

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Kimberly Haller

Opinion No. 14-16WC

v.

By: George K. Belcher, Esq.
Administrative Law Judge

Champlain College Corp.

For: Anne M. Noonan
Commissioner

State File No. FF-61172

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

J. Justin Sluka, Esq. for Defendant
William B. Skiff, Esq. for Claimant

ISSUE PRESENTED:

As a matter of law, is Defendant obligated to include in Claimant's average weekly wage calculation the value of tuition-free college credits she earned in accordance with Defendant's employee tuition policy?

EXHIBITS:

Claimant's Exhibit 1: Claimant's Statement of Undisputed Material Facts
Claimant's Exhibit 2: Tuition Benefits/Human Resources and Organizational Development

Defendant's Statement of Undisputed Material Facts, 12/24/15
Defendant's Exhibit A: Employer First Report of Injury
Defendant's Exhibit B: Tuition Benefits/Human Resources and Organizational Development
Defendant's Exhibit C: Summary of Claimant's courses taken and value per credit
Defendant's Exhibit D: Wage Statement (Form 25)
Defendant's Exhibit E: Notice and Application for Hearing (Form 6)
Defendant's Exhibit F: Formal hearing docket referral, February 5, 2015

FINDINGS OF FACT:

The following facts are undisputed:

1. The parties have filed reciprocal motions for summary judgment.
2. At all times relevant to these proceedings Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.
3. On March 10, 2014 Claimant suffered a work related injury, which Defendant has accepted.
4. At the time of her injury, Claimant was employed by Defendant as its Recruitment Director.
5. Since May 2012, Claimant had been taking graduate courses at Champlain College under its "Tuition Policy." That policy allows college employees, their spouses and eligible dependent children to take college courses on a tuition-free basis. The courses are offered on a "space available" basis and there are a number of limitations. There is no limit, however, on the number of courses or degrees that an employee may take over the course of his or her career at the college. *Defendant's Exhibit C.*
6. The Tuition Policy provides that an employee who undertakes a tuition-free master's degree program must complete one full year of employment after completing the program. If he or she quits the program or fails to complete the one-year employment period thereafter, the Policy makes provision for the employee to reimburse the college for a portion of the tuition that would have been charged to a paying student. *Defendant's Exhibit C, Section 4.4.1.*
7. The purpose of the college's tuition benefits policy is stated in part as follows: "This policy outlines educational benefits provided by the College to employees in order to facilitate professional development and engagement." *Defendant's Exhibit C.*
8. The free tuition policy was a substantial benefit to Claimant and one of the reasons she worked at Champlain College. The policy allowed her to work towards and earn a graduate degree without paying tuition. *Claimant's Exhibit 1.* Claimant was taking courses as part of her progress towards a Master's Degree in Mediation and Applied Conflict Studies. *See Defendant's Opposition to Claimant's Cross Motion for Summary Judgment, Factual Background at p. 2.*
9. Using just her paid wages, Claimant's average weekly wage was \$987.12. *Claimant's Exhibit 1 at ¶3.*

10. Claimant enrolled in the following courses at the following times:

Dates	Course Name	Credit Hours	Value Per Credit	Status
5/14 – 7/3/12	Conflict Intervention	6	\$599	Completed
8/27 – 10/27/12	Fieldwork 1	3	\$599	Completed
10/29 – 12/13/12	Negotiation	3	\$599	Completed
1/7 – 3/9/13	Interpersonal Conflict	3	\$599	Completed
1/7 – 3/9/13	Advanced Practice 1	1.5	\$599	Dropped ¹
3/11 – 5/11/13	Mediation Models	3	\$599	Completed
5/13 – 7/6/13	Identity Based Conflict	1.5	\$599	Completed
5/13 – 7/6/13	Advanced Practice 1	1.5	\$599	Completed
8/26 – 10/23/13	Research Methods	3	\$639	Completed
10/28 – 12/14/13	Technology and Med.	3	\$639	Completed
1/6 – 3/1/14	Organizational Conflict	1.5	\$639	Completed
1/6 – 3/1/14	Principles of Con. Anal.	3	\$639	Completed
3/10 – 5/3/14	International Conflict	3	\$639	Dropped ²
3/10 – 5/3/14	Fieldwork 2	3	\$639	Dropped
8/25 – 10/18/14	Fieldwork 2	3	\$660	“in process” ³
8/25 – 10/18/14	Systems and Conflict	3	\$660	“in process”

11. Claimant completed and was credited with 27 course credits between May 2012 and July 2014. *Claimant’s Exhibit 1.*

12. Claimant is not seeking that the value of the tuition-free credit hours she earned be included in her average weekly wage for purposes of temporary total benefits, because the benefit continued to be available to her during the period of her temporary disability. Rather, she asserts that the value of the credit hours be included in her average weekly wage calculation for purposes of calculating the permanent partial disability benefits due. *See Claimant’s February 16, 2016 Supplemental Memorandum of Law.*

¹ Claimant dropped this class on January 14, 2013. She did not earn any credit hours and reimbursed the college for 25 percent of the course tuition.

² Claimant’s work injury occurred on March 10, 2014, just days after this course started.

³ From the evidence submitted, I cannot discern whether the “in process” classes were completed or not.

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, 2523 (1991). Summary judgment is appropriate only when the facts in question are clear, undisputed, or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of comparative plausibility of facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.* 2005 VT 115.
2. Vermont's Worker's Compensation Act uses the wages paid during the 26-week period prior to injury as a measure upon which disability payments are based. The Act defines "wages" to include "bonuses and the market value of board, lodging, fuel, and other advantages which can be estimated in money which the employee receives from the employer as part of his or her remuneration." 21 V.S.A. §601(13).
3. As stated by Professor Larson in his treatise on workers' compensation: "In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but anything of value received as consideration for the work, as, for example, tips, bonuses, commissions, and room and board, constituting real economic gain to the employee." 2 A. Larson, *The Law of Workers' Compensation*, §60.12 (1987). As stated in another treatise, "The value of education, training and experience may be considered as part of an employee's remuneration, though there is contrary authority." 11 *Corpus Juris Secundum* §609.
4. There is no Vermont case law applying the "other advantages" language to free tuition benefits for college coursework.
5. A number of cases have determined that the statutory language "other advantages" does not include health insurance premiums provided by the employer. *Lydy v. Trustaff*, 194 Vt. 165 (2013); *Pikens v. NSA Industries*, Opinion No. 36-98WC (June 24, 1998); *Pelissier v. Hannaford Brothers*, Opinion No. 26-11WC (September 9, 2011).
6. On the other hand, the term "other advantages" has been held to justify increasing an injured worker's average weekly wage to include the value of massages that were made available to an employee, *Estate of Lyons v. American Flatbread*, Opinion No. 36R-03WC (Nov. 3, 2003), and the value of a ski pass conferred upon a part-time ski instructor, *Gaboric v. Stratton Mountain/Wilburton Inn*, Opinion No. 12-04WC (April 26, 2004).

7. Defendant makes the following arguments to exclude the tuition benefit value in Claimant's average weekly wage. First, it argues that the same rationales that the Vermont Supreme Court used in *Lydy* to deny inclusion of health insurance premiums should apply here by analogy: (1) the benefit might, or might not, be of eventual benefit to the employee depending upon uncontrollable contingencies; (2) the history of Vermont's Worker's Compensation Act did not likely contemplate the growth of employee benefits; and (3) the benefit must be "remuneration" in order to fall within the wage umbrella and must be tied somehow to the employee's labors, rather than coming simply from the status of employee.
8. Next, Defendant argues that the Workers' Compensation Act has not been significantly amended since its adoption to include expanded employee benefits, so it can be presumed that "other advantages" should continue to be narrowly construed. Defendant also argues that any "other advantage" that might be included as part of a wage calculation must be similar to "room, board, food, electricity, telephone, uniforms or similar benefit," citing Workers Compensation Rules 8.1130 and *Gaboric, supra*.⁴ The argument continues that because the listed items (food, uniforms, etc.) are things needed to do a job, any extraneous "other advantage" must therefore be essential to the job in order to be included in the wage calculation. Finally, Defendant argues that Claimant could not have taken a cash equivalent of the value of the courses had she chosen not to avail herself of the benefit, *see Pickens, supra*. According to Defendant, "The courses are the very definition of fringe benefit..." and therefore outside of consideration as "other advantage" under *Lydy*.⁵
9. Many of the arguments that Defendant has attempted to transpose from *Lydy* are unpersuasive here. *Lydy* was a three-to-two decision by the Vermont Supreme Court, with an elaborate analysis by the dissenters. For example, the argument that the legislature has not frequently amended our Workers' Compensation Act can just as easily amplify the "wide net" of the meaning of "other advantages" to allow flexibility concerning the development of modern employee benefits.⁶ The majority in *Lydy* also relied heavily upon the Commissioner's previous decisions, which rejected including health insurance benefits as "other advantages." There is no such history here.

⁴ *Defendant's Opposition to Claimant's Cross-Motion for Summary Judgment at p. 4.*

⁵ It is unclear what effect the label "fringe benefit" has in this context, because the statute does not exclude "fringe benefits" from consideration as wages. To the contrary, if a benefit (fringe or otherwise) is within the term "other advantages," it qualifies as wages.

⁶ "The broad reference to 'other advantages' an employee receives from the employer suggests a legislative intent to cast a wide net, consistent with its goal of protecting earning capacity. We have previously recognized that, although the term 'wages' ordinarily implies 'compensation in money,' the term, as used in Vermont's workers' compensation statute, 'is synonymous with earnings,' and includes 'material objects or benefits other than cash.'" *Lydy, supra* at ¶31 (Robinson, J., dissenting), quoting *Quinn v. Pate*, 124 Vt. 121, 124 (1964).

10. There are only a few pertinent cases from other jurisdictions concerning the question now before me. In *Casualty Underwriters v. Whitman*, 139 S.W.2d 261 (Tex. Com. App. 1940), the Texas appellate court denied inclusion of a machinist's training and experience under statutory language similar to Vermont's law, because its value was "not subject to measurement" nor capable of definite ascertainment in terms of money." In *Blackwelder v. Faith Heritage School*, 811 N.Y.S.2d 225 (2006), the Supreme Court of New York determined that a maintenance and custodial worker, whose three children attended the school tuition free, was not entitled to include the value of this benefit in his average weekly wage because the "tuition benefit was an additional benefit not given as remuneration for services provided by the claimant..." *id.* at 1006.
11. As the hearing authority considers whether novel employee benefits should be included within the scope of "other advantages," the following principles gleaned from prior decisions should be applied. First, is the benefit a "significant part" of the compensation, *see Gaboric, supra* at 15. Second, does the employee derive true value from the offered benefit or is it a benefit that means little to the employee except as an enhancement to average weekly wage, *see Lydy, supra* at 154. Third, is the value of the benefit reasonably subject to objective valuation? While the statute allows "advantages" other than wages to be "estimated," the valuation cannot be so ambiguous or amorphous that it jeopardizes the insurable interests of the employee/employer relationship. As was stated in *Pelissier v. Hannaford Brothers, supra*, "At the same time, [inclusion of health insurance premiums in the wage calculation] might complicate the wage calculation process to the point where the injured worker's right to timely benefits is compromised."
12. It is fundamental that the workers' compensation act is "remedial in nature and must be liberally construed to provide injured employees with benefits unless the law is clear to the contrary. *Lydy, supra* at ¶23.
13. Using the criteria set forth above, the tuition benefit at issue here qualifies as an "other advantage." First, the free tuition policy was considered by Claimant to be a benefit of her employment and a "substantial benefit to me and one of the reasons I worked at Vermont College." *Claimant's Exhibit 1*. Not only was the program a benefit that Claimant consistently used, but it also inured to Defendant's benefit as well, by encouraging her professional development and engagement in the college's programs. The College also benefitted by virtue of its employees' enhanced educational qualifications.
14. Second, Claimant derived true value from the tuition free program. She took advantage of it from 2012 until 2014 and was using it to acquire a master's degree. It was one of the reasons she worked for this employer.
15. Third, the benefit is capable of simple valuation. In fact, if Claimant defaulted on her obligations under the program, there was a formula by which she was required to reimburse the college for a portion of the value of the credit hours she had earned. *Defendant's Exhibit B, Section 4.4.1*. Calculating the value of the benefit is not so amorphous as to jeopardize the employee's right to compensation. Rather, the benefit is subject to simple valuation.

16. Finally, including the free tuition benefit in the wage calculation here will not upset the “delicate balance” struck between employees and employers in the workers’ compensation setting. Limited to the facts of this case, it is unlikely that the balance described in *Pelissier, supra*, will be upset. Moreover, the Commissioner’s task in this matter is to apply the law as written to the facts that are presented. If there are broader policy implications, these may be addressed by the legislature.
17. I conclude in this case that the free tuition benefit Claimant received qualifies as an “other advantage” that can be easily estimated and that was paid to her benefit as remuneration for her work.

ORDER:

Claimant’s Motion for Summary Judgment is hereby **GRANTED**. Defendant’s Motion for Summary Judgment is hereby **DENIED**. For the purposes of calculating permanent partial disability benefits, Claimant’s average weekly wage shall be adjusted to include the value of the credit hours she completed during the 26-week period prior to her March 10, 2014 compensable work injury.

DATED at Montpelier, Vermont this ____ day of August 2016.

Anne M. Noonan
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 VSA Sec. 670, 672.