

**STATE OF VERMONT
DEPARTMENT OF LABOR**

G. S.)	Opinion No. 61-05WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Laferriere Construction, Inc.)	For: Patricia A. McDonald
)	Commissioner
)	
)	State File No. S-18959

Pretrial ruling on the briefs

APPEARANCES:

Patrick L. Biggam, Esq., for the Claimant
Bonnie B. Shappy, Esq., for the Defendant

ISSUE:

Should carrier-defendant prevail at hearing, may it seek a deduction against future permanency benefits due claimant for benefits paid pursuant to an interim order?

UNDERLYING FACTS:

Claimant, who worked as a carpenter for Laferriere Construction, injured his hand at work on April 11, 2002, an injury that required several hand operations over the next two years. On November 23, 2004, claimant's physician released him to light duty work. Two months later, defendant moved to terminate temporary total disability benefits on the grounds that claimant had failed to conduct a good faith job search for work within his restrictions. Claimant responded with his evidence of a good faith job search. Defendant characterized that evidence as insufficient, arguing that benefits should have ceased because claimant did not conduct the required good faith job search. A specialist in this Department rejected the defendant's argument and issued an interim order for benefits. Pursuant to that order, the carrier resumed payment of temporary total disability (TTD) benefits. However, it argues that payments made from February 15, 2005 to June 10, 2005 were not due and payable. Defendant seeks to recover payments made during that period through a deduction against permanent partial disability benefits that may be due.

DISCUSSION:

Claimant argues that the recent Vermont Supreme Court case, *Gallipo v. City of Rutland* 2005 VT 83, controls this case. The Court held that defendant in *Gallipo* could not recoup the payments it made under an interim order because:

In examining our workers' compensation statute, we cannot find a legislative intent to grant employers such a reimbursement right. Although we recognize that defendant did confer a benefit upon plaintiff when it made interim payments pursuant to the Commissioner's order, we also note that plaintiff did not commit any wrongdoing to receive these benefits. We, therefore, decline to create this right where the Legislature has been silent. See *Gintof v. Husky Injection Molding*, 2005 VT 8, ¶ 8, 16 Vt. L. Wk. 38, 868 A.2d 713 (mem.) (noting that the court will not extend benefits beyond that which the Legislature provided). In so holding, we echo the concerns voiced by courts in other states that, in an area of law created entirely through statutory enactment, we are hesitant to create rights where the Legislature chose not to do so.

Id. ¶ 49.

Gallipo was an appeal from a trial court decision on an unjust enrichment claim, an action defendant argues is distinct from the instant action. I agree. *Gallipo* considered whether the claimant was ordered to repay benefits defendant had made under an interim order. The issue was one of reimbursement.

Defendant here is not asking for a reimbursement check from the claimant. It is asking, should it prevail at hearing on the TTD issue, that it be able to deduct from any future permanent partial disability benefits that may be due claimant, payments made to the claimant under the interim order.

The *Gallipo* Court declined to find a reimbursement right because the legislature had not spoken on that issue. However, it has considered deduction:

Payments made by an employer or his insurer to an injured worker during the period of his disability, or to his dependents, which, by the provisions of this chapter, were not due and payable when made, may, subject to the approval of the commissioner, be deducted from the amount to be paid as compensation.

21 V.S.A. § 651.

Such a deduction has been permitted in other cases where payments made prior to hearing were found not due and payable. See e.g. *Knoff v. Joe Knoff Illuminating*, Op. No. 39-05WC (2005).

Furthermore, deduction against future payments is addressed in another area: our legislature has provided that a claimant may forfeit future benefits if he or she makes a false statement to obtain workers' compensation benefits. 21 V.S.A. § 708(a); *Butler v. Huttig Building Products*, 175 Vt. 324 (2003).

CONCLUSION

Although repayment has not been legislatively authorized, forfeiture for false statements and deduction against future payments for payments made when not due and payable have been, issues not addressed in *Gallipo*.

Wherefore, defendant may pursue the right to a deduction in permanency at the time of formal hearing.

Dated at Montpelier, Vermont this 30th day of September 2005.

Patricia A. McDonald
Commissioner