STATE OF VERMONT
DEPARTMENT OF LABOR

Michael Hathaway

v.

S.T. Griswold & Company

Opinion No. 04-14WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. S-22188

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Corina Schaffner-Fegard, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant entitled to vocational rehabilitation services as a consequence of his June 14, 2002 compensable work injury?

2. Is Claimant's erectile dysfunction causally related to his June 14, 2002 compensable work injury?

3. Is Defendant's workers' compensation insurance carrier obligated under 21 V.S.A. §640(c) to reimburse Claimant for wages withheld by his current employer?

EXHIBITS:

Claimant's Exhibit 1:	Letters from Drs. Hebert (December 23, 2013) and Campbell (December 19, 2013)
Claimant's Exhibit 2:	Letters from Attorney McVeigh to Attorney Schaffner-Fegard
Claimant's Exhibit 3:	Dr. Hebert office notes, 1/15/13 and 5/4/12
Claimant's Exhibit 4:	Excerpts from Claimant's deposition, November 28, 2011

Defendant's Exhibit A:	Deposition of Claimant, November 28, 2011
Defendant's Exhibit B:	First Report of Injury, 6/14/2002
Defendant's Exhibit C:	Claimant's Response to Requests to Admit, October 7, 2013
Defendant's Exhibit D:	Dr. Campbell response to August 15, 2013 letter from Attorney McVeigh
Defendant's Exhibit E:	Dr. Campbell response to letter from William Chapman, 4/3/12; Work Status Report
Defendant's Exhibit F:	Letter from Attorney McVeigh, July 8, 2010
Defendant's Exhibit G:	Medical records (CD)
Defendant's Exhibit H:	Wage statement with associated payroll detail, 12/5/11
Defendant's Exhibit I:	Letter from Dr. Bove, October 22, 2013

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. Beginning in 1999, Claimant worked for Defendant for a period of approximately nine and a half years as a concrete construction laborer. His job duties included preparing forms, tying rebar and assisting with other tasks around the job site. Claimant quit school in the eleventh grade; he does not have a GED.

Claimant's June 2002 Work Injury, Medical Course and Return to Work

2. On June 14, 2002 Claimant was at work, spotting a crane at the Fletcher Allen Health Care "big dig" construction site. After hooking a concrete block to the crane and signaling the crane operator to begin cabling up, his left foot became entangled in the tag line. Claimant grabbed the line, so as to remain upright, and was lifted 20 feet in the air. The line broke and he fell straight down, landing on his left foot.

3. As a result of this accident, Claimant suffered injuries to his left heel, left knee and lower back.

4. Claimant was disabled for only three or four days following the accident. Upon returning to work, his treating providers imposed a 75-pound lifting restriction. Thereafter, for the remainder of his tenure with Defendant, Claimant's job assignments focused less on concrete work and more on lighter duty jobs. These included working as a crane rigger and managing Defendant's warehouse.

5. For some time after August 2002, Claimant treated only sporadically for his accident-related injuries. In the fall of 2003, he underwent a physical therapy evaluation for ongoing complaints of lower back and left heel pain, but did not attend follow-up visits. In August 2004 he consulted with a chiropractor, but again did not pursue treatment. Prior to being rehired following a layoff, in October 2004 Dr. Fitzgerald determined that he was capable of working as a concrete laborer so long as he was restricted from lifting more than 50 pounds frequently. There is no evidence that Defendant was unable to accommodate this restriction.

6. In 2007 Claimant began treating for persistent left knee pain. Ultimately he was diagnosed with a medial meniscus tear, for which he underwent arthroscopic repair with Dr. Campbell, an orthopedic surgeon, in February 2009. Later, he suffered a recurrent tear, which Dr. Campbell surgically repaired in November 2011. Defendant's workers' compensation insurance carrier paid the medical and indemnity benefits referable to both surgeries.

7. Following first a layoff and then the sale of its business, Claimant's employment for Defendant terminated in 2008. In the spring of 2009 he began working for Engineers Construction Inc. (ECI), another local concrete construction company. Claimant has maintained continuous employment with ECI since that time. On average, he works nine to ten hours daily. The work is year-round, without seasonal layoffs or other down time. There is no evidence that Claimant is earning less money for ECI than he was when he worked for Defendant.

8. After his first knee surgery, Claimant was totally disabled from working between February and April 2009, at which point Dr. Campbell released him to return to work without restrictions. After his November 2011 surgery, he was totally disabled until early January 2012. Having initially released him to return to work in a modified duty capacity (with limitations against squatting), Dr. Campbell cleared him to resume full-time, full-duty work in April 2012. Aside from these two periods of disability, since beginning his employment for ECI no medical provider has ever taken Claimant out of work or otherwise restricted his activities on account of the injuries he sustained in June 2002.

9. In his deposition testimony, Claimant described his various job responsibilities at ECI. These include tying rebar, scraping and oiling concrete forms, measuring, sizing and building wooden forms, transporting materials via forklift, front loader or excavator and cleaning up around construction sites. While performing these tasks, he occasionally has to lift and carry pieces of rebar or plywood, rolls of tie wire, small bolts and tools, none of which weighs more than approximately 40 pounds. Typically the construction site has been back-filled to create a reasonably flat walking area, and whether working subgrade, at ground level or on staging he is able to complete all tasks without having to kneel or bend down.

10. Since returning to work after his second knee surgery, Claimant is no longer required to lug the larger forms or set the actual rebar. His supervisors at ECI have assigned heavier tasks to younger employees, leaving the "lighter bit of it" to him.

Suitability of Claimant's Current Employment

11. As to the medical suitability of Claimant's current job, Dr. Campbell responded "yes," without elaboration, to the following question, which Claimant's attorney put to him in an August 2013 letter:

> [Claimant] is a construction worker and my question is whether it is preferable for him from a medical standpoint to perform lighter duty work – in particular working as a truck driver – than it is for him to continue in his current line of work.

12. Dr. Campbell reiterated his opinion in a December 2013 letter to Claimant's attorney, as follows:

> Please note it is my medical opinion that [Claimant] would benefit from pursuit of his CDL (commercial driver's license) and it would be best to avoid his current line of work.

13. Dr. Hebert, who has been Claimant's primary care physician since 2006, stated the following in a December 2013 "To Whom It May Concern" letter:

> [Claimant] has been a patient of my internal medicine practice for the last 8 years. This back pain started after an accident during work in 2001 [*sic*]. He was lifted by a crane and dropped from a large height. Since that time he has had back and knee pain and evaluation by several specialists. It is my medical opinion that [Claimant] would benefit from a job that is less physically intense.

Erectile Dysfunction

14. Claimant first complained of problems with sexual function during an August 2003 visit to Dr. Terrien, his primary care provider at the time. Dr. Terrien's office note states as follows:

> Problem with erection since his injury. Also frequency of relations has ↓ from [approximately once per day] to once or twice a week. Interest also has ↓.

15. Dr. Terrien's plan was to "obtain x-ray report." This reference is unclear. In any event, from the medical records submitted, it does not appear that Claimant underwent any follow-up evaluation or treatment with Dr. Terrien for these complaints.

16. In the context of a December 2007 independent medical examination with Dr. Backus, Claimant reported, "Sex is troublesome because of pain." In assigning an eight percent whole person impairment rating referable to Claimant's low back injury, Dr. Backus specifically noted "significant limitations on normal [activities of daily living] to include walking, sitting, lifting *and even sexual function with pain radiating into his groin* (emphasis added) . . .".

17. At Dr. Hebert's referral, in May 2008 Claimant underwent a urology consult with Dr. Jackson. Regarding the etiology of Claimant's complaints, Dr. Jackson stated:

> I am not sure as to the precise etiology of the patient's erectile difficulties. I think a significant neurovascular injury would not cause the partial erectile dysfunction the patient is experiencing. Instead, I would expect a more complete absence of significant erectile activity. I suppose he could have a partial neurologic injury or may have some venous leak which has been unmasked by some decreased inflow with age and/or adrenergic overload secondary to his back pain.

18. As treatment, Dr. Jackson provided Claimant with samples of Viagra, Levitra and Cialis. He also recommended that Claimant undergo testing to check his testosterone levels. From the medical records submitted, it is unclear whether this occurred. At a follow-up visit in November 2008, Claimant reported "reasonable results" with Cialis, but difficulty obtaining insurance coverage for the medication.

19. In the course of a May 2012 office visit for elevated blood pressure, Dr. Hebert reported as follows:

> [Claimant] is also concerned about erectile dysfunction. He says he has had this since his accident. He had a consult with Dr. Trotter in the past, and Cialis helped, but it was not covered. He is questioning whether it could be related to a workman's comp issue.

20. Dr. Hebert's stated plan was to refer Claimant for a urology consult, "to see if they feel this could be a nerve injury from his accident, or whether it is related to his age, weight, glucose of 103."

21. At Dr. Hebert's referral, in August 2012 Claimant underwent a second urology consult for erectile dysfunction, this time with Dr. Sargent. Dr. Sargent reported that Claimant had "minimal risk factors for arterial or neurogenic disease," and that he discussed with Claimant "the role of psychogenic factors." At a January 2013 follow-up visit, Claimant reported that Viagra "helps a little bit," and also that "when he has [low back pain] during sexual activity, [it] brings down [his] erection." Dr. Sargent noted that Claimant was pursuing treatment of his back pain, "which will most likely help with sexual activity."

22. According to Defendant's medical expert, Dr. Bove, Claimant's presentation "seems consistent with progressive erectile dysfunction based on a more limited arterial inflow in a man who is in his mid-50's and mildly obese." In his opinion, the etiology of Claimant's dysfunction is more likely vasculogenic rather than neurogenically based, meaning that it is not causally related to his 2002 work injury.

Lost Wages Attributable to Attendance at Medical Appointments

23. Claimant seeks to recover from Defendant a total of $189.60 in lost wages attributable to his attendance at medical appointments necessitated by his work injury. Both appointments occurred long after his employment for Defendant terminated and he began working for ECI. Claimant used paid ETO (presumably, earned time off) for these appointments, but has not otherwise demanded reimbursement from ECI.

DISCUSSION:

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

2. A defendant who moves for summary judgment satisfies its legal burden when it presents at least one legally sufficient defense that would bar the opposing party's claim. *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 266 (1981). Once a properly supported summary judgment motion has been made, the non-moving party may not rest on mere allegations in its pleadings. *Pierce v. Riggs*, 149 Vt. 136, 139-140 (1987). Rather, it must respond with sufficient evidence to support a prima facie case. If an essential element of the non-movant's case cannot be established, summary judgment is appropriate. *State of Vermont v. G.S. Blodgett Company*, 163 Vt. 175, 180 (1995).

3. Defendant here seeks summary judgment in its favor on three distinct issues. As to two of these – whether Claimant is entitled to vocational rehabilitation services as a consequence of his June 2002 work injury and whether his erectile dysfunction is causally related to that injury – Defendant claims the evidence is insufficient as a matter of law to support a ruling in Claimant's favor. As to the third issue – whether Defendant is obligated to pay Claimant for lost wages attributable to his attendance at medical appointments – Defendant asserts that as a matter of law responsibility for those payments rests not with Claimant's former employer or its carrier, but rather with his current employer.

Claimant's Entitlement to Vocational Rehabilitation Services

4. Vermont's workers' compensation law makes the following provision for injured workers whose functional restrictions preclude them from resuming their prior jobs after a work-related injury:

> When as a result of an injury covered by this chapter, an employee is unable to perform work for which the employee has previous training or experience, the employee shall be entitled to vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore the employee to suitable employment.

21 V.S.A. §641(a).

5. Workers' Compensation Rule 51.2600 defines "suitable employment" as follows:

> "Suitable employment" means employment for which the employee has the necessary mental and physical capacities, knowledge, skills and abilities;
>
> 51.2601 Located where the employee customarily worked, or within reasonable commuting distance of the employee's residence;
>
> 51.2602 Which pays or would average on a year-round basis a suitable wage;[1] **AND**
>
> 51.2603 Which is regular full-time work.[2] Temporary work is suitable if the employee's job at injury was temporary and it can be shown that the temporary job will duplicate his/her annual income from the job at injury. (Emphasis in original).

[1] "Suitable wage" is defined as one that is as close as is reasonably attainable to 100 percent of the employee's pre-injury average weekly wage. Workers' Compensation Rule 51.2700.

[2] "Regular full-time" employment is defined as a job that "at the time of hire was, or is currently expected to continue indefinitely." Workers' Compensation Rule 51.2100.

6. Of note, neither the statute nor the rules require that an injured worker be returned to specific employment in order for an employer's vocational rehabilitation responsibilities to be fulfilled. The goal of vocational rehabilitation is to restore earning skills, not necessarily to procure a particular job. *Bishop v. Town of Barre*, 140 Vt. 564, 578 (1982); *Wentworth v. Crawford & Co.*, 174 Vt. 118 (2002); Workers' Compensation Rule 50.0000. Nevertheless, the workers' compensation rules acknowledge that a claimant's successful return to suitable employment for at least 60 days is itself sufficient proof of employability as to justify terminating vocational rehabilitation services. Workers' Compensation Rule 56.1110; *Morrisseau v. Hannaford Brothers*, Opinion No. 21SJ-12WC (January 10, 2013).

7. Considering the evidence in the light most favorable to Claimant, *State v. Delaney, supra*, I conclude that, as currently comprised, his job at ECI fulfills the necessary requirements of suitable employment as delineated in Rule 51.2600. It is within his mental and physical capabilities, knowledge, skills and abilities. It is located in the same general vicinity as his prior employment for Defendant. It pays a suitable wage as that term is defined in Rule 51.2700, and constitutes regular full-time employment as defined in Rule 51.2100. Perhaps most important, it is a job that Claimant has proven himself fully capable of performing for almost five years. With reference to Rule 56.1110, this in itself is sufficient proof of suitable employment, and thus employability, to disqualify him from entitlement to vocational rehabilitation services as a matter of law.

8. Claimant asserts that the opinions he has offered from Drs. Campbell and Hebert, Finding of Fact Nos. 11-13 *supra*, constitute sufficient evidence to support at least a prima facie case in favor of vocational rehabilitation entitlement. I disagree. What is required to overcome summary judgment is evidence that, if found most credible at hearing, will establish that Claimant's current job is unsuitable, as that term is defined in Rule 51.2600. Here, although both doctors have stated that it would be preferable or beneficial for him to pursue another line of work, neither has ever determined that he lacks the necessary physical capacities to perform the tasks he is routinely assigned in his current job.[3] Their proffered opinions fall short of what Rule 51.2600 requires to trigger vocational rehabilitation services, therefore.

[3] Notably absent from both Dr. Campbell's and Dr. Hebert's opinion letters is any analysis of Claimant's specific job tasks at ECI, which Claimant himself acknowledged are less physically demanding than those assigned to his younger coworkers. Had either expert undertaken such an analysis (preferably supported by a formal assessment of Claimant's functional capacities), this might have led them to conclude that his injury-related functional restrictions render even those lighter duty tasks unsuitable. As it is, notwithstanding my obligation to award Claimant the benefit of all reasonable doubts and inferences, *State v. Delaney, supra*, I cannot rely on evidence that does not yet exist.

9. With its focus on "suitable" rather than "preferable" employment in the vocational rehabilitation context, Vermont's workers' compensation statute reasonably reflects the compromise that underlies the general purpose of our law – to provide employees with a speedy and certain remedy for their work-related injuries, *St. Paul Fire & Marine Insurance Co. v. Surdam*, 156 Vt. 585 (1991), while at the same time guaranteeing to employers a liability that is "limited and determinate," *Morrisseau v. Legac*, 123 Vt. 70, 76 (1962). When a work-related injury occurs, the employer assumes responsibility for restoring the injured worker's current earning skills, hopefully by reassignment to the same or modified duties. *See* Workers' Compensation Rule 55.2000. Where, as here, such efforts prove successful, the employer is not obligated to retrain the employee for an alternative career path as well. *Morrisseau, supra*.

10. Even considering the evidence in the light most favorable to Claimant, I conclude that he has failed to establish an essential element of his claim for vocational rehabilitation services, that is, that his current employment is unsuitable. Summary judgment in Defendant's favor is therefore appropriate.

Compensability of Erectile Dysfunction

11. In workers' compensation cases the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

12. Claimant rests his claim for benefits related to his erectile dysfunction on Dr. Sargent's observation, in the context of his January 2013 evaluation, that he was pursuing treatment of his back pain, "which will most likely help with sexual activity." Finding of Fact No. 21 *supra*. Dr. Sargent's comment followed Claimant's report that his injury-related low back pain sometimes affected his ability to maintain an erection during sexual activity.

13. Considering the evidence in the light most favorable to Claimant, Dr. Sargent's comment establishes a causal link between Claimant's low back pain and his reported deficits in sexual function. If the former is deemed causally related to the June 2002 work injury,[4] then the latter reasonably might be considered a natural consequence flowing directly from it, and therefore causally related as well. *See* 1 Lex K. Larson, *Larson's Workers' Compensation* §10 (Matthew Bender, Rev. Ed.) at p. 10-1.

[4] It does not appear from the Department's claim file that Defendant has ever formally accepted Claimant's lower back complaints as causally related to his June 2002 work injury. It denied responsibility for the condition in 2009, though later it agreed voluntarily to pay for physical therapy on a without-prejudice basis.

14. Of note, however, Dr. Sargent's comment only serves to establish that Claimant's sexual dysfunction derives from his low back *pain*, not from any injury-related nerve damage *per se.* It thus lends support to Dr. Backus' impairment rating, Finding of Fact No. 16 *supra*, which included consideration of pain during sexual activity as an element of the limitations attributable to Claimant's low back injury. Neither Dr. Sargent nor any other expert proffered an opinion that, if believed, would establish the compensability of a neurogenically-based erectile dysfunction, however. On this question, therefore, Claimant has failed to establish a prima facie case.

15. I conclude that there is no genuine issue of material fact as to whether Claimant's erectile dysfunction is causally related to nerve damage or other injury referable to his June 2002 accident at work. Therefore, Defendant is entitled to summary judgment on this issue. However, I conclude that a genuine issue of material fact does exist as to whether Claimant's pain during sexual activity is causally related to his low back pain. Summary judgment on this issue is inappropriate.

Wage Reimbursement under 21 V.S.A. §640(c)

16. The final issue raised by Defendant's motion is purely a legal one – whether Defendant's workers' compensation insurance carrier is obligated under 21 V.S.A. §640(c) to reimburse Claimant for wages withheld by his current employer.[5]

17. In pertinent part, §640(c) states as follows:

> An employer shall not withhold any wages from an employee for the employee's absence from work for treatment of a work injury or to attend a medical examination related to a work injury.

18. When the injured worker has remained continuously employed by the same employer from the time of the injury, throughout his or her treatment period and during any subsequent examinations as well, the statute's mandate is clear – the employer cannot dock the employee's pay for time missed while attending causally related medical appointments. But where, as here, the employee has changed jobs in the interim, which employer is responsible for ensuring that wages are not withheld – the one for whom the employee worked at the time of the original injury, or the one for whom he or she is currently working?

19. Claimant contends that the employer at the time of the injury should bear responsibility in the first instance, and if, as here, it no longer exists, then responsibility should fall on its workers' compensation insurance carrier. As support, he cites to 21 V.S.A. §601(3), which defines the term "employer" to include its workers' compensation insurance carrier "so far as applicable."

[5] As a preliminary matter, Defendant asserts that Claimant lacks standing to defend his current employer against a claim for wage reimbursement under §640(c). While this may be true, he clearly has standing to assert a claim for wage reimbursement against his prior employer and/or its workers' compensation insurance carrier, which is how I construe his position on the issue.

20. Defendant points to the language of the statute as support for its assertion that the current employer bears responsibility. A prior employer no longer pays wages, it argues, and therefore cannot logically be barred from withholding them. As for extending the statute's mandate to the prior employer's carrier, it asserts that a carrier is empowered only to pay benefits, not wages. Again, therefore, the statutory prohibition against withholding wages cannot logically apply.

21. The Legislature is presumed to use statutory language advisedly, "and with intent that it should be given meaning and force." *Vermont State Colleges Faculty Federation v. Vermont State Colleges*, 138 Vt. 451, 455 (1980) (internal citations omitted). Individual provisions must be construed in light of the entire statutory framework, *Estate of Dunn v. Windham Northeast Supervisory Union*, 2012 VT 93, ¶8, citing *Trickett v. Ochs*, 2003 VT 91, ¶22, but a court "is not at liberty to read into the statute provisions which the legislature did not see fit to incorporate." *Archer v. Department of Employment Security*, 133 Vt. 279, 281 (1975), quoted with approval in *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 223 (2000).

22. Applying these rules of construction here, I find it significant that, in drafting the language of §640(c), the Legislature chose to create a prohibition against "withhold[ing] wages." I agree with Defendant that a workers' compensation insurance carrier has no role to play with respect to paying wages to, or withholding wages from, an injured employee. The carrier's obligation is to pay "compensation," or "benefits," terms that in the context of the Workers' Compensation Act are not synonymous with wages.[6] *See, e.g.*, 21 V.S.A. §§632 (death benefits), 642 (temporary total disability compensation), 645 (permanent total disability compensation), 646 (temporary partial disability compensation) and 648 (permanent partial disability compensation). For that reason, this is an instance where the statutory definition of "employer" under §601(3) logically cannot be read to include its insurance carrier as well.

23. As for whether the prohibition against withholding wages applies to a current or former employer, again the specific language of the statute is instructive. Section 640(c) imposes its obligation on "*an* employer" not to withhold wages from *an* employee" on account of "*a* work injury." In contrast, in the sections noted above, the statute imposes the obligation on "*the* employer" to pay indemnity benefits to "*the* injured employee" on account of "*the* work injury." Presumably the Legislature understood the difference between the indefinite article "a," which connotes a more generalized reference, and the definite article "the," which is meant to be more specific. *See, e.g., State Farm Fire & Casualty Co. v. Old Republic Insurance Co.*, 644 N.W.2d 715, 718 n.5 (Mich. 2002). In this way, it signaled its intent to broaden the prohibition against withholding wages to encompass an injured employee's current employer.

[6] As defined in the Act, the term "wages" signifies payments "which the employee receives from the employer as part of his or her remuneration." 21 V.S.A. §601(13). Considered in the context most applicable to their usage in the statute, Merriam-Webster defines "compensation" as "payment to unemployed or injured workers or their dependents," and "benefit" as "a payment or service provided for under an annuity, pension plan or insurance policy." *Merriam-Webster.com/dictionary*.

24. Claimant argues that it is unfair to impose the mandate of §640(c) on an employer who bears no responsibility for the underlying injury. The Legislature's authority to do so derives specifically from the Vermont Constitution:

> The General Assembly may pass laws compelling compensation for injuries received by employees in the course of their employment resulting in death or bodily hurt, for the benefit of such employees, their widows, widowers or next of kin. *It may designate the class or classes of employers and employees to which such laws shall apply*.

Vermont Constitution, Chapter II, §70 (emphasis added).

25. By using the language that it did in §640(c), the Legislature thus designated a class of employer upon which to impose the obligation not to withhold wages. Viewed in the context of a single case, the result may seem unfair. Viewed in the context of the system as a whole, it is an effective means of spreading the risk across all employers. Today, ECI must pay wages for time lost on account of an injury for which it was not responsible. Tomorrow, a worker injured while in ECI's employ will move on to another job, and ECI will be absolved of responsibility under §640(c).

26. Vermont's Workers' Compensation Act is to be liberally construed to accomplish the humane purpose for which it was passed; thus "no injured employee should be excluded unless the law clearly intends such an exclusion . . . ." *Herbert v. Layman*, 125 Vt. 481, 485-86 (1966), quoted with approval in *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983). As the facts of this case show, were the prohibition against withholding wages under §640(c) not imposed upon the current employer, Claimant would have no recourse at all. Given the plain language of the statute, I cannot presume the Legislature intended this result.

27. I conclude as a matter of law that Defendant's workers' compensation insurance carrier cannot be held liable for reimbursing wages withheld from Claimant under §640(c), and that Claimant's claim for reimbursement lies, if at all, against his current employer.

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED IN PART** and **DENIED IN PART**, as follows:

1. Summary judgment in Defendant's favor is hereby **GRANTED** as to Claimant's claim for vocational rehabilitation services causally related to his June 2002 work injury;

2. Summary judgment in Defendant's favor is hereby **GRANTED** as to Claimant's claim for workers' compensation benefits causally related to his erectile dysfunction, but **DENIED** as to Claimant's claim for workers' compensation benefits causally related to pain during sexual activity; and

3. Summary judgment in Defendant's favor is hereby **GRANTED** as to Claimant's claim for reimbursement under 21 V.S.A. §640(c).

DATED at Montpelier, Vermont this 17th day of March 2014.

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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.