STATE OF VERMONT
DEPARTMENT OF LABOR

Semir Mahmutovic	Opinion No. 22-22WC
v.	By: Beth A. DeBernardi Administrative Law Judge
Washington County Mental Health Services, Inc.	For: Michael A. Harrington Commissioner
	State File No. HH-63265

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
David A. Grebe, Esq., for Defendant

ISSUE PRESENTED:

Is Defendant obligated to pay Claimant the wages withheld by his current employer when he missed work to receive medical treatment for the injury he sustained during his prior employment with Defendant?

EXHIBITS:

Claimant's Exhibit 1:	*Hathaway v. S.T. Griswold & Co*., Opinion No. 04-14WC (March 17, 2014)
Claimant's Exhibit 2:	First Report of Injury (Form 1) and Report of Benefits and Related Expenses Paid (Form 13)
Claimant's Exhibit 3:	September 29, 2021 medical record of Thomas Gill, MD
Claimant's Exhibit 4:	Defendant's authorization for Dr. Gill's arthroscopy
Claimant's Exhibit 5:	Claimant's October 13, 2021 lost wage claim
Claimant's Exhibit 6:	Defendant's October 21, 2021 email transmitting its Denial (Form 2) of Claimant's lost wage claim
Claimant's Exhibit 7:	Claimant's counsel's memorandum of law filed in the *Hathaway* case in January 2014

FINDINGS OF FACT:

There is no genuine issue as to the following material facts:

1. Claimant sustained a work-related left knee injury arising out of and in the course of his employment with Defendant on April 27, 2016.[1] Defendant accepted his claim and paid workers' compensation benefits. *Claimant's Statement of Undisputed Material Facts* ("*Claimant's Statement*"), ¶ 1; *Claimant's Exhibit 2*; *Defendant's Statement of Undisputed Material Facts* ("*Defendant's Statement*"), ¶ 1.

2. Claimant eventually left his job with Defendant. He now works for the Howard Center in Burlington, Vermont. *Claimant's Statement*, ¶ 2; *Defendant's Statement*, ¶¶ 2-3.

3. Claimant has continued to seek medical treatment for his work-related left knee injury. *Claimant's Statement*, ¶ 3.

4. Claimant underwent evaluation and treatment of his left knee in Boston, Massachusetts, with orthopedic surgeon Thomas Gill, MD, on September 29, 2021. *Claimant's Statement*, ¶ 4; *Claimant's Exhibit 3*; *Defendant's Statement,* ¶ 4.

5. Defendant authorized Claimant's treatment in Boston with Dr. Gill. *Claimant's Statement*, ¶ 5; *Claimant's Exhibit 4*; *Defendant's Statement*, ¶ 5.

6. Claimant missed work at his current job at the Howard Center to travel to Boston for medical treatment with Dr. Gill. He submitted a request to Defendant for payment of eight hours of lost time at the Howard Center at an hourly rate of $19.09, for a total reimbursement of $152.72.[2] *Claimant's Statement*, ¶ 6; *Defendant's Statement,* ¶ 6.

7. Defendant denied payment of the lost wages on the grounds that 21 V.S.A. § 640(c) shifts the financial responsibility for such wages to Claimant's current employer, the Howard Center. *Claimant's Statement*, ¶ 7; *Claimant's Exhibit 6*; *Defendant's Statement*, ¶ 7.

CONCLUSIONS OF LAW:

Summary Judgment Standard

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). 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, 48 (1990).

[1] Claimant's Statement and the First Report of Injury (Form 1) both identify the injury date as April 27, 2016. Defendant's Statement identifies the date as May 23, 2016. This discrepancy is not material to the parties' cross motions for summary judgment.

[2] Claimant's Exhibit 5 sets forth his hourly rate as $19.13 and his lost wage claim as $153.04.

2. Where the parties have filed cross motions for summary judgment, each party is entitled to the benefit of all reasonable doubts and inferences when the opposing party's motion is being judged. *Toys, Inc., supra,* at 48.

3. Claimant here seeks summary judgment overruling the Department's prior decision in *Hathaway v. S.T. Griswold & Co.*, Opinion No. 04-14WC (March 17, 2014) and finding that Defendant is obligated under 21 V.S.A. § 640(c) to reimburse him for the wages he lost when he attended a medical appointment in Boston. Defendant seeks summary judgment upholding the Department's *Hathaway* decision and finding that Claimant's current employer is responsible for payment of the wages he lost to attend a work-related medical appointment.[3]

Employer's Obligation to Pay Wages under 21 V.S.A. § 640(c)

4. The Vermont workers' compensation statute provides that an "employer shall not withhold any wages from an employee for the employee's absence from work for treatment of a work injury…." 21 V.S.A. § 640(c). If the injured employee has not changed jobs, then the application of § 640(c) is straightforward. The controversy arises when the employee sustains an injury with one employer and then seeks medical treatment while working for a subsequent employer. Under those circumstances, the parties disagree about whether the original employer or the current employer is responsible for paying the wages the employee would have earned had he or she not been attending a work-related medical appointment.

5. The Commissioner decided this issue in 2014, ruling that the original employer and its workers' compensation insurance carrier cannot be held liable for reimbursing wages withheld from an injured worker under § 640(c) by his current employer. Instead, the injured worker's claim for reimbursement lies, if at all, against his current employer. *See Hathaway, supra,* at Conclusion of Law Nos. 16 through 27.

6. For the reasons set forth in *Hathaway*, I uphold the Commissioner's statutory interpretation of § 640(c) and conclude that Defendant is not liable for reimbursing the wages Claimant lost from his current employer when he sought medical treatment in Boston. Claimant's claim for those lost wages properly lies against his current employer.

Claimant's Standing to Challenge the Constitutionality of the Department's Application of 21 V.S.A. § 640(c)

7. Claimant contends that requiring his current employer to pay his wages under § 640(c) is an unconstitutional violation of his current employer's due process rights. He requests that the Department rectify the alleged constitutional deficiency by interpreting § 640(c) in such a way as to require Defendant to pay those wages instead. In short, Claimant contends that his current employer bears no responsibility for his work-related injury and that it is therefore unfair to require the current employer to

[3] Although Defendant did not caption its filing as a cross motion, it specifically requested that "judgment as a matter of law be entered in favor of the Defendants." *Defendant's Opposition*, at 1.

pay the wages he would have earned had he not been attending the medical appointment. *Claimant's Motion*, at 2. In response, Defendant contends that Claimant lacks standing to litigate this issue before the Department.

8. An administrative agency does not have the authority to rule on the constitutionality of a statute it administers, but it does have jurisdiction to consider claims that the statute was administered in an unconstitutional manner. *See Luck Bros., Inc. v. Agency of Transportation*, 2014 VT 59, ¶ 21; *Williams v. State*, 156 Vt. 42, 53-54 (1990); *Alexander v. Town of Barton*, 152 Vt. 148, 151 (1989). In so doing, the agency may interpret the statute in such a manner as to avoid the constitutional issue. *See, e.g., State v. Colby*, 2009 VT 28, ¶ 9; *State v. Berard*, 2019 VT 65, ¶ 16.

9. In order for the Department here to determine the constitutionality of § 640(c) as applied to Claimant's lost wage claim, Claimant must demonstrate that he has standing to raise the issue. If he does not have standing, then the Department does not have jurisdiction over his request. *See Brod v. Agency of Natural Resources*, 2007 VT 87, ¶ 2, citing *Parker v. Town of Milton*, 169 Vt. 74, 77 (1998).

10. To establish standing, a plaintiff "must present a real – not merely theoretical – controversy involving the threat of actual injury to a protected legal interest rather than merely speculating about the impact of some generalized grievance." *Brod, supra*, at ¶ 9 (quotations omitted). To meet this burden, a plaintiff must show "(1) injury in fact, (2) causation, and (3) redressability." *Id*., quoting *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 341 (1997).

11. Claimant here asserts that he has suffered an injury in fact because he made a claim for his lost wages from Defendant, and Defendant declined to pay them. *See* Finding of Fact Nos. 6-7 *supra.* If Defendant owes the wages but did not pay them, then Defendant's failure to pay is the cause of Claimant's loss. Finally, the Department can redress the alleged injury by ordering Defendant to pay the wages, if the Department agrees that Defendant owes them. Accordingly, I conclude that Claimant has met the requirements for standing to pursue his wage claim against Defendant, which claim includes a challenge to the constitutionality of the Department's application of § 640(c). *See Brod, supra,* at ¶ 9; *see also Hathaway, supra*, at Conclusion of Law No. 16, footnote 5 (claimant has standing to assert his wage claim against his prior employer under § 640(c)).

12. Defendant contends that Claimant lacks standing because he has not asked his current employer to pay his lost wages, nor has the current employer expressly declined to pay those wages. Accordingly, Defendant contends that Claimant has not yet suffered any injury and therefore fails to meet the standing criteria.

13. To the extent that Claimant has a claim for lost wages against his current employer, I agree that he has not yet suffered an injury and has no standing to assert a constitutionally cognizable claim on the current employer's behalf. However, he is asserting his claim against Defendant, not against the current employer, and he has standing to do that. Conclusion of Law No. 11 *supra*.

Constitutionality of § 640(c) as Applied to Claimant's Wage Claim

14. The claimant in *Hathaway* argued that it was unfair and unconstitutional to impose the mandate of § 640(c) on his current employer, as the current employer bore no responsibility for his underlying injury. Therefore, to avoid an unconstitutional application of the statute, the Commissioner was obligated to impose the mandate of § 640(c) on the defendant – the employer in whose service Hathaway sustained his injury.

15. The Commissioner in *Hathaway* disagreed. She concluded that requiring the claimant's current employer to pay his lost wages was not a constitutional violation, as the Legislature lawfully designated current employers as the class of employers upon whom that obligation would rest pursuant to the following provision of 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). *See Hathaway*, *supra*, at Conclusion of Law Nos. 24 through 27.

16. Having considered the issue, I conclude that the Commissioner's determination of the constitutionality of its application of § 640(c) in *Hathaway* is sound. I therefore uphold that determination and apply it to Claimant's wage claim here. Claimant has a claim for lost wages, if at all, against his current employer. Defendant has no obligation to pay Claimant the wages withheld by his current employer when he missed work to receive medical treatment for the injury he sustained during his prior employment with Defendant.

ORDER:

Claimant's Motion for Summary Judgment is hereby **DENIED.** Defendant's Cross Motion for Summary Judgment is hereby **GRANTED.**

DATED at Montpelier, Vermont, this 4th day of November 2022.

_____
Michael A. Harrington
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.