeks' time. *Defendant's Exhibit 12*.

23. At a June 25, 2013 follow-up visit, Dr. Lazar described Claimant's past medical history as follows, *Defendant's Exhibit 12*:

> Notable for low back pain for roughly the past 4 years. She had exacerbation of her L5-S1 disease, which began in March and she underwent facet joint injection at DHMC on 05/09/2013. She had slowly improved to the point of returning to work before this injury occurred.

24. On July 2, 2013 Defendant filed its denial of Claimant's claim for workers' compensation benefits arising out of her alleged June 7, 2013 injury, on the grounds, *inter alia*, that she had a prior back injury for which she had been treating since March 16, 2013 and therefore that there was "no causal relationship to [the] alleged work injury and disability." *Defendant's Exhibit 13*. Defendant expanded upon the basis for its denial by letter from its attorney on February 18,

2014. In it, Defendant asserted that because Claimant's current injury had been diagnosed as "recurrent low back pain," it was covered by the terms of the 2011 settlement she had negotiated in the context of her August 27, 2010 work-related low back injury, such that she was now barred from recovering any additional workers' compensation benefits. *Defendant's Exhibit 14.*

25. Following an informal conference, on June 27, 2014 the Department's workers' compensation specialist issued an interim order, obligating Defendant to pay temporary total disability and medical benefits from June 7, 2013 through August 6, 2013. *Defendant's Exhibit 16.* The specialist then referred the matter to the formal hearing docket for resolution of the legal question whether and to what extent the settlement documents Claimant had executed in the context of her August 27, 2010 injury now barred her from pursuing her current claim for benefits. *Defendant's Exhibit 15.*

26. At Defendant's request, on October 28, 2014 Claimant underwent an independent medical examination with Dr. Binter. Based both on her physical examination and on her review of the relevant medical records, Dr. Binter concluded that Claimant had most likely suffered "a flare of her low back and right leg pain" as a consequence of her June 7, 2013 work-related lifting injury. More specifically, in response to the question, "Would you define the incident on 06/07/13 is [sic] a temporary worsening of a pre-existing disability caused by [Claimant's] lifting a television at work?" Dr. Binter answered, "Yes." *Defendant's Exhibit 17.*

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. Defendant here asserts that the settlement to which Claimant agreed in the context of her August 2010 work-related low back injury operates as a release of "any and all future claims for lower back injuries against Walmart," including flare-ups such as the one she suffered while working at its Berlin, Vermont store on June 7, 2013. As the material facts are undisputed, summary judgment is an appropriate vehicle for resolving this issue. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).

3. "A release is a contract." *Investment Properties, Inc. v. Lyttle*, 169 Vt. 487, 497 (1999), citing *Economou v. Economou*, 136 Vt. 611, 619 (1979). As with any contract, in interpreting the terms of a release the goal is to give effect to the parties' intent, as reflected in the plain language of the document when that

language is clear. *Northern Security Insurance Co. v. Mitec Electronics, Ltd.*, 2008 VT 96, ¶28 (internal citations omitted).

4. Defendant would construe the terms of the settlement documents at issue here as protecting Claimant's current employer, whom it identifies simply as "Walmart," against her pending claim for workers' compensation benefits. The plain language of the documents state otherwise, however. All three documents specifically designate "Walmart #1297," located in Chiefland, Florida, as the "Employer." Even upon close reading of their terms, none contain the broader language necessary to encompass an affiliated store owned by the same corporation. *Cf. Northern Security, supra* (by its clear language, release held to bind not only specifically named parties but also their "successors, affiliates or assigns").

5. I acknowledge that if Claimant's more recent symptoms are deemed a recurrence of her August 2010 injury rather than a flare-up, her prior settlement might still bar her current claim. *See Pacher v. Fairdale Farms*, 166 Vt. 626, 627 (1997) (mem.) (holding employer at time of first injury liable for subsequent recurrence). This result will flow directly from the plain language of the settlement documents themselves, which clearly identify the first employer – Walmart #1297 – as the entity entitled to protection against further liability. But under Vermont law, a flare-up by definition constitutes a new injury, for which the subsequent employer – here, the Walmart store at which Claimant worked as of June 7, 2013 – is liable until the condition returns to its previous baseline. *Id.* at 628; *see also, Cehic v. Mack Molding Inc.*, 2006 VT 12, ¶9. The settlement documents provide no protection in that instance.[1]

6. I conclude that Claimant is not barred as a matter of law from asserting her current claim solely by virtue of the prior settlement she reached with respect to the injuries she suffered while employed by Walmart #1297 on August 27, 2010. For that reason, Defendant's motion for summary judgment must be denied.

ORDER:

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

DATED at Montpelier, Vermont this _____ day of _____, 2015.

_____
Anne M. Noonan
Commissioner

[1] Although Defendant's medical expert has characterized Claimant current injury as a flare-up, Finding of Fact No. 26 *supra*, it is possible she might yet reconsider her opinion. Neither party has sought summary judgment on this issue, and therefore I will not grant or deny it here.

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.