STATE OF VERMONT
DEPARTMENT OF LABOR

Sharon Conant	Opinion No. 06-19WC
v.	By: Stephen W. Brown Administrative Law Judge
Entergy Corporation/ American International Group	For: Lindsay H. Kurrle Commissioner
	State File No. FF-61233

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

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

ISSUE PRESENTED:

What amount is Defendant entitled to offset against its future indemnity obligations because of its past overpayment of wage replacement benefits?

EXHIBITS:

Claimantôs Exhibit 1:	Excerpts from Collective Bargaining Agreement	
Defendantôs Exhibit A:	Vermont Supreme Court decision dated July 8, 2016, *Conant v. Entergy Corporation*, 2016 VT 74 (ñ*Conant II*ò)	
Defendantôs Exhibit B:	Department of Labor Ruling on Cross Motions for Partial Summary Judgment, *Conant v. Entergy Corporation*, Opinion No. 11-17WC (June 27, 2017) (ñ*Conant III*ò)	
Defendantôs Exhibit C:	(i.)	Forwarded email from Claimantôs counsel to Department of Labor dated July 14, 2017
	(ii.)	Spreadsheet concerning Claimantôs 2014 state and federal income taxes (ñTax Worksheetò)
Defendantôs Exhibit D:	(i.)	Spreadsheet concerning Claimantôs earnings and deductions (ñEarnings Worksheetò)
	(ii.)	Claimantôs payroll records

BACKGROUND:

Claimant's Injury and Prior Proceedings

1. This case arises out of an ankle injury that Claimant suffered in Defendantôs parking lot in February 2014. She reported the injury to Defendant, who in turn reported it to its workersô compensation insurer. Claimantôs injury caused her to miss time from work.

2. Following her injury, Claimant had access to two potential forms of payment: workersô compensation benefits and disability benefits provided under a collective bargaining agreement (ñCBAò). The CBA provided compensation in different amounts for ñoccupationalò and ñnonoccupationalò disabilities.

3. For occupational injuries, the CBA provided wage continuation benefits with an offset for workersô compensation benefits such that the combination of contractual and workersô compensation benefits would equal 100 percent of an injured workerôs wages.

4. For nonoccupational injuries, the CBA provided for three stages of benefits: (1) continued full salary for five days or until accrued ñcontinuance of full salary daysò 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.

5. Initially, Defendantôs insurer denied Claimantôs claim for workersô compensation benefits on the grounds that her injury was nonoccupational. As such, it began paying salary continuance and short-term disability benefits pursuant to the CBAôs ñnonoccupational disabilityò provisions. Unlike workersô compensation benefits, these payments were subject to payroll taxes.

6. In June 2014, while Claimant was receiving nonoccupational benefits, she requested a hearing on Defendantôs denial of her workersô compensation claim, arguing that her injury was occupational. The Department found that Defendantôs denial was not reasonably supported and issued an interim order directing Defendant to pay temporary total disability (ñTTDò) benefits retroactively to March 7, 2014, the date when Claimant began losing time from work due to her injury. Defendant sought a stay of that order pending a determination of whether it actually owed any TTD benefits, given the contractual benefits Claimant had already received under the CBA.

7. While its request for a stay was pending, Defendant paid Claimant $34,980.00 in TTD benefits (representing thirty weeks of such benefits). Claimant therefore received more in combined benefits than if she had only received occupational or only nonoccupational benefits.

8. Defendant first moved for summary judgment before the Department on the issue of its overpayment on December 14, 2014. The Commissioner partially granted that motion on April 28, 2015 (Opinion No. 10-15WC) (ñ*Conant I*ò), holding that Defendant could offset TTD benefits it paid for weeks during which Claimant also received salary continuance under the nonoccupational injury provision of the CBA. However, it held that Defendant could not offset the short-term disability benefits it paid under the CBA.

9. Defendant appealed that decision to the Vermont Supreme Court, which issued a decision on July 8, 2016. *See Conant v. Entergy Corp.*, 2016 VT 74 (ñ*Conant II*ò).[1] In *Conant II*, the Court reversed the Commissionerôs exclusion of short-term disability benefits from Defendantôs offset, and remanded for a determination of the amount of the offset. *Id.*

10. Following remand, the parties filed cross motions for partial summary judgment on the question of whether Defendant could offset wage replacement benefits against permanent partial disability benefits associated with Claimantôs February 2016 permanency rating. Claimant argued that because her entitlement to permanency benefits accrued before the Supreme Courtôs ruling, *Conant I* was still in effect and the benefits were not subject to offset. *See Conant v. Entergy Corporation/American International Group*, Opinion No. 11-17WC (June 26, 2017) (ñ*Conant III*ò), Finding of Fact No. 12. The Department rejected that argument and held that Defendant could offset wage replacement benefits against any permanent partial disability benefits that were causally related to Claimantôs work injury. *Id.*, Conclusion of Law No. 14. The *Conant III* decision did not determine the amount of Defendantôs offset.

11. The parties have now filed cross motions for summary judgment as to the amount of Defendantôs offset. Defendantôs primary assertion is that the calculation of its offset should be based on Claimantôs gross wages before deductions. Claimant argues that the calculation of Defendantôs offset should be based primarily on her net wages after deductions, but she acknowledges that some deductions such as her 401(k) contributions and loan repayments should be included.

[1] The history summarized in Findings of Fact Nos. 1-8, *supra*, is as stated by the Vermont Supreme Court in *Conant II*, ¶¶ 2-12.

Undisputed Facts Relating to the Amount of Defendant's Offset[2]

12. Claimant has supplied two spreadsheets analyzing her pay. *See* Defendantôs Statement of Undisputed Facts No. 4; Claimantôs Response No. 4; Defendantôs Exhibits C and D. The first spreadsheet, attached to the end Defendantôs Exhibit C, analyzes certain aspects of Claimantôs 2014 federal and state taxes. I refer to that spreadsheet as the ñTax Worksheet.ò The second spreadsheet, attached to the beginning of Defendantôs Exhibit D, analyzes Claimantôs earnings and deductions during the period between March 22 and September 20, 2014. I refer to that spreadsheet as the ñEarnings Worksheet.ò[3] I note that Defendantôs Statement of Undisputed Material Fact and Claimantôs admission of the same establish only that Claimant supplied these spreadsheets; there is no stipulation as to their accuracy.

13. The parties agree that between March 22 and September 20, 2014, Claimant received gross pay of $28,880.35 and net pay after taxes and other deductions of $16,906.33. Defendantôs Motion, pp. 3 and 7; Claimantôs Brief at 2; Earnings Worksheet. However, there is no Statement of Undisputed Material Fact or citation to evidence supporting the partiesô use of this specific date range as the starting point for their analysis.[4]

14. During that same time interval, Claimantôs pay[5] was subject to pre-tax deductions totaling $7,314.07 and post-tax deductions totaling $1,660.74. *See* Defendantôs Statement of Undisputed Facts No. 4; Claimantôs Response No. 5; *accord* Earnings Worksheet.

15. Claimant obtained a permanent partial disability (ñPPDò) rating in February 2016. Her PPD benefits based on that rating total $24,239.25. *See* Defendantôs Statement of Undisputed Facts Nos. 2-3; Claimantôs Response Nos. 2-3.

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[2] Although the parties filed cross motions for summary judgment, only Defendant filed a Statement of Undisputed Material Facts, to which Claimant filed responses. I accept Defendantôs statements that Claimant admitted as true for the purposes of this opinion. I do not treat assertions that lack a stipulation, Statement of Undisputed Material Fact, or citation to evidence as ñundisputedò for the purposes of this opinion.

[3] The partiesô briefs refer only to a single spreadsheet appearing within Defendantôs Exhibit C. However, most of their analysis focuses on the Earnings Worksheet attached to Defendantôs Exhibit D. I refer to it as the Earnings Worksheet notwithstanding the partiesô citations to Defendantôs Exhibit C.

[4] The Supreme Courtôs opinion in *Conant II* uses the period between March 2 and August 23, 2014 for its analysis, resulting in gross and net monetary amounts of $24,927.74 and $14,524.16, respectively. *See id.*, ¶ 7. Because this decision does not ultimately determine the amount of Defendantôs offset, I need not resolve this discrepancy.

[5] I use the word ñpayò broadly to include all funds reflected on Claimantôs payroll records submitted as Defendantôs Exhibit D, including periods for which Claimant was receiving contractual benefits through payroll that were not strictly wages for work performed.

Unresolved Factual Issues Relating to the Amount of Defendant's Offset

16. There is no stipulation, Statement of Undisputed Material Fact, or clearly-cited evidentiary support for the following factual matters that I consider material to the calculation of Defendantôs offset:

    a. The amounts of (1) federal and state income tax refunds that Claimant actually received for the 2014 tax year attributable to the period during which Defendant overpaid benefits, and (2) the refunds she would have received had Defendant initially treated her injury as occupational;[6]

    b. The amount by which Claimantôs tax withholdings would have differed had Defendant treated her injury as occupational from the beginning;[7]

    c. The amount of ñoccupationalò benefits Claimant would have received under the CBA had Defendant treated her injury as occupational from the beginning, which in turn depends on the precise length of her disability and the length of her pre-injury tenure with Defendant;[8]

    d. The amount of, and reasons for, any difference between Claimantôs actual payroll deductions (such as for insurance, retirement contributions, charitable deductions, loan repayments, and union dues) compared the amounts of such deductions that would have resulted had Defendant treated her injury as occupational from the beginning.[9]

[6] The parties refer to Claimantôs receipt of federal and state tax refunds for 2014. The Tax Worksheet purports to show both the actual amount of such refunds and the amount they ñshouldò have been. However, there is no tax return in evidence and no mathematical explanation of the amount Claimantôs refunds ñshouldò have been. Nor is there any evidence concerning what portion, if any, of Claimantôs actual 2014 tax refunds were attributable to the time period during which she was receiving both TTD and contractual benefits under the CBA.

[7] The Earnings Worksheet shows differing amounts of tax withholdings under the headings ñAs Reportedò and ñShould Be,ò but there is no transparent mathematical analysis supporting the ñShould Beò amounts.

[8] Claimant states that ñ[u]nder the correct section of the CBA, she would have received contract benefits totaling $6,502.89.ò Claimantôs Brief at 4; *accord* Earnings Worksheet, ñShould Beò heading. The amount of Claimantôs occupational benefits under the CBA depends on the lengths of both her disability and her tenure with Defendant. *See* Claimantôs Exhibit 1, p. 39 (providing formula for benefits). There is no stipulation or Statement of Undisputed Material Fact as to the exact duration of either time period. While Claimant asserts that she had six years of service with Defendant, she does not cite any evidence for this assertion, nor is there any stipulation to that effect.

[9] For some payroll deductions (such as insurance premiums and retirement account contributions), the ñShould Beò section of the Earnings Worksheet shows lower total amounts of these deductions than the ñAs Reportedò section. Much of this difference corresponds to the termination of some deductions on a particular date (June 28, 2014), but there is neither a stipulation nor adequate evidentiary support for any factual predicate underlying that cutoff date. Other payroll deductions (such as loan repayments, charitable contributions, and union dues) appear in the ñAs Reportedò section but not in the ñShould Beò section at all, without citation to any evidence supporting such omissions.

DISCUSSION:

1. Summary judgment is proper when ñthere 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.ò *State v. Delaney*, 157 Vt. 247, 252 (1991). To prevail on a motion for summary judgment, the facts must be ñclear, undisputed or unrefuted.ò *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. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

> (A) Filing a separate and concise statement of undisputed material facts or a separate and concise statement of disputed facts, consisting of numbered paragraphs with specific citations to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) Showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

V. R. Civ. P. 56(c)(1).

3. A tribunal ruling on a motion for summary judgment ñneed consider only the materials cited in the required statements of fact, but it may consider other materials in the record.ò V. R. Civ. P. 56(c)(3).

Basic Formula for the Amount of Defendant's Offset

4. The Supreme Courtôs mandate in *Conant II* was for the Commissioner to determine the amount of the offset that Defendant is ñentitled to receive pursuant to 21 V.S.A. § 651 by virtue of the overpayment of wage replacement resulting from the Commissionerôs determination that the injury was occupational in nature.ò *See* 2016 VT 74, ¶ 27.

5. Section 651 provides in turn that ñ[p]ayments made by an employer or his or her insurer to an injured worker during the period of his or her disability, or to his or her dependents, 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.ò 21 V.S.A. § 651.

6. From these sources, I conclude that the basic formula for determining the amount of Defendantôs offset is, for the relevant time period:

Total Claimant received from Defendant
— *Total Claimant would have received had Defendant treated her injury as occupational*
Defendant's Offset

7. The relevant time period for this calculation begins on March 7, 2014, the beginning date for Claimantôs retroactive TTD benefits. *See* Finding of Fact No. 6. It ends on the last day for which Claimant received both retroactive TTD benefits and any combination of wage replacement and short-term disability benefits pursuant to the CBA. Defendant must prove the end date for the relevant time period at trial.[10]

The Inputs in the Offset Formula Must be Gross Figures, Not Net of Taxes and Deductions

8. The parties dispute whether and to what extent the inputs to the formula in Conclusion of Law No. 6 must include amounts that were deducted from Claimantôs pay during the relevant time period, and/or the amounts that would have been deducted had Defendant initially treated Claimantôs injury as occupational.

9. Neither Section 651 nor the Supreme Courtôs decision in *Conant II* specify whether the formula should use gross or net figures.

10. However, the Court in *Conant II* made clear that the rationale underlying its decision was a ñclear and strong policy against the double recovery of benefits[.]ò *Id.*, ¶ 14 (noting further that in some instances, even *without* an applicable statutory setoff clause, the Court had declined to compel employers ñto pay twice for the same lost time due to work injury or prohibit a credit for payments made by employers for what are later deemed compensable injuries.ò) (citing *Yustin v. Dep't of Pub. Safety*, 2011 VT 20, ¶ 11).

11. The policy against double recovery is best served by requiring that the offset formula be based entirely on gross figures. Denying Defendant credit for funds subject to payroll deductions would yield the same basic result that motivated the Supreme Courtôs reversal in *Conant II*, namely the Defendant paying Claimant more than it would have paid had it treated Claimantôs injury as occupational in the first instance. Moreover, it appears that all of these deductions were taken from Claimantôs pay either because of legal requirements (in the case of tax withholdings), because Claimant elected to pay for certain benefits (in the case of employee-paid insurance and retirement contributions), or because Claimant elected to have her employer pay certain recipients of her choice (in the case of charitable contributions and loan repayments). Whether or not Claimant received actual cash in hand, she benefitted economically from these deductions.

12. Using gross rather than net quantities also accords with the treatment of wages as gross figures by the Vermont Workersô Compensation statute and rules. *E.g.*, 21 V.S.A §

[10] Both partiesô numerical analyses treat the relevant time period as ending on September 20, 2014. However, there is no stipulation or evidentiary citation establishing any salient event on that date.

601(13) (defining ñwagesò as including ñbonuses and the market value of board, lodging, fuel, and other advantages which can be estimated in money and which the employee receives from the employer as a part of his or her remuneration[.]ò). Workersô Compensation Rule 8.1100 (providing for gross wages as the starting point for average weekly wage computations).

13. Since payroll deductions would not reduce Claimantôs average weekly wage in calculating the amount of indemnity benefits under the Workersô Compensation Rules, I see no reason for those deductions to reduce Defendantôs offset for simultaneously paying her wage replacement, workersô compensation indemnity, and short-term disability benefits, all of which had the fundamental purpose of replacing her wages.[11]

14. Claimant cites no legal authority for the exclusion of any payroll deductions from the inputs into the formula. Instead, she rests her argument primarily on her descriptions of certain deductions as improper or beyond her control. *See* Claimantôs Brief at 5-6. I find these descriptions unpersuasive and unsupported by evidence. However, Claimant may present evidence at trial that any payroll deduction was unlawful or unauthorized. Absent such evidence, however, Defendantôs offset must include all amounts that were or ñshould have beenò deducted from Claimantôs pay during the relevant time period.

Genuine Issues of Material Fact Preclude Summary Judgment as to the Offset's Exact Amount

15. Having determined the applicable formula, however, there is still not enough evidence to compute the amount of Defendantôs offset as a matter of law. Calculation of that figure will require, at a minimum, proof of all the items identified *supra* at Finding of Fact No. 12 and establishment of the relevant time period for the calculation, *see* Conclusion of Law No. 7. The parties should not hesitate to rely upon expert testimony to establish any of these quantities.

[11] This is not to say, however, that the amounts Claimant received or would have received during the relevant time period were in fact ñwagesò under the definitions cited above. Defendant suggests that these amounts were ñwagesò and that therefore, computing its offset using net rather than gross amounts would have wide-ranging repercussions for the calculation of future injured workersô statutory indemnity benefits. I do not find that the amounts in question were actually wages; in fact, the Supreme Court held that they were ñwage replacement benefits.ò *See Conant II*, ¶ 6.

ORDER:

Claimantôs Motion for Summary Judgment is **DENIED**; Defendantôs Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**, as follows:

1. The relevant time period for the purpose of determining Defendantôs offset is that period beginning March 7, 2014 and continuing until the last day Claimant received both TTD benefits and any combination of salary continuation and short-term disability insurance proceeds under the CBAôs ñnonoccupational benefitsò provision.

2. The formula for determining the amount of Defendantôs offset shall be, for the relevant time period, the difference between (1) the amount Defendant actually paid to Claimant directly *or* paid to any other person or entity on Claimantôs behalf during the relevant time period, and (2) the amount that Defendant would have paid to Claimant directly *or* paid to any other person or entity on Claimantôs behalf during the same time period if it had treated Claimantôs disability as ñoccupationalò rather than ñnonoccupationalò as of March 7, 2014.

3. The inputs into this formula must be gross figures, including any amounts lawfully deducted from Claimantôs pay for health insurance, dental insurance, life insurance, income and payroll taxes, 401(k) contributions, loan repayments, union dues, and charitable contributions, and any other amounts paid to individuals or entities on Claimantôs behalf. Claimant may present any evidence necessary to prove that any deduction was unlawful or unauthorized.

4. Proof of the gross amount Claimant would have received during the relevant time period must include proof of any facts that would have caused the amount of wage-replacement benefits to change during that period.

DATED at Montpelier, Vermont this 18th day of March 2019.

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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.