STATE OF VERMONT
DEPARTMENT OF LABOR

Brandy Clayton

v.

J.C. Penney Corporation

Opinion No. 13-16WC

By: Jane Woodruff, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. GG-61153

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

David Grayck, Esq., for Claimant
Wesley Lawrence, Esq., for Defendant

ISSUE PRESENTED:

As a matter of law, does the parties' September 24, 2014 approved settlement agreement bar Claimant from asserting a claim for workers' compensation benefits on account of her alleged March 10, 2015 work-related right foot injury?

EXHIBITS:

Claimant's Exhibit 1:	Affidavit of Brandy Lee Walker-Clayton, April 25, 2016
Claimant's Exhibit 2:	Dr. McNamara statement, May 14, 2015
Claimant's Exhibit 3:	Dr. White Independent Medical Examination, June 16, 2014
Defendant's Exhibit A:	Various documents referable to September 24, 2014 approved settlement agreement
Defendant's Exhibit B:	Dr. Smith office note, October 24, 2013
Defendant's Exhibit C:	Dr. Smith office note, December 2, 2013
Defendant's Exhibit D:	Dr. Smith office note, February 10, 2014

FINDINGS OF FACT:

With judicial notice taken of the relevant forms contained in the Department's claim files relating to both the pending claim and to State File No. CC-57897, the following facts are undisputed:

1. Claimant works as a hair stylist for Defendant, a job that requires her to be on her feet for much of the day. *Claimant's Exhibit 3*.

2. On or about February 14, 2011 Defendant filed a First Report of Injury (Form 1) with respect to an alleged March 26, 2010 injury, described as follows: "[Employee] has complaint of heel and arch pain in [left] foot due to standing all day/plantar fasciaitis [sic]." Defendant accepted the claim as compensable. *Department State File No. CC-57897*.

3. Subsequently, the Department approved the parties' executed Agreement for Temporary Total Disability Compensation (Form 21), by which Defendant paid temporary disability benefits for "left foot plantar fasciitis" commencing on April 7, 2011. Later, Defendant paid temporary partial disability benefits commencing on March 11, 2012 for an injury described as "left foot," and then additional temporary total disability benefits for the same described injury commencing on May 2, 2012. Last, in April 2013 it paid permanent partial disability benefits in accordance with a one-percent whole person impairment rating for an injury described as "left foot plantar fasciitis." *Department State File No. CC-57897*.

4. On or about September 15, 2014 the parties submitted a "Modified Full and Final Form 16 Settlement Agreement with Addendum" for the Commissioner's review and approval. The identification block in the form's upper right corner referenced State File No. CC-57897, with a date of injury of "03/26/2010," *Defendant's Exhibit A*. The document stated the parties' agreement as follows:

> The injured worker . . ., Insurance Carrier . . ., Administrator . . . and . . . Employer agree that injured worker alleges a work injury occurred on or about March 26, 2010 and any other date while worker was employed by JC Penney Co. or as a result of any injury allegedly incurred while worker was employed by JC Penney Co. allegedly causing the following injuries: left foot; and any other injury or condition or symptom or body part and any and all sequelae resulting in alleged temporary and /or permanent disabilities and/or medical treatment beginning on: March 26, 2010.

. . .

This is an agreement in which the claimant agrees to accept a lump sum of $4,200.00 (Four Thousand Two Hundred and 00/100 Dollars) plus payment of $510.78 to Department of Vermont Health Access in full and final settlement of all claims for any and all benefits, injuries, diseases, illnesses, conditions and/or symptoms and any and all sequelae allegedly sustained as a result of the accident referred to above and from Claimant's employment for employer. . ..

. . .

THIS IS INTENDED TO BE A GENERAL RELEASE OF ALL CLAIMS OF THE EMPLOYEE AGAINST THE EMPLOYER AND THE INSURANCE CARRIER ARISING FROM EMPLOYEE'S EMPLOYMENT WITH EMPLOYER. THE ATTACHED MODIFIED FULL AND FINAL FORM 16 ADDENDUM SETTLEMENT AND RELEASE AGREEMENT IS INCORPORATED HEREIN AND MADE A PART OF THIS MODIFIED FULL AND FINAL FORM 16 SETTLEMENT AGREEMENT WITH ADDENDUM (bolded emphasis in original).

5. The attached Addendum referenced the same date of injury, "03/26/2010," in the upper right corner identification block.[1] It contained the following language, *Defendant's Exhibit A*:

> 2. I, Brandy Clayton, for myself and my heirs, assigns and successors, for and in consideration of the lump sum settlement amount of **$4,710.00 (Four Thousand Seven Hundred Ten and 78/100 Dollars)** paid to Employee by Carrier as set forth in the Form 16 and Paragraphs 1 and 7 herein, after the Commissioner of Labor's approval of both the Form 16 and this Addendum, the receipt of which is hereby acknowledged, do hereby release and forever discharge Carrier, TPA, Employer, and any person or entity associated with them in any way, including, but not limited to, their Representatives, Agents, Employees, Insurers, Attorneys, Directors, Officers, Subsidiaries, Holding Companies, Heirs, Assigns, Predecessors, and Successors, from any and all actions or causes of action, claims, judgments, or demands whatsoever which I now have or may have against Carrier, TPA or Employer on account of any liability, matter, cause, transaction, occurrence, incident or thing having any connection whatsoever with my alleged injuries of March 26, 2010, or any other date including, but not limited to, any and all claims arising under 21 V.S.A. §601 et seq., *State of Vermont Workers' Compensation and Occupational Disease Rules,* or in any way relating to 21 V.S.A. §§643(b) and 710 and the handling and/or adjusting of any Workers' Compensation claim(s) due to my injuries arising out of and/or in the course of my employment for Employer, including, but not limited to, any claim for benefits or damages of any kind from Carrier, TPA and

[1] The identification block identified different state file and insurance company claim numbers from those reflected on the settlement agreement itself; this appears to have been an inadvertent error.

> Employer. I, Brandy Clayton, intend this provision to be all-encompassing and to act as a full and total release of any and all such claims I may have against Carrier, TPA, Employer, and/or their Representatives, Agents, Employees, Attorneys, Directors, Officers, Subsidiaries, Holding Companies, Heirs, Assigns, Predecessors, Holding Companies, and Successors, whether or not specifically referred to herein, notwithstanding that the matter and damage may be continuing or undiscovered at this time (bolded emphasis in original).
>
> . . .
>
> 3. Employer/Carrier/TPA agrees to pay **$4,710.78 (Four Thousand Seven Hundred Ten and 78/100 Dollars)** as set forth in the Form 16 and paragraphs 1 and 7 herein in order to resolve Employee's claim [sic] workers' compensation benefits relative to any injury or claim she may have against Employer/Carrier. . .. Employee agrees to accept as full payment for all workers' compensation benefits, the sum of **$4,200.00 (Four Thousand Two Hundred and 00/100 Dollars)** (bolded emphasis in original).
>
> . . .
>
> 11. **Employee acknowledges that she has read the Form 16 and this Addendum Settlement and Release Agreement and understands all of its terms, and has entered into and signed the Form 16 and this Addendum Settlement and Release Agreement knowingly, voluntary** [sic] **and of her own free will and volition. Employee acknowledges that she represents herself in this matter and has been advised that she has the right to have this Agreement reviewed by an attorney on her behalf and such review may be in her best interest. Employee further acknowledges that she has chosen to forego review of this Agreement by an attorney and has full understanding of the terms of the Agreement set forth in the Form 16 and this Addendum and the future implications of entering into the Agreement** (bolded emphasis in original).

6. In the August 27, 2014 explanatory letter submitted to the Department regarding the proposed settlement, *Defendant's Exhibit A*, Defendant's attorney made the following representations:

> [Claimant's] initial injury was to the lower extremity. There was no history of trauma; however, [Claimant] reported she began experiencing pain in her left foot.
>
> . . .
>
> The Claimant reached medical end result some time ago and she continues work. Dr. Boucher found a 1% permanency. [Claimant's] primary complaint is lower extremity pain. She has had diagnostic studies, most recently an MRI on July 15, 2013 without signs of any faciitis [sic].

> Right now the Claimant is only taking over the counter medications as I understand it, such as Advil and Tylenol. This agreement is based on the fact that the Claimant will have sufficient funds to certainly purchase whatever over the counter analgesics she needs now and in the future.

7. Claimant represented herself at the time she negotiated the terms of the above settlement. *Defendant's Exhibit A.*

8. As part of the Form 16 review and approval process, on September 16, 2014 the Commissioner's designee sent Claimant a letter to confirm her understanding of the settlement agreement's terms, *Defendant's Exhibit A*. The letter stated, in pertinent part:

> Vermont's workers' compensation law requires that before I can approve a settlement agreement such as the one you have proposed, I must be convinced that it is in your best interests to do so. In your case, having suffered foot pain as a result of your activities at work, it is particularly important for you to understand what a full and final settlement really means.

Claimant signed the letter where indicated to confirm her understanding of the settlement agreement's terms and then returned it to the Commissioner's designee, who approved the agreement shortly thereafter, on September 24, 2014.

9. Claimant understood the terms of the parties' settlement agreement to apply solely to her compensable left foot injury, and not to any injury to, or treatment for, complaints of pain in her right foot. *Claimant's Exhibit 1* at ¶¶23-27.

10. Prior to entering into the settlement agreement, Claimant had complained to Dr. Smith, her treating podiatrist, of both left *and* right foot pain. Dr. Smith's October 24, 2013 office note, *Defendant's Exhibit B,* reflects that on that date he examined both feet, recorded his findings and, in addition to listing various diagnoses as to the left foot, made two diagnoses specific to the right foot, one of which was plantar fasciitis. As treatment for the right foot symptoms, he recommended conservative options such as ice, massage, stretches and supportive shoes and inserts. By this time, Claimant already had undergone two surgical procedures to address her left foot complaints, following which Defendant's independent medical examiner, Dr. Boucher, had rated her with a one-percent whole person permanent impairment, *Claimant's Exhibit 3.*

11. As to the causal relationship between Claimant's work and her foot pain, Dr. Smith's October 24, 2013 office note, *Defendant's Exhibit B*, stated:

> We did discuss her bilateral foot pain and how this may relate to her occupation. Her occupation requires her to stand on hard floors all day long, moving only in small tight spaces to perform her duties. I believe that this can be a predisposing factor in developing fasciitis. I have explained to her that it is hard to pinpoint a direct cause for fasciitis since there can be many underlying causes to plantar fasciitis including but not limited to gastroc equinus, pes planus, increased body habitus, and nerve entrapment that can contribute to symptoms of fasciitis. I think that work environment definitely plays a role in not only the development of fasciitis, but also the prolonged recovery.

12. Claimant next presented to Dr. Smith on December 2, 2013, *Defendant's Exhibit C*. As was the case in October, she reported symptoms in both her left and her right foot, and Dr. Smith's objective examination noted findings bilaterally. As before, his diagnoses addressed both feet, with specific reference to plantar fasciitis on the right. Also as before, Dr. Smith commented that Claimant's occupation "can definitely be a contributor to problems with fasciitis," specifically "the combination of other anatomic issues with a job that entails I think . . . a large amount of standing that she does . . ."

13. Claimant next presented to Dr. Smith on February 10, 2014, *Defendant's Exhibit D*. Although the diagnosis of right foot plantar fasciitis was still noted on that date, both her subjective complaints and Dr. Smith's objective findings and treatment recommendations concerned only her left foot.

14. At Defendant's request, in June 2014 Claimant underwent an independent medical examination with Dr. White, *Claimant's Exhibit 3*. Dr. White's examination and report focused almost entirely on Claimant's left foot pain; the sole reference to the right foot was in the context of reporting her past medical history, which noted, "She has been having some problems with her right foot."

15. Notwithstanding Dr. Smith's stated opinion, as reflected in his October 24, 2013 office note, *Defendant's Exhibit B*, that Claimant's "work environment definitely plays a role" in the etiology of both her left and her right foot pain, at the time the parties negotiated, and the Department approved, the settlement agreement in State File No. CC-57897, she had not filed a claim for workers' compensation benefits referable to her right foot plantar fasciitis. *Claimant's Exhibit 1* at ¶23. Nor is there evidence of any medical treatment directed solely at the right foot during this time.[2]

[2] Defendant acknowledged that it paid for Dr. Smith's office visits on October 24, 2013, December 2, 2013 and February 10, 2014. Presumably it did so in conjunction with Claimant's compensable left foot injury, notwithstanding that some portion of each evaluation may have concerned her right foot pain as well.

16. On or about March 17, 2015 Defendant filed the First Report of Injury (Form 1) upon which Claimant's current claim for benefits is based. The First Report referenced an alleged March 10, 2015 injury, described as follows: "Plantar fascitis [sic] – right foot is swelling due to tendons being overstretched." *Department State File No. GG-61153*.

17. Defendant denied Claimant's claim for benefits on the grounds that it was barred by the parties' September 24, 2014 settlement agreement. Appended to the denial were medical records documenting treatment with Dr. McNamara, a podiatrist, for symptoms consistent with plantar fasciitis in her right foot in November 2007. As to these, in May 2015 Dr. McNamara responded to a telephone information request from Claimant as follows, *Claimant's Exhibit 2*:

> Why did the right foot pain go away in 2007 and then return in 2015?
>
> Plantar fasciitis, like many other conditions, can respond to treatment but return at some point later in the future. Ms. Clayton works as a hairdresser. The weight bearing demands of this type of work are significant and would put one at a somewhat greater risk for a weight bearing overuse condition, such as plantar fasciitis, than someone who did not have a similar occupation.

18. Also appended to Defendant's denial, *Department State File No. GG-61153*, was a March 9, 2015 medical record from Dr. McNamara, which gave the following history of Claimant's current complaint:

> Plantar fasciitis that started about 6 weeks of excruciating pain in her right foot. The right foot bothered her a little when she was compensating for the fasciitis she had in her left foot, but it has gotten significantly worse in the last 6 weeks. There have been some people leaving the salon she works at, so the remaining people are working much longer hrs and harder schedules the past 2 months. Had left foot fasciitis 3-4 yrs, ultimately requiring fasciotomy, radiofrequency, and then did not fully resolve until after a gastrocnemius recession about a year ago. Patient has been fighting a cold for the past few days so on her feet a little less and her pain level is decreased to about a 3 so not bad, but after she has worked her regular schedule it is about an 11 on the 10 scale. . ..

19. In discussing treatment options for Claimant's right foot planter fasciitis, Dr. McNamara noted that she "has tried all home remedies that she tried when she had this with her left foot," including orthotic management, stretching and wearing a night splint and fascia socks. He suggested that she undergo a trial of physical therapy pending workers' compensation approval for surgical treatment. *Department State File No. GG-61153*.

20. Following a May 26, 2015 informal conference, the Department's Workers' Compensation Specialist determined that Defendant's denial was reasonably supported. The current cross-motions for summary judgment followed.

CONCLUSIONS OF LAW:

1. 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. Heritage Realty of Vermont*, 137 Vt. 425 (1979).

2. The parties here each claim that they are entitled to judgment in their favor as a matter of law on the question whether their September 2014 settlement agreement bars Claimant's current claim for workers' compensation benefits. Defendant's argument is based primarily on the general release language scattered throughout both the agreement itself and the addendum. Claimant's argument focuses instead on the specific references to her March 26, 2010 left foot injury as evidence of her intent not to foreclose future claims related to her right foot condition.

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). The law presumes that a written contract contains the parties' entire agreement. *Economou v. Vermont Electric Coop*., 131 Vt. 636, 638 (1973) (internal citations omitted). Contract terms that are unambiguous on their face cannot be modified by extrinsic evidence. *Hall v. State*, 2012 VT 43, ¶21.

4. Claimant here asserts that the parties' settlement agreement was rendered ambiguous by virtue of the Commissioner's designee's use of the words "foot pain" to describe Claimant's injury in her September 16, 2014 letter, Finding of Fact No. 8 *supra*. While Claimant does not argue it, I might add that a fair reading of Defendant's August 27, 2014 explanatory cover letter, Finding of Fact No. 6 *supra*, could also be read as a sign that the parties were focused on settling just her left foot injury at the time the agreement was submitted. Particularly given that Claimant was unrepresented at that point, I can certainly understand why she might subsequently have become confused as to the settlement's actual scope.

5. That Claimant may have misunderstood the agreement's terms does not necessarily mean that they were ambiguous, however. The plain language of the agreement stated, in bold and capitalized print, that it was "**INTENDED TO BE A GENERAL RELEASE OF ALL CLAIMS OF THE EMPLOYEE AGAINST THE EMPLOYER AND THE INSURANCE CARRIER ARISING FROM EMPLOYEE'S EMPLOYMENT WITH EMPLOYER**," Finding of Fact No. 4 *supra*. Likewise, the addendum plainly stated that Claimant was releasing Defendant from "any and all" workers' compensation claims causally related not only to her alleged March 26, 2010 injury, but also to "any other date," Finding of Fact No. 5 *supra*. These words convey a clear and unambiguous message. For that reason, they are not subject to modification by way of extrinsic evidence.

6. Though the release's language itself is not objectionable, its scope deserves close scrutiny, however. A release must be specific in order to be valid, and as a general rule is interpreted narrowly. *Lyttle, supra*. If its terms, though clearly drafted, are so broad as to violate public policy, it can and should be voided. *Dalury v. S-K-I, Ltd.*, 164 Vt. 329, 332 (1995).

7. In *Dalury*, the Vermont Supreme Court was asked to consider whether an injured skier was barred from suing a ski area for negligence by virtue of an exculpatory release he had signed in conjunction with his purchase of a ski pass. The Court held that he was not. It invalidated the release on public policy grounds, particularly those considered fundamental to the law of premises liability. The policy rationale underlying that legal construct "is to place responsibility for maintenance of the land on those who own or control it," the Court stated, "with the ultimate goal of keeping accidents to the minimum level possible." *Id.* at 334-335. Commercial landowners are uniquely situated for that task. "They alone can properly maintain and inspect their premises, . . . insure against risks and effectively spread the cost of insurance among their . . . customers." *Id.* at 335. Their customers, on the other hand, "are not in a position to discover and correct risks of harm, and they cannot insure against the [business owner's] negligence." *Id.*

8. The *Dalury* Court stressed that its determination of what constitutes a public interest sufficient to void an otherwise valid release "must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations." *Id.* at 334. In that case, the balance weighed in favor of voiding the release. "If defendants were permitted to obtain broad waivers of their liability," the Court noted, "an important incentive for ski areas to manage risk would be removed with the public bearing the cost of the resulting injuries. It is illogical, in these circumstances, to undermine the public policy underlying business invitee law and allow skiers to bear risks they have no ability or right to control." *Id.* at 335.

9. In cases decided since *Dalury*, the Court has reiterated the same principles, albeit with different results. *See, e.g., Provoncha v. Vermont Motocross Association, Inc.*, 2009 VT 29 (holding that exculpatory release executed by participant in motocross event did not contravene public policy because the event was not open to the public at large); *Thompson v. Hi Tech Motor Sports, Inc.*, 2008 VT 15 (declining to invalidate exculpatory release executed by customer of motorcycle dealership given the dealership's lack of control over the manner in which customers test drove its vehicles).

10. The releases at issue in *Dalury, Thompson and Provoncha* all arose in the context of negligence actions sounding in tort, but the Court's analysis applies equally well to releases that arise in the workers' compensation arena. The compromise upon which that system is premised charges an employer with responsibility for maintaining safe work premises and insuring against the risk of work-related injuries to its employees; in return, it reaps the benefit of limited and determinate liability. *Morrisseau v. Legac*, 123 Vt. 70, 76 (1962). Were an employer allowed to use an overly broad release from liability in one injury claim to shield it from responsibility in other, unrelated claims as well, an important incentive for managing risk would be undermined. The public would bear the cost of subsequent injuries, a result exactly opposite from what the Legislature intended, and strikingly similar to the one the Court found objectionable in *Dalury*.

11. Repeatedly, the Court has held that "evaluating whether a release from liability contravenes public policy does not follow a strict formula, because 'no single formula will reach the relevant public policy issues in every factual context.'" *Thompson, supra* at ¶6, quoting *Dalury, supra* at 333. Here, I conclude that a release negotiated in the context of settling a particular workers' compensation claim does not violate public policy if it is properly limited to the specifically alleged work-related "injury by accident"[3] from which the claim arose. This is so even if it purports to shield the employer from liability for as yet undiscovered injuries, so long as they are causally related to the initial injury upon which the settlement was based.

12. However, a release that purports to cover not only injuries arising from a pending claim, but also those that might arise from completely unrelated causes at any time during the injured worker's employment is impermissibly broad. It undermines the employer's incentive to manage its risk appropriately, and absolves it from responsibility for protecting its employees from work-related harm. Because it thus violates critical public policy objectives, it is void.

13. In the case before me now, I conclude that those portions of the parties' September 2015 settlement agreement and addendum that purport to release Defendant "from any and all actions or causes of action, claims, judgments, or demands whatsoever" that Claimant may have against Defendant "on account of any liability, matter, cause, transaction, occurrence, incident or thing having any connection whatsoever with [her] alleged injuries of March 26, 2010" are valid and enforceable.

[3] The phrase "injury by accident" connotes not only one that occurs instantaneously or traumatically, but also one that arises gradually, as the result of accelerated degeneration or cumulative stress. *Stannard v. Stannard*, 175 Vt. 549 (2003); *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31 (1980).

14. However, I further conclude that those portions of the agreement and addendum that purport to release Defendant generally from "**ALL CLAIMS OF THE EMPLOYEE AGAINST THE EMPLOYER AND THE INSURANCE CARRIER ARISING FROM EMPLOYEE'S EMPLOYMENT WITH EMPLOYER**," including "any and all" workers' compensation claims arising on "any other date" besides March 26, 2010, are impermissibly broad and violate public policy. For that reason, I consider them void.

15. As to whether Claimant's pending claim for benefits on account of an alleged March 10, 2015 right foot injury is barred or not, I cannot yet say. I do not consider either of Dr. McNamara's statements, Finding of Fact Nos. 17 and 18 *supra*, conclusive on the question whether Claimant's current complaints are causally related in any way to her previously settled left foot claim, or whether, to a reasonable degree of medical certainty, they are entirely separate and distinct. If the former, then her current claim is barred; if the latter, then it may proceed. In either event, genuine issues of material fact exist, sufficient to preclude summary judgment in either party's favor.

ORDER:

Based on the foregoing findings of fact and conclusions of law, the parties' cross motions for summary judgment are each hereby **DENIED**.

DATED at Montpelier, Vermont this _____ day of August 2016.

_____
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.