

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

David Yustin

Opinion No. 27-09WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

State of Vermont  
Department of Public Safety

For: Patricia Moulton Powden  
Commissioner

State File No. Y-03484

**RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**ATTORNEYS:**

Chris McVeigh, Esq., for Claimant  
Keith Kasper, Esq., for Defendant

**ISSUES:**

1. Was it proper for Defendant to offset the sick leave wages it paid to Claimant during his period of temporary total disability from the workers' compensation benefits it later was ordered to pay for the same period?
2. Was it proper for Defendant to reimburse Claimant's medical providers directly for their charges relating to his work injury?
3. Does Defendant owe interest on Claimant's temporary disability benefits?

**FINDINGS OF FACT:**

The following facts are undisputed:

1. Claimant is a Vermont State Trooper. On June 12, 2006 he injured his left shoulder while working out at the Rutland County Sheriff's gym in preparation for a physical fitness exam.
2. Defendant initially denied Claimant's claim for workers' compensation benefits causally related to this injury as not having arisen out of and in the course of his employment.
3. While the claim was being contested, Claimant used previously accumulated sick leave to pay for his lost time from work and his employer-provided health insurance to pay for his medical treatment.

4. The State of Vermont Personnel Policy and Procedures Manual states as follows with respect to workers' compensation claims that are filed but not yet approved as compensable by its Risk Management Workers' Compensation Division:

Days lost during the pay period of injury should be coded on time reports as sick leave. Employees who do not have enough sick leave accrued to cover their lost time may report lost days as annual leave, if they have any accumulated. Any sick or annual leave used for this injury will be reimbursed to the employee if the claim is approved for Workers' Compensation indemnity, subject to the waiting periods outlined above.

5. On March 24, 2008 the parties participated in an informal conference, following which Workers' Compensation Specialist Anne Coutermarsh issued an interim order that provided, in relevant part:

Therefore, Risk Management is hereby **ORDERED** pursuant to 21 V.S.A. §662(b) to pay temporary total disability benefits for the period of 1/8/07 through 5/7/07, all related medical benefits as well as [any] permanency that may be due for the 6/12/06 work-related left shoulder injury, as required pursuant to 21 V.S.A. §640(a).

6. Defendant did not seek a formal hearing following the issuance of the interim order. Instead, on April 7, 2008 it took the following actions:
  - (a) Defendant's adjuster requested that the State Finance Office reinstate the sick leave Claimant had used to pay for his period of temporary total disability from January 8, 2007 through May 7, 2007;
  - (b) Defendant also made the appropriate adjustments to reverse all federal and state income tax withholdings, Social Security and Medicare tax payments and retirement deductions that had been associated with the sick leave wages it had paid Claimant during his period of temporary total disability.
7. On April 8, 2008 Defendant's adjuster notified Claimant's attorney that she had "forwarded [Claimant's] wage reinstatement to payroll yesterday (4/7/08)." She asked Claimant's attorney to "[p]lease let me know if [Claimant] has any questions with the reinstatement of time used related to this injury, the changes should be reflected in his next payroll cycle."
8. Shortly thereafter, Claimant's sick leave account was credited for all leave taken during the period covered by the March 24<sup>th</sup> interim order.
9. Beginning on May 8, 2008 Defendant reimbursed Claimant's health care providers for all medical benefits related to this claim.

10. Following independent medical evaluations by both parties, Claimant was determined to have a permanent impairment to his shoulder that was less than that relating to a prior work injury to the same body part, such that no additional permanent partial disability benefits were due.
11. On August 21, 2008 the parties participated in another informal conference, following which Specialist Coutermarsh indicated her agreement with Defendant's methodology in offsetting from the temporary disability benefits owed Claimant the amounts paid to him as sick time during his disability.
12. Defendant is self-insured for both workers' compensation and health coverage for its employees.
13. If Claimant's temporary total disability benefits were paid in cash, they would total \$16,558.00. Defendant paid a total of approximately \$22,000.00 in medical benefits associated with Claimant's June 12, 2006 shoulder injury.
14. If calculated from May 7, 2007 through April 18, 2008, the interest due on Claimant's temporary total disability benefits would total \$1,882.24.
15. Claimant's fee agreement with his attorney obligated him to pay one-third of any recovery, including retroactive temporary total disability benefits, as part of the contingency fee for representation.<sup>1</sup>

## **DISCUSSION:**

1. Summary judgment is proper when "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, after giving the benefit of all reasonable doubts and inferences to the opposing party." *State v. Delaney*, 157 Vt. 247, 252 (1991). To prevail on a motion for summary judgment, the facts must be "clear, undisputed or unrefuted." *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979); *A.M. v. Laraway Youth and Family Services*, Opinion No. 43-08WC (October 30, 2008).
2. The issues raised by Defendant's motion for summary judgment concern a self-insured employer's rights and responsibilities in situations where an employee draws sick leave wages and utilizes group health insurance coverage while his or her workers' compensation claim is being disputed. Once the claim is determined to be compensable, is the employer entitled to offset the sick leave wages it paid from the temporary total disability benefits it now owes? And can it reimburse the employee's medical providers directly for his injury-related medical expenses or must it pay those monies first to the employee? The answer is yes to both.

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<sup>1</sup> Though noting that Claimant failed to produce a copy of his fee agreement, Defendant admits that this fact is "likely true."

Offset for Sick Leave Wages Paid During Period of Temporary Total Disability

3. As noted above, Defendant's Personnel Policy and Procedures Manual provides that an employee who draws time from his or her sick or annual leave bank pending review of a work-related injury claim "will be reimbursed" the time if the claim ultimately is approved. Claimant cites no reason why he should not be bound by this directive, and in fact, there is legal precedent for its binding effect. *See Benoir v. Ethan Allen*, 147 Vt. 268 (1986) (employee handbook constitutes part of a binding and enforceable contract between employee and employer).
4. Implicit in this directive is that the employee cannot recoup the leave *time* he or she took without also repaying the leave *wages* he or she received; otherwise he or she would be receiving compensation above and beyond what the parties had contracted for in their employment agreement.
5. I find that it was proper for Defendant to recoup the leave wages Claimant owed by offsetting them against the workers' compensation benefits it was ordered to pay for the same period. Such a procedure equitably balances the parties' competing interests – the employee's interest in having access to an alternate source of wages pending resolution of a disputed workers' compensation claim, and the employer's interest in being reimbursed expeditiously once its workers' compensation obligation has been determined. Courts that have considered the issue have reached the same conclusion. *Morgan v. New York State Developmental Center*, 563 N.Y.S.2d 125 (NY 1990); *Lowell v. Metropolitan Government*, 696 S.W.2d 2 (Tenn. 1985), citing *Allen v. Consolidated Aluminum Co.*, 688 S.W.2d 64 (Tenn. 1985); *Moss v. City of Philadelphia*, 228 A.2d 47 (Pa. Super. 1967).
6. My conclusion is limited to the narrow factual circumstances presented by this claim, however. It allows an offset only for leave wages paid during the same period for which temporary disability benefits also are determined to be due. In that context, the wages paid are akin to an advancement of workers' compensation benefits, *see Morgan, supra*, and therefore the offset is both practical and fair. My ruling should not be interpreted to give the employer the right to offset other, unrelated debts that an employee might owe. Doing so would violate the statutory prohibition against either assigning workers' compensation claims or making them subject to creditors' claims. 21 V.S.A. §681.
7. My ruling also is limited to situations where the employer is self-insured for workers' compensation. In that context, both the leave wages to be offset and the workers' compensation benefits to be paid derive from the same source.<sup>2</sup> Whether a different conclusion might be warranted in the case of an insured employer, because the leave wages have been paid from one source and the workers' compensation benefits are to be paid from another source, is not for me to decide now.

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<sup>2</sup> Claimant makes much of the fact that the governmental entity for which he worked, the Department of Public Safety, is distinct from the governmental entity responsible for adjusting his workers' compensation claim, the Risk Management Division. The distinction is irrelevant. Claimant's employer is the State of Vermont. The fact that responsibility for different aspects of his employment relationship has been assigned to different governmental entities does not alter that reality in any respect.

Direct Reimbursement of Medical Providers

8. I find that it was proper for Defendant to reimburse Claimant's medical providers directly for their treatment of his work-related injury rather than to funnel those monies first through Claimant. The statute obligates an employer "to furnish" medical services to an injured worker, 21 V.S.A. §640(a), not to reimburse him or her for the cost of such services. *Pokorny v. Getta's Garage*, 594 A.2d 446, 455 (Conn. 1991) (interpreting similar language). As such, it relieves the employer of all responsibility for medical bills and creates instead a direct relationship solely between the employer and the medical provider. *Id.* Claimant has no right to inject himself as an intermediary between the two. *Avdibegovic v. University of Vermont*, Opinion No. 06-09WC (February 23, 2009) (claimant has no role in determining amount self-insured employer is obligated to pay to reimburse group health insurance carrier for covering medical bills relating to work injury).

Interest on Temporary Disability Benefits

9. Having found that Defendant appropriately offset the amount it had paid Claimant in sick leave wages from the amount it owed him in temporary disability benefits, Claimant's claim for interest on the latter amount must fail. Defendant having advanced those benefits to him by paying him sick leave wages during the period of his disability, Claimant was not, as he argues, "deprived [of their] use" in any material respect. Once ordered to pay workers' compensation benefits, furthermore, Defendant promptly reimbursed Claimant's sick leave bank and made the appropriate adjustments to his tax withholding and retirement accounts as well. There is neither an equitable nor a legal basis for assessing interest, therefore.

**ORDER:**

There being no genuine issues of material fact, Defendant is entitled to judgment in its favor as a matter of law. Defendant's Motion for Summary Judgment is hereby **GRANTED**.

**DATED** at Montpelier, Vermont this 17<sup>th</sup> day of July 2009.

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Patricia Moulton Powden  
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.