STATE OF VERMONT
DEPARTMENT OF LABOR

Scott Myrick

v.

Ormond Bushey & Sons

Opinion No. 07-14WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Z-01465

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Erin Gilmore, Esq., for Defendant

ISSUES PRESENTED:[1]

1. Is Defendant obligated to reimburse Claimant for various medical charges he paid directly to Dr. Bucksbaum?

2. Is Defendant obligated to pay interest and/or penalties referable to its late payment of Dr. Bucksbaum's medical charges?

3. Is Defendant obligated to reimburse Claimant for monies he paid to an unlicensed provider who failed to properly bill for or substantiate the treatment rendered?

4. Does Defendant owe additional mileage reimbursement referable to Claimant's travel for medical treatment causally related to his compensable work injury?

[1] Defendant initially sought summary judgment as to Claimant's claim for wage replacement benefits under 21 V.S.A. §650(c) for time spent attending medical appointments necessitated by his injury. Claimant has now acknowledged that as he was not employed at the time of these appointments, he has "no viable lost wage claim." Therefore, I consider this claim withdrawn.

EXHIBITS:

Claimant's Exhibit 1:	Letter from Attorney McVeigh to Attorney Wright, October 13, 2010
Claimant's Exhibit 2:	Letters from Attorney McVeigh with attached cancelled checks, statement and Affidavit of Scott Myrick
Defendant's Exhibit 1:	Opinion and Order, *Myrick v. Ormond Bushey & Sons*, Opinion No. 31-10WC (October 5, 2010)
Defendant's Exhibit 2:	Dr. Bucksbaum medical bills, 06/08/2010 – 07/12/2011
Defendant's Exhibit 3:	Payment spreadsheet
Defendant's Exhibit 4:	Formal hearing referral memorandum, 7/10/13
Defendant's Exhibit 5:	State of Vermont Board of Chiropractic, Default Order, *In re Elmer Sweetland*, Docket No. CH 04-0105, with attached Specification of Charges

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. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Claimant suffered a compensable work-related injury on November 8, 2006. Following a formal hearing, on October 5, 2010 Defendant was ordered to pay workers' compensation benefits accordingly. *Myrick v. Ormond Bushey & Sons*, Opinion No. 31-10WC (October 5, 2010).

3. Claimant paid a total of $814.00 for medical treatment provided by Dr. Bucksbaum on two occasions – June 8, 2010 and July 8, 2010 – in accordance with Dr. Bucksbaum's billing for those dates. Shortly after the decision referenced above issued, by letter dated October 13, 2010 he requested that Defendant reimburse him for those payments, but Defendant did not do so.

4. In all, Dr. Bucksbaum billed a total of $3,210.00 for medical treatments rendered between June 8, 2010 and July 12, 2011. Consistent with the Commissioner's October 5, 2010 Opinion and Order, to the extent these treatments were both causally related to the work injury and medically necessary, Defendant was obligated to pay for them.

5. On or about May 10, 2012 Defendant issued payment in the amount of $2,869.06 to Dr. Bucksbaum for the above dates of service, including the two dates of service (June 8th and July 8, 2010) that Claimant previously had paid directly. The difference between the amount paid and the amounts billed likely represented reductions taken upon application of the medical fee schedule, Workers' Compensation Rule 40.

6. The record does not reflect when Defendant first received the billings upon which its May 10, 2012 payment to Dr. Bucksbaum was based. Neither Defendant's identity nor the identity of its workers' compensation insurance carrier is reflected on the bills. In addition, on each of the bills the "No" box is checked in response to the question, "Is patient's condition related to employment?"

7. Defendant has paid Claimant a total of $1,654.32 as reimbursement for various mileage, meals and lodging expenses he claimed were due, in accordance with an interim order issued by the Department's specialist on July 10, 2013. The amount paid included interest and penalties as specified in the interim order.

8. Consistent with the specialist's interim order, the mileage expenses that Defendant paid were calculated after deducting Claimant's normal commute distance to and from his workplace, *see* Workers' Compensation Rule 12.2000, which at the time of his injury was 70.2 miles. At the time these mileage expenses were incurred, Claimant was neither employed nor receiving temporary total disability benefits.

9. When Claimant began treating with Dr. Bucksbaum, his mileage to and from Dr. Bucksbaum's Rutland, Vermont office totaled 80.4 miles. At some point, Dr. Bucksbaum relocated his practice from Rutland to Maine. The record does not clearly reflect the mileage to and from Dr. Bucksbaum's Maine office, though based on the specialist's interim order it appears to have been in excess of 600 miles round-trip.

10. Claimant underwent chiropractic adjustments with Monk Sweetland, an unlicensed chiropractor, on November 8th, November 22nd and December 15th, 2008 and on February 16th, 2009. Dr. Sweetland's chiropractic license previously had expired on September 30, 2004. Subsequently, the State of Vermont Board of Chiropractic revoked the license, effective September 8, 2005, on the grounds that Dr. Sweetland had engaged in unprofessional conduct. Among the allegations accepted as true in the revocation order were that he had failed to maintain patient medical records, continued to treat patients after his license lapsed and adjusted animals in his practice without first obtaining a veterinary referral.

11. Claimant paid Dr. Sweetland a total of $180.00 for the treatments rendered on the above dates, in accordance with a billing statement entitled "Monk's Place." Beneath the title the word "Consultant" appears. Beneath that is the phrase, "Common sense solutions to everyday problems" and beneath that, "Help when you need it." Aside from the dates of service, amounts charged and a two-word illegible notation, the billing statement does not reflect either the diagnosis or the specific treatments provided.

CONCLUSIONS OF LAW:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

2. Defendant here seeks summary judgment in its favor as to whether it is obligated to reimburse Claimant for the following expenses:

   - $814.00 for treatment with Dr. Bucksbaum on June 8th and July 8th, 2010;
   - $180.00 for treatment with Dr. Sweetland from November 8th, 2008 through February 16th, 2009; and
   - Additional mileage for treatment-related travel to and from Dr. Bucksbaum's Maine office, representing the amounts deducted from previous reimbursements in consideration of Claimant's normal commute distance to and from work.

Procedural Issues

(a) Constitutionality of Summary Judgment in Workers' Compensation Proceedings

3. As his first argument in opposition to Defendant's motion, Claimant asserts that summary judgment in the context of Vermont's workers' compensation statute should be limited solely to consideration of issues that are based "entirely upon a question of law," and not those that require determination of a "factual legal issue." He argues that because the statute, 21 V.S.A. §670, allows for a *de novo* appeal of the commissioner's decision to the superior court, for the commissioner to rule as a matter of law that no genuine issue of material fact exists in effect deprives the opposing party of its constitutional right to a jury trial.

4. The commissioner's authority to determine the amount of compensation due under the Workers' Compensation Act by way of a formal hearing derives directly from the statute, 21 V.S.A. §§606, 663 and 664. The Vermont Rules of Civil Procedure are applicable to formal hearings "insofar as they do not defeat the informal nature of the hearing." Workers' Compensation Rule 7.1000. In accordance with this rule, the commissioner has at times applied the summary judgment procedure, V.R.C.P. 56, as a means of adjudicating contested claims. This includes both claims in which purely legal issues are decided, *see, e.g., Yustin v. State of Vermont Department of Public Safety*, Opinion No. 27-09WC (July 17, 2009), *aff'd* 2011 VT 20, and those in which no genuine issue of

material fact are found to exist, *see, e.g., Hathaway v. S.T. Griswold & Co.*, Opinion No. 04-14WC (March 17, 2014).

5. The Vermont Supreme Court has upheld the constitutionality of summary judgment as a mechanism for disposing of issues, claims and defenses that do not merit a full trial. *In re Deer View LLC Subdivision Permit*, 2009 VT 20, ¶3; *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 264 (1981). The function of summary judgment is to avoid a useless trial, that is, one where there is no genuine issue as to any material fact. *Sykas v. Kearns*, 135 Vt. 610, 612 (1978). Summary judgment does not entail a trial of the underlying merits of a case. "Rather, it resolves the question whether the party opposed to the motion can demonstrate that [it] has evidence sufficient to create an issue." *Tierney v. Tierney*, 131 Vt. 48, 51-52 (1973).

6. As these well-settled principles establish, the line Claimant seeks to draw – between summary judgment as to a purely legal issue and summary judgment as to a "factual legal issue" – is a distinction without a difference. In both cases, the losing party lacks the facts necessary to establish a prima facie case, such that judgment "as a matter of law" is appropriate. *Ross v. Times Mirror, Inc.*, 164 Vt. 13 (1995).

7. Claimant here argues that because the workers' compensation statute allows for a *de novo* appeal to the superior court on issues of fact, somehow that excuses him from having to present sufficient evidence to overcome summary judgment at the formal hearing stage. The commissioner's vital role in the dispute resolution process is not so easily dismissed, however. The Supreme Court has repeatedly acknowledged the deference due the commissioner's initial interpretation and application of the workers' compensation statute, having been entrusted by the Legislature with its administration. *See, e.g., Cyr v. McDermott's*, 2008 VT 106, ¶7; *Travelers Indemnity Co. v. Wallis*, 2003 VT 103, ¶14; *Wood v. Fletcher Allen Health Care*, 169 Vt. 419, 422 (1999). As the Court specifically has noted, "This is true notwithstanding the fact that the workers' compensation statutes authorize a trial *de novo* in superior court." *Letourneau v. A.N. Deringer/WAUSAU Insurance Co.*, 2008 VT 106, ¶8.

8. Indeed, recognizing the commissioner's primary jurisdiction over the adjudication of disputes, whether factual or legal, arising under the Workers' Compensation Act, *Travelers Indemnity Co., supra*, the statute, 21 V.S.A. §671, requires that even a *de novo* appeal to superior court must be based solely on questions certified to it by the commissioner. Issues not first considered at the formal hearing stage will not be certified, and therefore are not ripe for consideration on appeal. *See, Morrisseau v. Legac*, 123 Vt. 70, 73 (1962) (applying same statutory language in context of supreme court appeal).

9. I conclude that the commissioner's use of summary judgment as a mechanism for ruling as a matter of law that a party lacks the evidence necessary to present a genuine issue of material fact is an appropriate use of the authority granted by the workers' compensation statute, one which does not deprive the losing party of its constitutional right to a jury trial in any respect.

(b) Admissibility of Hearsay-Based Spreadsheet

10. As a second procedural issue, Claimant asserts that because the spreadsheet (Defendant's Exhibit 3) that Defendant submitted to establish its payment of Dr. Bucksbaum's outstanding bills is based on unauthenticated hearsay, it should not be considered in support of its motion for summary judgment. In making this argument, Claimant does not suggest that the document contains any factual errors or misrepresentations, intentional or otherwise. Rather, he objects to the spreadsheet as a matter of "form and substance."

11. As is the case with the rules of civil procedure, the Vermont Rules of Evidence are applicable to formal hearings, but only "insofar as they do not defeat the informal nature of the hearing." Workers' Compensation Rule 7.1000. Hearsay is admissible "provided that it is of a type commonly relied upon by prudent people in the conduct of their affairs, conforms to the requirements of [Rule 7.1000], and the opposing party has had sufficient notice of it to verify its accuracy." Workers' Compensation Rule 7.1010.

12. Aside from his general characterization of Defendant's spreadsheet as "inadmissible hearsay," Claimant has not asserted any grounds for disqualifying the evidence in accordance with the factors listed in Rule 7.1010. In keeping with the informal nature of workers' compensation proceedings before the commissioner, and without any allegation that the exhibit contains false, misleading or erroneous information, I conclude that it is admissible.

Defendant's Obligation to Reimburse Claimant for Monies Paid to Dr. Bucksbaum

13. Defendant seeks summary judgment in its favor as to its obligation to reimburse Claimant for two bills, totaling $814.00, which he paid directly to Dr. Bucksbaum for medical treatment causally related to his work injury. Some two years later, Defendant issued payment to Dr. Bucksbaum to cover all of his billings, including the two bills Claimant previously had paid. In doing so, Defendant ignored at least one prior notification from Claimant, in which he identified both the service provided and the amount paid, and requested prompt reimbursement.

14. Defendant has made no attempt to explain why it failed to respond to Claimant's request. Instead, it seeks to shift the blame to Dr. Bucksbaum, for having accepted what amounted to double payment for the two bills without subsequently issuing a refund to Claimant. Defendant cites no legal theory in support of its position. Nor can I discern support from the statute.

15. Section 640a(a) of the workers' compensation statute requires that within 30 days after receiving a bill from a health care provider, an employer must either "pay *or reimburse* the bill," 21 V.S.A. §640a(a)(1) (emphasis added), or give written notice that it is contesting or denying it. 21 V.S.A. §640a(a)(2). It is reasonable to infer from the italicized language that the Legislature contemplated the exact situation presented here – that the injured worker, or perhaps a group health insurer, will already have paid the bill, such that reimbursement to someone other than the provider itself will have to be made. If, as may have been the case here, the bill is submitted without sufficient information to determine its compensability, the employer has an affirmative obligation to promptly request whatever additional records or reports are necessary. 21 V.S.A. §640a(a)(2).

16. The undisputed evidence here establishes that Defendant was aware of Claimant's claim for reimbursement at least as of October 13, 2010. However, the record does not reflect what steps, if any, it took subsequently to request additional information, whether from Claimant or directly from Dr. Bucksbaum. If it took appropriate action and received no response, its obligation to pay or reimburse may have expired, *see* 21 V.S.A. §640a(f). If it took no action, it likely remains responsible even today. In either event, for so long as the question remains unresolved summary judgment in Defendant's favor is not appropriate.

17. I conclude that genuine issues of material fact exist as to Defendant's obligation to reimburse Claimant a total of $814.00, representing payment for treatment he received from Dr. Bucksbaum on June 8th and July 8th, 2010. Therefore, it is not entitled to summary judgment on this issue.

Defendant's Obligation to Pay Interest and Penalties to Dr. Bucksbaum

18. In his Opposition to Defendant's Motion, Claimant requests that Defendant be ordered to pay interest and penalties to Dr. Bucksbaum on account of its delayed payment of his treatment-related charges between June 8, 2010 and July 12, 2011. Procedurally, as Defendant has not sought summary judgment on this issue Claimant has chosen the wrong context in which to raise it. Even if it was appropriately raised, the evidence is insufficient at this point to support such an order.

19. The undisputed evidence clearly documents a significant delay between the treatment dates, which ranged from June 8, 2010 through July 12, 2011, and the date when payment was issued, May 10, 2012. However, the record does not establish when Defendant first received both the bills and the supporting medical records, which would have been the trigger for determining when payment was due under §640a. Without this information, I cannot calculate whether the payment was late, and therefore I cannot assess either interest or penalties.

Defendant's Obligation to Reimburse Claimant for Monies Paid to Dr. Sweetland

20. Defendant seeks summary judgment in its favor as to its obligation to reimburse Claimant a total of $180.00, representing payment for four treatments he received from Dr. Sweetland between November 8, 2008 and February 16, 2009. It asserts that because Dr. Sweetland was not a licensed health care provider at the time he rendered treatment, and also because he failed to document his charges appropriately, as a matter of law he is not entitled to payment under the statute.

21. The statute requires an employer to pay for "reasonable . . . medical . . . services" necessitated by a compensable injury. 21 V.S.A. §640(a). It is logical to infer that only lawfully delivered medical services are covered by this mandate. Otherwise, it would be difficult to ensure that the treatment provided meets the appropriate standards of care and quality. For this reason, where the statute elsewhere references health care providers, for example in §§640(b) (allowing employer or employee to designate a "treating health care provider") and 640a (establishing procedure for reviewing and paying "health care provider" bills), it defines the term to mean a practitioner who is "licensed or certified or authorized by law to provide professional health care service to an individual . . .." 21 V.S.A. §601(22).

22. A practitioner who is not required to be licensed or certified under Vermont law can lawfully provide treatment, and therefore an employer may still be responsible under §640(a) for paying the charges related thereto.[2] *V.O. v. Windsor Hospital*, Opinion No. 12-08WC (March 27, 2008). But where Vermont law requires that only a licensed or certified practitioner can provide a particular type of medical service, such that treatment rendered by an unlicensed provider is unlawful, I must consider it to be unreasonable as well, and therefore not covered under §640(a).

23. The undisputed evidence here establishes that Dr. Sweetland was not licensed to practice chiropractic medicine at the time that he provided treatment to Claimant, as is required under Vermont law, 26 V.S.A. §522(a). That in itself disqualifies him from receiving payment under §640(a). That he also failed either to maintain treatment records or to submit appropriately documented and coded medical bills, as is required under §§640a(f) and (g), further disqualifies him.

24. Claimant argues that Defendant should be obligated to reimburse him nonetheless, because he was unaware that Dr. Sweetland was not licensed and consequently paid for the services he received "in good faith." The statute does not allow for any such exception, and strong policy considerations weigh against it. The fact is, by providing treatment without a license, Dr. Sweetland put Claimant's safety and health at risk. That Claimant paid his bill without recognizing the danger is unfortunate, but it is not a consequence I properly can lay at Defendant's feet.

[2] For example, massage therapists are not required to be licensed under Vermont law; their charges are routinely covered under §640(a).

25. I conclude that because Dr. Sweetland was not licensed to practice chiropractic medicine at the time he treated Claimant, as a matter of law the services he provided are not covered under the workers' compensation statute. For this reason, and also because Dr. Sweetland failed either to maintain treatment records or to submit appropriately documented medical bills, I conclude as a matter of law that Defendant is not obligated to pay his charges, either directly or by way of reimbursement to Claimant.

Defendant's Obligation to Reimburse Claimant for his "Normal Commute Distance" Mileage Expenses

26. Defendant seeks summary judgment in its favor as to whether it is obligated to include Claimant's normal commute mileage to and from work as part of the mileage reimbursement due him, under Workers' Compensation Rule 12.2100, for his treatment-related travel to and from Dr. Bucksbaum's Maine office. As Claimant was neither employed nor receiving temporary total disability benefits at the time of these excursions, he contends that the "normal commute distance" deduction should not have applied.

27. Under Rule 12.2100, an injured worker who is required to travel for treatment of a compensable injury is entitled to reimbursement for mileage "beyond the distance normally traveled to the workplace." The purpose of the rule is to make the worker whole, by providing compensation for expenses that he or she would not have incurred but for the work injury. At the same time, the rule is phrased so as to deny reimbursement for regular commuting expenses that presumably the worker would have had to bear even had there been no injury. *Fosher v. Fletcher Allen Health Care*, Opinion No. 11-11WC (May 5, 2011).

28. Although often not specifically authorized by statute, most jurisdictions consider treatment-related transportation expenses, whether local or distant, to be included as part of an employer's obligation to provide medical benefits to an injured worker. *See generally*, 5 Lex K. Larson, *Larson's Workers' Compensation* §94.03[2] (Matthew Bender, Rev. Ed.) and cases cited therein. As Vermont's statute is silent on the issue, Rule 12.2100 was promulgated with that interpretation in mind. Both the language and the purpose of the rule are clear, and do not allow for the exception Claimant favors.

29. I conclude as a matter of law that Defendant appropriately deducted the mileage referable to Claimant's normal commute distance to and from work from the reimbursement due him on account of his treatment-related travel to and from Dr. Bucksbaum's Maine office.[3] Summary judgment in its favor is appropriate, therefore.

[3] As further support for its summary judgment claim, Defendant argues that it should be excused from paying additional mileage related to Claimant's travel to and from Dr. Bucksbaum's Maine office because he likely could have obtained the same treatment from another, more locally situated provider. Having concluded as a matter of law that Rule 12.2100 does not permit the interpretation for which Claimant advocates, I need not reach this argument. In any event, the proper context for Defendant to have raised this defense would have been with respect to its obligation to pay Dr. Bucksbaum's charges themselves, not the mileage charges to and from his office.

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 **DENIED** as to its obligation to reimburse Claimant in the amount of $814.00, representing payment for treatment he received from Dr. Bucksbaum on June 8th and July 8th, 2010;

2. Summary judgment in Defendant's favor is hereby **GRANTED** as to its obligation to reimburse Claimant in the amount of $180.00, representing payment for treatments he received from Dr. Sweetland between November 8, 2008 and February 16, 2009;

3. Summary judgment in Defendant's favor is hereby **GRANTED** as to its obligation to include Claimant's normal commute mileage to and from work as part of the reimbursement due him for his treatment-related travel to and from Dr. Bucksbaum's Maine office.

DATED at Montpelier, Vermont this 24th day of April 2014.

_____

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.