STATE OF VERMONT
DEPARTMENT OF LABOR

Sharon Conant	Opinion No. 11-17WC
v.	By: Phyllis Phillips, Esq. Hearing Officer
Entergy Corporation/ American International Group	For: Lindsay H. Kurrle Commissioner
	State File No. FF-61233

RULING ON CROSS MOTIONS FOR PARTIAL 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 an offset of wage replacement benefits it overpaid in 2014 against any permanent partial disability benefits it may owe in conjunction with Claimantôs January 2016 end medical result determination and February 2016 permanent impairment rating?

EXHIBITS:

Claimantôs Exhibit 1:	Order, *Conant v. Entergy Corporation*, Opinion No. 10-15WC (April 28, 2015)
Claimantôs Exhibit 2:	Defendantôs Notice of Appeal to Vermont Supreme Court, May 22, 2015
Claimantôs Exhibit 3:[1]	Email correspondence from Attorney Rousseau to Attorney Lawrence, January 20, 2016
Claimantôs Exhibit 4:	Email correspondence from Attorney Rousseau to Attorney Lawrence, March 3, 2016
Claimantôs Exhibit 5:	Email correspondence from Attorney Rousseau to Attorney Lawrence, March 18, 2016
Claimantôs Exhibit 6:	Email correspondence from Attorney Lawrence to Mary Sarazin, June 20, 2016
Claimantôs Exhibit 7:	Email correspondence from Attorney Lawrence to Mary Sarazin and Attorney Rousseau, July 8, 2016

[1] Defendant objects to the admissibility of Claimantôs Exhibits 3, 4 and 5 on hearsay grounds. *Employer's Response to Claimant's Statement of Undisputed Facts* at pp. 2-3. It does not dispute that Claimantôs attorney authored the emails in question. The exhibits are therefore admissible as evidence of communications from Claimantôs attorney to Defendantôs attorney, though not for the purpose of establishing the truth of the assertions contained therein.

Defendantôs Exhibit A: *Conant v. Entergy Corporation*, 2016 VT 74
Defendantôs Exhibit B:[2] Claimantôs Objection to AIGôs Motion to Stay Payment of Temporary Total Disability Benefits, September 29, 2014

FINDINGS OF FACT:

The material facts are as stated in the Vermont Supreme Courtôs ruling in *Conant v. Entergy Corporation*, 2016 VT 74. In addition, the following facts are undisputed:

1. In early February 2014, Claimant injured her ankle in Defendantôs parking lot. When Defendantôs workersô compensation carrier, AIG, denied her claim for workersô compensation benefits, Defendant began paying her salary continuance and short-term disability benefits instead, in accordance with the provisions of the applicable collective bargaining agreement. In all, Defendant paid a total of $24,927.75, covering the pay periods from March 9, 2014 through August 23, 2014. After taxes and other deductions, Claimantôs net payout totaled $14,524.16. *Defendant's Exhibit A* at ¶¶2, 7.

2. Meanwhile, in June 2014 Claimant appealed Defendantôs denial of her claim for workersô compensation benefits. Following an informal conference, in September 2014 the Departmentôs workersô compensation specialist concluded that the denial was not reasonably supported, and issued an interim order directing Defendant to pay temporary total disability benefits retroactive to March 7, 2014, the date on which Claimant began losing time from work because of her injury. In accordance with the applicable statutory provisions, the order specified that if Defendant failed to pay as directed within 21 days, it could be liable for interest, penalties and late fees. *Defendant's Exhibit A* at ¶8.

3. Defendant immediately sought a stay of the specialistôs interim order, pending a determination whether it owed Claimant any temporary disability benefits at all given the salary continuance and short-term disability benefits she already had received under the collective bargaining agreement. While the request was pending, and before the 21-day payment window expired, it issued payment of retroactive temporary disability benefits totaling $34,980.00. The specialist then denied the stay request as moot. *Defendant's Exhibit A* at ¶9.

4. Claimant thus received two types of wage replacement benefits covering the same disability period ï the first (salary continuance and short-term disability) paid as if her injury was not work-related, and the second (workersô compensation temporary total disability) paid as if it was. *Defendant's Exhibit A* at ¶9.

[2] This exhibit was appended as Exhibit A to *Employer's Reply to Opposition to Motion for Partial Summary Judgment and Opposition to Claimant's Motion for Summary Judgment*. It has been re-numbered to avoid confusion with Exhibit A as appended to *Employer's Motion for Partial Summary Judgment.*

5. Before the Commissioner, Defendant asserted that Claimant had been overpaid. It sought summary judgment on the question whether it was entitled to offset the salary continuance and short-term disability payments she had received against any future permanent partial disability benefits to which she might otherwise become entitled. *Conant v. Entergy Corporation,* Opinion No. 10-15WC (April 28, 2015) at Finding of Fact No. 13. The Commissioner concluded that Defendant was entitled to an offset as to the salary continuance payments, but not as to the short-term disability payments. *Claimant's Exhibit 1*.

6. Defendant filed its Notice of Appeal to the Vermont Supreme Court on May 22, 2015. *Claimant's Exhibit 2*. It did not request a stay of the Commissioner's ruling in the interim.

7. The Supreme Court issued its decision on July 8, 2016. The Court concluded that the Commissioner's determination allowing only an offset for Defendant's salary continuance payments, but not for the short-term disability benefits Claimant had received was error. Instead, it held that Defendant was entitled to an offset as to both. It thus reversed and remanded for a determination "of the amount to be offset from Claimant's future workers' compensation benefits." *Defendant's Exhibit A* at ¶1.

8. In the meantime, on April 6, 2016 Claimant had filed a Notice and Application for Hearing (Form 6)[3] in which she sought (a) permanent partial disability benefits; (b) attorney fees; and (c) reimbursement for an impairment rating evaluation that had occurred on February 16, 2016. The attached impairment rating recited that Claimant had reached an end medical result for her ankle injury on January 14, 2016, and ascribed a five percent whole person permanent impairment causally related thereto. As reflected in the Department's formal hearing docket referral memo, the permanent partial disability benefits attributable to this rating total $24,239.25. *Defendant's Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment on Effect of Supreme Court's Reversal* at ¶3.

9. Claimant's attorney previously had requested, via email on January 20, 2016, *Claimant's Exhibit 3*, that Defendant's attorney "follow up" with Defendant to ascertain whether it would preapprove payment for an impairment rating evaluation. On March 3, 2016, she had again corresponded via email to Defendant's attorney, requesting reimbursement for the evaluation, for which she asserted her office had paid, and querying whether Defendant intended to obtain its own rating. *Claimant's Exhibit 4*. She later reiterated her request for reimbursement via email to Defendant's attorney on March 18, 2016. *Claimant's Exhibit 5*. The record does not indicate whether or when Defendant's attorney responded to any of these emails.

[3] I take judicial notice of previously filed workers' compensation forms pursuant to Workers' Compensation Rule 17.2100.

10. By email to the attorneys on June 20, 2016, the Department's workers' compensation specialist served notice of Claimant's April 2016 hearing application. *Claimant's Exhibit 6*. In anticipation of the ensuing informal telephone conference, scheduled for July 12, 2016, on July 8, 2016 Defendant's attorney filed its answer to Claimant's hearing notice via email. *Claimant's Exhibit 7*. Appended to the email was a copy of the Supreme Court's decision, which he asserted had been handed down "about an hour ago." *Id.*

11. Following the scheduled informal conference, the matter was forwarded to the formal hearing docket. A formal hearing has now been scheduled to determine the amount of the offset to which Defendant is entitled.[4]

12. At issue in the pending summary judgment motions is whether the offset should apply to the permanent partial disability benefits Claimant asserts she is now owed as a consequence of her February 2016 impairment rating, *see* Finding of Fact No. 8 *supra*. Defendant contends that the offset applies to any benefits to which Claimant became entitled after September 2014, when it paid temporary disability benefits in compliance with the Department's interim order, and thus created the overpayment that the Supreme Court later recognized. Claimant argues that because her entitlement to permanency benefits accrued before the Supreme Court's ruling, the Commissioner's April 2015 order was still in effect, and therefore the benefits are not subject to offset.

DISCUSSION:

1. 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).

2. The material facts here are undisputed. The legal issue upon which the case turns is whether the offset to which the Supreme Court determined Defendant was due applies to a benefit that, arguably at least, should already have been paid at the time of its ruling.

[4] As the dissenters noted in the Supreme Court's ruling, the parties have "widely divergent views" of how the offset should be calculated, particularly given the differential tax treatment accorded short-term disability benefits as opposed to workers' compensation wage replacement benefits. *Conant, supra* at ¶55 (Robinson, J., *dissenting)*.

3. Blackôs Law Dictionary defines the term ñreverseò as ñto overthrow, vacate, set aside, make void, annul, repeal or revoke.ò *Black's Law Dictionary* (6th ed. 1990); *see State v. Lynds*, 158 Vt. 37, 53 (1991) (Dooley, J., on motion for specificity on remand, citing *Gillie v. State*, 512 N.E.2d 145, 148 (Ind. 1987), noting in the criminal context that the Supreme Courtôs reversal and remand ñacts to óplace the parties in the position they would have occupied if no proceedings on the charges had ever occurred,ôò); *Atlantic Coast Railroad Line v. St. Joe Paper Co.*, 216 F.2d 832, 833 (5th Cir. 1954) (ñTo reverse a judgment . . . means to overthrow it by contrary decision, to make it void, to undo or annul it by errorò).

4. Applied in the context of this case, the effect of the Supreme Courtôs July 2016 reversal of the Commissionerôs April 2015 ruling was twofold. First, it established that as of September 2014 Defendant had paid wage replacement benefits ñwhich, by the provisions of [the Workersô Compensation Act], were not due and payable when made,ò 21 V.S.A. §651. Second, it restored Defendantôs statutory right, again as of September 2014, to claim an offset (in an amount to be determined on remand) against ñthe amount to be paid as compensation.ò *Id.*[5]

5. Claimant does not argue the latter point *per se*. Instead, she asserts that the permanency benefits against which Defendant now claims an offset had already become due by the time of the Supreme Courtôs ruling. For that reason, she claims, they do not qualify as ñfutureò compensation benefits at all.

6. Claimant offers a two-pronged argument in support of her position. First, she correctly notes that because Defendant never requested, and therefore was never granted, a stay of the Commissionerôs April 2015 order, it was still in full force and effect as of February 2016, when her permanent impairment rating issued. Thereafter, she asserts, Defendant failed to take appropriate action to determine the extent of her permanency, as required under Workersô Compensation Rule 10.1200. Considering these omissions together, she argues that Defendant was legally obligated to make payment of her permanency benefits well before the Supreme Courtôs July 2016 ruling issued. In that sense, she contends, as of the Courtôs ruling, these were ñpast dueò benefits, not ñfutureò ones.

7. Claimant charges Defendant with ñunclean hands,ò at least in part because it did not seek a stay of the Commissionerôs April 2015 order. The fact is, the Commissionerôs order granted Defendant at least a partial offset for the salary continuance payments it had made, and at the time the order issued there were as yet no ñfutureò benefits against which to apply it. Given this circumstance, and the stringent standard against which motions to stay are evaluated, *Bodwell v. Webster Corp.*, Opinion No. 62S-96WC (December 10, 1996), I will not fault Defendant for making a tactical decision not to pursue a remedy it was unlikely to attain.

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[5] The Court described Defendantôs §651 offset as applying to ñClaimantôs future workersô compensation benefits.ò *Conant, supra* at ¶¶1, 25. This is in accord with its previous holding in *Bishop v. Town of Barre*, 140 Vt. 564, 579 (1982), which affirmed the Commissionerôs discretion under §651 to deduct the amount of overpaid temporary disability benefits from a subsequent permanency award.

8. At the heart of Claimantôs argument is her second assertion, namely, that as of February 2016 her entitlement to permanency benefits was for Defendant a current obligation, not a future one. For this she relies on Workersô Compensation Rule 10.1200, which states:

> Within 45 days after receiving notice or knowledge that the injured worker has reached an end medical result, the employer or insurance carrier shall take action necessary to determine whether he or she has suffered a permanent impairment as a result of the compensable injury.

9. Applying the ruleôs requirements to the undisputed facts here, Defendant first received notice that Claimant had reached an end medical result via email correspondence from her attorney on January 20, 2016. Finding of Fact No. 9 *supra; Claimant's Exhibit 3*. Within 45 days thereafter, or by March 6, 2016, it should have taken steps to determine the extent, if any, of her permanent impairment. Despite prodding from Claimantôs attorney, *id.; Claimant's Exhibits 3-5*, it did not do so.

10. Claimant asserts that from this failure to act, her entitlement to permanency benefits ripened into a current obligation. I disagree. Certainly, it provided the basis for her to request the Departmentôs intervention, which she did via her April 6, 2016 Notice and Application for Hearing, Finding of Fact No. 8 *supra*. But nothing in either the statute or the rule allows for an *automatic* assessment of permanency benefits against an employer that shirks its responsibility in this manner.[6]

11. This does not mean that Claimant had no recourse for Defendantôs failure to act. As noted above, she could, and did, request a hearing. Had the Departmentôs specialist scheduled an informal conference sooner, conceivably she might have issued an interim order prior to the Supreme Courtôs July 8, 2016 reversal and remand. This would have transformed Claimantôs entitlement to permanency benefits from a future obligation to a current one,[7] at a time when the Commissionerôs earlier ruling would still have been in effect. Defendant would have been obligated to commence paying weekly benefits, with only the limited offset that the Commissioner had allowed, not the more expansive one that the Court later mandated.

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[6] In contrast, for example, in appropriate circumstances Rule 3.2400 requires the Commissioner to issue an interim order that compensation be paid when an employer fails to either accept or deny a claimed work-related injury within 21 days of receiving notice or knowledge thereof. Similarly, in certain circumstances issuance of an interim order ñshall be presumed appropriateò under Rule 7.1420 when an employer fails to respond to a preauthorization request within the required time period.

[7] In the absence of an agreement to pay compensation benefits, the statute, 21 V.S.A. §662(b), grants the Commissioner discretion to issue an interim order ñthat payments be madeò pending a formal hearing. Such payments are due and payable upon issuance of the interim order, in accordance with Workersô Compensation Rule 16.1400.

12. Other outcomes are equally plausible, however. For example, even had the informal conference occurred prior to the Supreme Courtôs ruling, it would have been within the specialistôs discretion to grant Defendant leave to obtain a second permanent impairment evaluation, as permitted under Workersô Compensation Rule 10.1210. Had that evaluation yielded a zero percent rating, Defendantôs obligation to pay permanency benefits might still have been uncertain as of the date of the Courtôs ruling.

13. ñTiming is everythingò is a popular expression, dating back centuries.[8] For Claimant, the timing of the Supreme Courtôs ruling may seem to have worked an arbitrary and harsh result. Had the ruling come a month later, perhaps Defendant would have felt its sting, or perhaps not. It is useless to speculate. The Courtôs ruling issued on a date when Defendantôs obligation to pay permanency benefits was as yet undetermined. It was thus an ñamount to be paid as compensation,ò not an amount already owed.

14. I conclude as a matter of law that Defendant is entitled to an offset of wage replacement benefits, in an amount to be calculated, against any permanent partial disability benefits it is determined to owe as causally related to Claimantôs February 2014 compensable work injury.

ORDER:

Defendantôs Motion for Partial Summary Judgment is hereby **GRANTED**. Claimantôs Motion for Partial Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 22nd day of June 2017.

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Lindsay H. Kurrle
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.

[8] The earliest attribution is to Hesiod, a Greek poet, *circa* 800 B.C.: ñObserve due measure, for right timing is in all things the most important factor.ò *See* https://en.wikiquote.org/wiki/Hesiod.