STATE OF VERMONT
DEPARTMENT OF LABOR

Gloria Crowe

v.

The Fonda Group

Opinion No. 04-18WC

By: Phyllis Phillips, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. S-13358

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Stephanie Romeo, Esq., for Defendant

ISSUE PRESENTED:

Is Defendantôs workersô compensation insurance carrier obligated under 21 V.S.A. §640(c) to reimburse Claimant for wages withheld by his current employer?

EXHIBITS:

Claimantôs Exhibit 1:	First Report of Injury (Form 1) for accident date 11/19/2001
Claimantôs Exhibit 2:	Agreement for Permanent Partial or Permanent Total Disability Compensation (Form 22)
Claimantôs Exhibit 3:	Operative Note, October 28, 2015
Claimantôs Exhibit 4:	Correspondence from Claimantôs attorney with attached travel expense itemization, February 7, 2017
Claimantôs Exhibit 5:	Correspondence from Defendantôs attorney, March 22, 2017
Defendantôs Exhibit A:	First Report of Injury (Form 1) for accident date 11/19/2001

FINDINGS OF FACT:

The following facts are undisputed:

1. Claimant injured her right shoulder and cervical spine in the course and scope of her employment for Defendant on November 19, 2001. *First Report of Injury (Form 1) (Claimant's Exhibit 1); Agreement for Permanent Partial or Permanent Total Disability Compensation (Form 22) (Claimant's Exhibit 2)*.

2. At the time of Claimantôs injury, Lumbermanôs Mutual Casualty Co. was Defendantôs workersô compensation insurance carrier. *Claimant's Exhibit 1*.

3. Claimant did not return to work for Defendant following her injury. Instead, she pursued a vocational rehabilitation plan and earned a special educatorôs license. Thereafter, she began working as a special educator for her current employer, the Milton School District. *Claimant's Statement of Undisputed Facts*, ¶5; *Defendant's Statement of Undisputed Facts*, ¶3.

4. Claimantôs cervical spine injury was not caused, and has not been aggravated, by her current employment for the Milton School District. *Claimant's Statement of Undisputed Facts*, ¶6.

5. As treatment for her work-related cervical spine injury, Claimant underwent cervical fusion surgery with Dr. Phillips on October 28, 2015. *Claimant's Exhibit 3*.

6. Following her surgery, Claimant attended several follow-up medical appointments, including a permanency evaluation, all referable to her November 19, 2001 work-related injury. As a result, she missed time from work at her current job for the Milton School District. *Claimant's Exhibit 4; Claimant's Statement of Undisputed Facts,* ¶¶4, 7;[1] *Defendant's Statement of Undisputed Facts*, ¶4.

7. Claimant sought payment from Defendant for wages lost at her current job for the Milton School District while attending medical appointments referable to her November 19, 2001 work-related injury. Defendant denied responsibility for payment. *Claimant's Exhibit 5*.

DISCUSSION:

1. To prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of facts offered by either party or the likelihood that one party or another might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.,* 2005 VT 115, ¶15.

[1] Defendant disputes that the amounts stated in *Claimant's Exhibit 4* accurately reflect the lost wages attributable to Claimantôs attendance at her post-surgical medical appointments. However, it acknowledges that these facts are not material to the legal question posed by the partiesô summary judgment motions, which is whether her prior employerôs insurance carrier can be held responsible for paying lost wages earned in her current employment.

2. The disputed issue here is purely a legal one. It arises under 21 V.S.A. §640(c)[2] and is triggered by the following scenario: An employee suffers a work injury for Employer One, recovers and returns to work for Employer Two. Later, he or she requires additional medical treatment, necessitated solely by the injury for which Employer One was responsible, but resulting intermittently ï a few hours here, a day there ï in lost wages from Employer Two. Which employer is obligated to make the employee whole, as §640(c) requires ï Employer One or Employer Two?

3. Faced with the identical factual scenario, and construing the plain language of the statute, in *Hathaway v. S.T. Griswold & Co.*, Opinion No. 04-14WC (March 17, 2014), the Commissioner concluded that Employer Two bears responsibility. Subsequently, in an amendment effective August 1, 2015, the Department incorporated the Commissionerôs ruling into what is now WorkersôCompensation Rule 4.1400.[3]

4. The Commissionerôs interpretation of §640(c) as expressed in *Hathaway* rests on a solid foundation, now buttressed by a legally promulgated rule. Claimantôs arguments to the contrary notwithstanding, I can discern no basis for reconsidering or reversing it.

5. With reference to the rationale stated in *Hathaway*, I conclude as a matter of law that neither Defendant nor its workersôcompensation insurance carrier bears responsibility under §640(c) for paying the wages Claimant has lost in her current employment while attending medical appointments necessitated by her prior work injury. Under both statute and rule, liability rests instead with her current employer.

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[2] In pertinent part, §640(c) reads: ñAn employer shall not withhold any wages from an employee for the employeeôs absence from work for treatment of a work injury or to attend a medical examination related to a work injury.ò

[3] Rule 4.1400, entitled ñWages while undergoing medical treatment or examination,ò now reads: ñThis rule shall apply to an injured workerôs current employer, notwithstanding that the injury occurred while he or she was employed by a prior employer.ò

ORDER:

Claimantôs Motion for Summary Judgment is hereby **DENIED**. Defendantôs Motion for Summary Judgment is hereby **GRANTED**. Claimantôs claim against Defendant, or its workersô compensation insurance carrier, for reimbursement of wages lost in her current employment while attending medical appointments necessitated by her November 19, 2001 compensable work injury is hereby **DENIED**.

DATED at Montpelier, Vermont this 2nd day of March 2018.

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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.