

STATE OF VERMONT
DEPARTMENT OF LABOR

Linda Moulton

Opinion No. 22-16WC

v.

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

Peter and Gertrude Davis

For: Anne M. Noonan
Commissioner

State File No. BB-02356

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

No appearance was made on behalf of Linda Moulton
Bonnie J. Badgewick, Esq., for Defendant

ISSUE PRESENTED:

Did Claimant willfully make false statements or representations for the purpose of obtaining temporary total disability benefits? If so, is Defendant entitled to repayment of some or all of the compensation paid to Claimant under 21 V.S.A. § 708(a)?

EXHIBITS:

Defendant's Statement of Undisputed Material Facts

Defendant's Exhibit A:	Affidavit of Defendant's workers' compensation claims adjuster
Defendant's Exhibit B:	Consulting Agreement with Binnacle Capital Services, LLC
Defendant's Exhibit C:	Check from Binnacle Capital Services, LLC to Claimant
Defendant's Exhibit D:	Claimant's timesheets for Binnacle Capital Services, LLC
Defendant's Exhibit E:	Claimant's additional timesheets
Defendant's Exhibit F:	Agreements for Temporary Total Disability Compensation (Form 21) dated April 27, 2010 and January 10, 2011 and Notice of Change in Compensation Rate (Form 28) dated July 30, 2013
Defendant's Exhibit G:	1099 Forms for 2011, 2013 and 2014
Defendant's Exhibit H:	Claimant's Income Tax Returns for 2011, 2012 and 2013
Defendant's Exhibit I:	Deposition Subpoenas for February 24, 2016 and April 8, 2016
Defendant's Exhibit J:	Subpoena Returns of Service

FINDINGS OF FACT:

As a preliminary matter, Claimant failed to respond to the motion for summary judgment and, in particular, failed to file a statement of contested facts. Vermont Rule of Civil Procedure 56(c)(2) provides that all material facts set forth in the moving party's statement will be deemed admitted unless they are controverted by the opposing party's statement. With no controverting statement from Claimant here, the moving party's Statement of Undisputed Material Facts is hereby taken as true. *Webb v. LeClair*, 2007 VT 65; *T.A. v. Ann Johnston and Charlotte Rancourt d/b/a Karma Farm*, Opinion No. 05S-07WC (September 12, 2007).

The following facts are accordingly undisputed:

The Claim

1. Claimant is an employee and Defendant is an employer within the meaning of the Vermont Workers' Compensation Act.
2. Judicial notice is taken of all forms and correspondence in the Department's file relating to this claim.
3. Claimant worked as a personal care home health aide. She injured her right shoulder in a work-related accident on March 6, 2010.
4. Defendant accepted the claim and paid temporary total disability benefits from March 10, 2010 through May 25, 2010, at which time Claimant returned to work with the same employer.
5. In April 2010 Claimant signed an Agreement for Temporary Total Disability Compensation (Form 21).
6. Claimant resigned her position with the employer in August 2010 because her hours were reduced.
7. In November 2010 Claimant signed another Agreement for Temporary Total Disability Compensation, which reflected a retroactive increase in her weekly compensation rate based on the inclusion of overtime earnings in her average weekly wage. Claimant's corrected average weekly wage was \$1,081.25.
8. In May 2012 Claimant underwent shoulder surgery with orthopedic surgeon Melbourne Boynton, MD.
9. As a result of the surgery, Claimant entered into a second period of temporary total disability. Defendant advanced temporary total disability compensation beginning April 16, 2012.
10. In October 2013 Claimant underwent work-related shoulder surgery with Dr. Boynton for the second time.

11. In June 2014 Claimant's assigned vocational rehabilitation counselor, Sandi Mann, performed an entitlement assessment. Ms. Mann found that Claimant did not have the physical capacities to return to the work for which she had previous training or experience (home health care) and that she was therefore entitled to vocational rehabilitation services.
12. In October 2014 Dr. Boynton determined that Claimant was at an end medical result, with an eight percent whole person permanent impairment.
13. In November 2014 orthopedic surgeon Robert S. Block, MD performed an independent medical examination of Claimant. He determined that she was not at an end medical result due to worsening AC joint instability.
14. In December 2014 Defendant sought to terminate Claimant's temporary total disability benefits based on Dr. Boynton's end medical result opinion. The Department rejected Defendant's request to terminate benefits due to inadequate documentation. In February 2015 Defendant again sought to terminate Claimant's temporary total disability benefits. The Department approved the request in March 2015.
15. Defendant paid Claimant permanent partial disability benefits, although the record does not reflect when it made those payments or the total amount paid.

The Subsequent Investigation

16. In March 2015 Defendant's claims adjuster wrote to Claimant's counsel, requesting confirmation that Claimant had not earned any wages from April 16, 2012 to the present and further requesting copies of Claimant's tax returns for 2012, 2013 and 2014.
17. In April 2015 Claimant's counsel acknowledged to Defendant that Claimant had been working for Binnacle Capital Services, LLC ("Binnacle") as an independent contractor since April of 2011, providing case management services for one private patient. Binnacle paid Claimant for her consulting services at various times from April 2011 through January 2015.
18. Claimant's counsel provided Defendant with Claimant's tax returns for 2011, 2012 and 2013; her Form 1099s for 2011, 2013 and 2014; and other documentation related to her contract with Binnacle.
19. In early 2012 Claimant had entered into a written Consulting Agreement with Binnacle Capital Services, LLC. The agreement called for her to provide case management services for one private patient. The agreement further provided that she would hire subcontractors to perform the nursing services contemplated by the agreement. Claimant's services included scheduling and supervising the nurses who provided patient care, ordering medical supplies and medication, and generally coordinating the patient's care. The agreement required her to submit an invoice every two weeks documenting both her own hours and the hours worked by the nurse subcontractors.

20. Claimant's timesheets indicate that she charged Binnacle between \$25.00 and \$28.00 per hour for her services. Between 2012 and 2014, she worked as few as four hours per week and as many as 18 hours per week, averaging about 12 hours per week.
21. Claimant also submitted information to Binnacle on the hours worked by the nurse subcontractors every week. The 1099 Forms that Binnacle sent to Claimant included the money that Claimant paid to the nurse subcontractors.
22. Claimant did not inform Defendant that she was providing services as an independent contractor to Binnacle until March 2015, when Defendant's adjuster asked her to confirm that she had not earned any wages since 2012.
23. Claimant reported her income as an independent contractor on Schedule C of her federal tax returns for 2011, 2012 and 2013. For 2011, Schedule C showed a net profit of \$26,364. For 2012, Schedule C showed a net profit of \$32,050. For 2013, Schedule C showed a net profit of \$35,852.
24. Defendant scheduled Claimant's deposition through Claimant's counsel for December 7, 2015. Claimant failed to appear. Claimant's counsel subsequently withdrew from the representation in January 2016.
25. Defendant rescheduled Claimant's deposition for February 24, 2016. A deputy sheriff served Claimant with the subpoena on February 9, 2016. Claimant failed to appear.¹
26. Defendant rescheduled Claimant's deposition for April 8, 2016. A deputy sheriff served Claimant with the subpoena on March 30, 2016. Again Claimant failed to appear.
27. To date, Defendant has paid Claimant indemnity benefits totaling \$125,283. Defendant also has paid \$42,382 in medical benefits for the claim. *Affidavit of Defendant's workers' compensation claims adjuster (Defendant's Exhibit A)*, ¶¶ 9-10.
28. Defendant alleges that Claimant engaged in fraud by collecting temporary total disability benefits without disclosing her income from Binnacle. Defendant's allegation of fraud is based on the following: (a) Claimant received temporary total disability benefits while she was earning income as an independent contractor; (b) Claimant signed several Agreements for Temporary Total Disability Compensation, all of which contained a notice advising of the obligation to report earnings; (c) Claimant was not forthright with her medical and vocational rehabilitation providers about her work status; and (d) Claimant failed to appear at her scheduled depositions.

¹ Claimant's daughter notified Defendant's counsel that Claimant could not attend the deposition scheduled for February 24, 2016, as she would be in Florida for the birth of her grandchild.

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 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, 428 (1979). Summary judgment is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.
2. Defendant alleges that Claimant willfully made false statements or representations for the purpose of obtaining benefits under Vermont's Workers' Compensation Act, 21 V.S.A. § 601 *et seq.* Section 708(a) of the Act provides in part 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 . . . 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 material fact.
3. The burden is on Defendant to prove that Claimant willfully made a false statement or representation for the purpose of obtaining any benefit or payment. Because the alleged conduct is analogous to civil fraud, the higher standard of clear and convincing evidence applies. *Butler v. Huttig Building Products*, Opinion No. 43-01WC (November 16, 2001); *Harrington v. Department of Employment and Training*, 152 Vt. 446, 448-49 (1989).
4. To determine whether a claimant has engaged in fraud under 21 V.S.A. § 708(a), it is necessary to determine what a willful false statement or representation is. In *Brill v. Butson's Enterprises*, Opinion No. 41-97WC (December 30, 1997), the claimant collected temporary disability benefits without reporting all of the income she was earning. In determining whether her failure to do so was willful, the Commissioner noted: "A willful act is one done intentionally, knowingly, and purposely as distinguished from an act done thoughtlessly, heedlessly or inadvertently." *Brill, supra* at Conclusion of Law No. 4; *see also Workers' Compensation Division v. Blow*, Opinion No. 26-97Pen (August 27, 1997).
5. For purposes of this summary judgment motion, Defendant's evidence of fraud must be reviewed in the light most favorable to the non-moving party, with the non-moving party entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney, supra*.

6. Defendant's first ground for alleging fraud is that Claimant received income from Binnacle while she was receiving temporary total disability benefits. Claimant does not dispute this fact. However, receipt of unreported income does not, by itself, establish fraud. A finding of fraud requires a willful mental state. To establish willfulness, Defendant must show that Claimant failed to report her income intentionally, knowingly and purposely, with the goal of obtaining benefits to which she was not entitled.
7. Defendant has failed to establish the requisite mental state by clear and convincing evidence. Taking the evidence in the light most favorable to Claimant, and giving her the benefit of all reasonable doubts and inferences, it is possible she did not realize that her earnings as an independent contractor were reportable to Defendant. She was not performing the hands-on, physically demanding home health care services that she was performing at the time of her injury. She was averaging only twelve hours of contracting services per week. She was earning only a fraction of what she earned prior to her injury and she was not working in the capacity of an employee.
8. Certainly Claimant should have disclosed these earnings. But the mere fact that she received them does not in itself establish first, that she understood her obligation to report them and second, that she acted intentionally, knowingly and purposely in failing to do so.
9. Second, Defendant references the Agreements for Temporary Total Disability Compensation that Claimant signed as a basis for finding that her failure to report was intentional. The agreements included the following language:

Temporary Total Disability compensation is provided only where an injury causes total disability from any work. By signing this agreement the employee is stating that he or she is not currently working, and that he or she is obligated to report promptly any work, earnings, wages or benefits to the insurance carrier/employer and the department.
10. Claimant signed the agreements in April and November of 2010. She did not start working as an independent contractor until April 2011. Accordingly, she was not "currently working" when she signed the agreements. Further, although the agreements included information about a claimant's obligation to report any work, earnings or wages, Defendant did not present clear and convincing evidence that Claimant knew and understood that the obligation applied to all or any portion of the non-employee income she received from Binnacle.

11. Third, Defendant argues that Claimant was not forthright with her vocational rehabilitation counselor and medical providers as to her work capacity and earnings. As examples, it cites the following:
- In April 2013 Claimant told her vocational rehabilitation counselor that she could not do most of her basic chores because of discomfort and had not been able to work in nearly a year;
 - In May 2013 she described her average day's activities to Dr. White as "just doing things around the house;"
 - In March 2014 she told another vocational rehabilitation counselor that she wanted to remain in the health care field, but could not continue to provide personal care due to the physical demands of the job; and
 - In November 2014 she told Dr. Block that she had been out of work since shortly after her first surgery.
12. Giving Claimant the benefit of all reasonable doubts and inferences, I do not consider any of these statements to be clearly fraudulent or for that matter, even inaccurate. To the contrary, it is entirely conceivable that when she said she had not been able to work in a year, she was referring only to her work as a home health aide, a job she was no longer physically able to perform. Similarly, her failure to mention to either doctor that she spent an average of twelve hours weekly coordinating care for one patient might have been because the activity was neither physical in nature nor significant enough in her mind to constitute "work." As noted above, Conclusion of Law No. 4 *supra*, a finding of fraud requires proof of a *willfully* false statement or misrepresentation, which none of these examples establish.
13. The last piece of evidence that Defendant relies on to establish fraud is Claimant's failure on two occasions to appear for properly noticed depositions, despite having been subpoenaed to do so. Without credible corroborating evidence, however, I cannot reasonably interpret her failure to attend in itself as sufficient to establish a fraudulent motive. Indeed, at least as to the second scheduled deposition date, the undisputed evidence establishes that Claimant's daughter advised defense counsel in advance that she would not be able to attend for personal reasons, namely her grandchild's impending birth. Unless the excuse was concocted, which Defendant has not alleged, there is no fraud here.
14. Reviewing all of the evidence in the light most favorable to Claimant, and giving her the benefit of all reasonable doubts and inferences, I am unable to conclude that she willfully made false statements or representations regarding her work for Binnacle in an attempt to obtain benefits. True, she earned income that she did not report to Defendant during her period of temporary disability, but Defendant has failed to present clear and convincing evidence that she acted intentionally, knowingly and purposely in doing so. For that reason, I conclude that the findings necessary to support forfeiture of compensation under § 708 are lacking.

15. Despite the lack of clear and convincing evidence of fraud, it nevertheless appears from the record that Claimant may have received an overpayment of temporary total disability compensation. If so, Defendant may recoup the overpayment from any future indemnity benefits that might be due her, pursuant to 21 V.S.A. § 651. *Bishop v. Town of Barre*, 140 Vt. 564 (1982).

ORDER:

Based on the foregoing, Defendant's motion for summary judgment is hereby **DENIED**.

DATED at Montpelier, Vermont, this 16th day of November 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.