Vermont Bar Association
139th Annual Meeting Seminar Materials

Torts, Insurance, & Workers' Compensation Year in Review

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VERMONT SUPREME COURT
TORTS YEAR IN REVIEW 2017
(Jennifer McDonald, Esq.)

Myrick v. Peck Electric Company, 2017 VT 4 (Jan. 13, 2017)
VSC revisits and upholds Vermont's long-standing rule barring a cause of action for private nuisance based solely on aesthetic disapproval. Plaintiffs' neighbors leased property to solar companies for the purpose of constructing commercial solar arrays. Plaintiffs filed suit against their neighbors claiming the solar arrays constitute a private nuisance by negatively affecting the area's rural aesthetic and causing a decrease in property values in the vicinity.

Vermont law defines a private nuisance as an *interference with the use and enjoyment of another's property that is both unreasonable and substantial*. Reasonableness is typically a question for the factfinder. Whether an interference is substantial is defined as offensiveness, inconvenience or annoyance to the normal person in the community. As a matter of law, an unattractive site, without more, is not a substantial interference because it does not affect a citizen's ability to use and enjoy his or her property.

The Court distinguishes freedom from annoyance and inconvenience from emotional distress. Emotional distress does not interfere with use or enjoyment of land. Aesthetic disapproval also cannot be measured in terms of unreasonableness because personal preferences are inherently subjective. Finally, the Court rejects the notion that a claim for nuisance can be based solely on diminution in property value. Such a rule would be both subjective and one-sided—permitting a neighbor to sue based on claims that neighboring activities reduced property values, but not permitting contribution where neighboring activities increased property values.

LeClair v. LeClair, 2017 VT 34 (May 12, 2017)
Notwithstanding the open and obvious nature of a dangerous condition, defendant/possessor of land owed a duty of care under §343 of the Restatement (Second) where he should have anticipated that plaintiff would fail to protect himself from the harm. VSC notes that its decision calls into question the continuing viability of older cases finding no liability to an invitee when an injury was caused by a condition that was obvious or known to invitee. Rather than reflecting on the duty of care owed by a defendant, the obvious nature of the risk/harm bears on plaintiff's comparative negligence.

Case arose of out of a premises liability claim by plaintiff resulting from an injury he sustained from falling off a roof. The defendant, plaintiff's grandfather, hired plaintiff to replace a roof on defendant's office building. On the day of the incident, plaintiff claimed he decided not to work because the roof was covered in frost and slippery. Defendant allegedly demanded that plaintiff nonetheless begin work. Plaintiff climbed up on the roof and then fell from the second-story sustaining serious and permanent head and spinal injuries.

The trial court granted summary judgment dismissing plaintiff's claim on grounds that plaintiff was completely aware of the dangerous nature of the roof and thus there was no duty to warn.

The VSC examined plaintiff's premises liability theory under §343 of the Restatement (Second) of Torts "Dangerous Conditions Known to or Discoverable by Possessor. Under this section, a possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

The operative consideration was sub-section (b) and whether, under the circumstances alleged, defendant should have expected that plaintiff would "fail to protect [himself] against [the harm]." The VSC concluded that a jury could find that defendant was in a position of authority and by ordering plaintiff to go up on the roof should have anticipated that the condition of the roof presented an unreasonable risk of harm.

Abajian v. TruexCullens, Inc., 2017 VT 74 (8/25/2017)
VSC affirmed trial court decision determining as a matter of law that negligence/breach of contract claim in construction dispute accrued more than six years before Complaint was filed. The accrual date is not determined by the date on which plaintiffs were put on notice of a roof defect, but on the date that plaintiffs had sufficient facts to lead any reasonable homeowner to begin the investigation that would lead to the discovery of the defect. "The plaintiff need not have an airtight case before the limitations period begins to run. Fleshing out the facts will occur during investigation of the matter of during discovery after the lawsuit is filed."

Couture v. Trainer, 2017 VT 73 (8/25/2017)
VSC affirmed dismissal of defamation and negligence Complaint based on defamatory statements submitted to parole officer in petition for relief from abuse. The trial court relied on the Restatement and decisions from other jurisdictions to conclude that statements to law enforcement officers, even if false, were protected by absolute privilege when made in connection with the quasi-judicial parole board hearings. The VSC agreed, noting that the decision is consistent with long-standing Vermont law that statements within judicial proceedings are absolutely privileged, even if false, if relevant to the proceeding. As support for this extension, the VSC cited public policy favoring unhindered communication with parole officers and in petitions for relief from abuse to ensure that members of the public can communicate sensitive and unflattering information to parole officers without fear of reprisal. Although false reporting is a legitimate concern, its effects are mitigated by procedural safeguards in the judicial or quasi-judicial proceedings and should not be mitigated through litigation for monetary relief.

2017 Vermont Laws No. 51 (S. 3) An act relating to mental health professionals' duty to warn (May 30, 2017)/18 V.S.A. §1882
Act adds 18 V.S.A. § 1882 to negate the VSC's decision in *Kuligoski v. Brattleboro Retreat and Northeast Kingdom Human Services*, 2016 VT 54A (Sept. 16, 2016) and limit mental health professionals' duty to that established by *Peck v. Counseling Service of Addison County, Inc.*, 146 Vt. 61 (1985).

The 2016 decision in *Kuligoski* imposed a duty on mental health care professionals to warn caregivers if the patient has violent tendencies and provide reasonable information to caregivers to enable them to recognize dangers and fulfill responsibilities of treatment. The decision was widely criticized by mental health professionals as providing an ill-defined and unworkable (1) creating potential caregiver liability for actions of persons in their care; (2) creating potential liability for mental health facilities and professionals to protect the public from patients no longer under their control; (3) creating a duty even where risk is not serious or imminent; and (4) putting providers in a position of violating HIPPA.

18 V.S.A. §1882 negates *Kuligoski* and replaces it with the original holding of *Peck* requiring only that "a mental health professional who knows or, based upon the standards of the mental health profession, should know that his or her patient poses a serious risk of danger to an identifiable victim has a duty to exercise reasonable care to protect him or her from that danger."

2017 Year-in-Review Materials
Insurance Law Section

Ross et al. v. John Hancock Life Insurance Co. et al.,
1095-11-15 Cncv (Mello, J., Oct. 7, 2016).

The general question presented in this case was whether the life insurer's termination of a policy for failure to pay premiums was valid, when the insurer provided notices to only one of three policyholders.

John Hancock issued a $1 million life insurance policy on the life of the grantor of an irrevocable life insurance trust. The adult children of the grantor held the policy. Two of the children, Charles and Peter, lived in Hinesburg, Vermont and one child, Jacqueline, lived in New York state.

The policy contained a flexible premium, allowing policy owners to make monthly, quarterly, semi-annual or annual premium payments.

The policy's termination clause stated that the owner would be in default if at the beginning of any policy month, the net cash surrender value dipped below zero after taking the monthly deduction due for that month. It also provided a 61-day grace period for the owner to cure the default by paying the overdue premium. It contained a notice provision requiring that, within 30 days of termination, the company notify the owner at his or her last known address, specifying the cost to cure the default. If the owner did not cure the default within the grace period, then the policy would terminate.

The policy allowed the owners to reinstate the policy within five years of termination by making a written request for reinstatement, together with evidence of the insurability of the life insured, and payment of the amount in default immediately before the policy terminated.

On February 22, 2011, John Hancock mailed a termination warning notice to Charles, Peter and Jacqueline at Charles' address in Hinesburg. The termination warning notice advised the owners to make a minimum payment of $9,790.20 by April 23, 2011 in order to maintain coverage through May 21, 2011.

Charles did not notify his siblings of the termination warning notice and no one made payment.

On May 3, 2011, John Hancock sent a lapse termination notice to Charles, Peter and Jacqueline to Charles' address in Hinesburg. The notice stated that the policy terminated on April 23, 2011 for failure to pay the premium. Charles did not notify his siblings of the lapse termination warning.

In 2013, the grantor died. After their mother's death, Peter and Jacqueline learned that the life insurance policy had terminated in 2011.

The siblings filed suit against John Hancock. Both the plaintiffs and defendant filed cross-motions for summary judgment.

In its motion, John Hancock argued that because the policy lapsed before the grantor's death in 2013, it had no liability on the policy. The siblings argued that because John Hancock failed to comply with its own notice requirements and Vermont law, the policy remained in effect at the time of their mother's death.

Judge Mello agreed with the policyholders. He noted that the policy required notices be sent to "your last known address" and that under the policy, "'you' and 'your' refer to the owner of the policy." He held that the plain language of the policy, therefore, required the company to send the notice to **each owner's** last known address. Because the company failed to do so, it violated its own policy termination provisions.

Judge Mello also held that John Hancock violated 8 V. S. A. § 3742(c), which required that any contract insuring the life of a person 64 years or older, and in force for at least one year, may **not** be cancelled for failure to pay the premium, unless after the grace period and at least 21 days before cancellation, the insurer sends notice of the impending cancellation to the "policyholder." The Vermont Division of Insurance had previously issued a bulletin explaining that the statute applied only to policyholders residing in Vermont and Judge Mello held that John Hancock violated the statute by failing to send notices to Peter, who also lived in Vermont.

John Hancock also argued that the statute merely required notice to a "policyholder," not "policyholders," and therefore, its notice to Charles was sufficient. Judge Mello rejected this argument, holding that courts may, when construing statutes, extend words importing a singular number to more than one person or thing in order to effectuate the intent of the legislature. Because the legislature enacted 8 V. S. A. § 3671(c) to protect policyholders from an unintended loss of life insurance coverage, construing the statute to require notice to all policyholders in Vermont was necessary to effectuate the legislature's intent.

Judge Mello rejected a number of other arguments from John Hancock, including estoppel, substantial compliance, and the argument the mere act of failing to pay the premiums, with or without proper notice, terminated the policy.

2017 Year-in-Review Materials
Insurance Law Section

Shriner v. Amica Mut. Ins. Co., 2017 VT 23 (Apr. 7, 2017)

The issue in this case was whether glass-blowing activity fell under the business exclusion in a homeowners' policy endorsement.

The policyholder was a retired physician who sold a glass-blowing studio in 2007 and moved the glass-blowing equipment to his home garage. From 2009- 2012, he and a friend made glass about once per week. They called their glass-blowing operation "Church and Maple Glass Studio" and maintained a website selling their glassware. The policyholder identified himself as an "artisan" on tax forms and filed a Schedule C for business profits and losses with his Form 1040. He described his business as "blown glass manufacturing" and reported sales ranging from $4,000 in one year to over $30,000 in another. He reported expenses for advertising, contract labor, legal and professional services, office space, meals and entertainment.

In 2012, the furnace exhaust system malfunctioned and caused a fire that destroyed the garage and all of its contents.

The policyholder made a claim against his homeowners policy, issued by Amica, which covered losses from fire and provided replacement coverage for buildings and personal property, after applying the $25,000 deductible.

The policyholder submitted an inventory of lost personal property, which Amica accepted. Amica determined the replacement cost of the garage, applied the $25,000 deductible and made partial payment. It then changed positions, asserting that the glassblowing operation constituted a "business," and refused to make further payments on the garage. It paid the policyholder only the $2,500 limit for business personal property.

The policyholder sued Amica, lost on dueling motions for summary judgment, and appealed to the Vermont Supreme Court.

The Vermont Supreme Court began its analysis by citing basic principles:

- an insurance policy is a contract;
- because an insurance policy is a contract, its interpretation is a question of law;
- the court applies the plain, ordinary and popular meaning of the terms of an insurance policy;

- the Court interprets each policy from the perspective of a reasonably prudent person;

- ambiguities in the policy will be construed in favor of coverage;

- Insurance policies and their endorsements must be read together as one document and the words of the policy remain in full force and effect except as altered by the words of the endorsement; and

- the insurer bears the burden of proving the exclusion.

The Court then reviewed the language of the policy, which excluded coverage for "structures from which business is conducted" and "structures used to store business property." The policy defined business as "part-time or occasional trade, profession, or occupation," but an endorsement replaced that definition with "trade, profession or occupation."

The policyholder argued that if one compared the definition of business under the policy, and the definition under the endorsement, there was ambiguity.

The court explained that a basic tenet of insurance law barred such a comparison (citing cases only from other jurisdictions): if an endorsement creates or expands an exclusion, and is not itself ambiguous, then courts may not look to the deleted language of the policy in order to determine whether there is ambiguity.

The Court went on to hold that because the policyholder conceded that his glassblowing was at least a part-time trade, profession or occupation, the question was whether the endorsement definition of business – trade, profession or occupation" encompassed the policy-holder's part-time glass-blowing activity.

The Court held that because the policyholder had filed a Schedule C form for business profits and losses with the IRS for his glass-blowing activity, and showed annual sales for glass-blowing ranging between $4,000 to over $30,000, despite the nature of the activity as part-time, he had engaged in business, as that term was defined under the endorsement.

VERMONT WORKERS' COMPENSATION UPDATE
JULY to SEPTEMBER 2016

by Keith J. Kasper Esq.

Erica Mongeon of Waterbury, Vermont, was hired as the new WC Administrative Assistant B for the Workers' Compensation Program otherwise known as the "voice" of the Department position, replacing Ellen Gonyaw who moved to Maine.

Jane Woodruff has stepped down as Administrative Law Judge. Department is currently interviewing candidates for her replacement.

Julie Charonko, long, long, long time WC Specialist II, is retiring from the Department and moving to Florida. We wish her well!

UNITED STATES DISTRICT COURT

Addecco USA Inc. V Colombia Forest Products, Inc., Case No. 2:15-cv-25 (July 8, 2016)(Judge Sessions)
On Cross Motions for Summary Judgment, Columbia Forest Products successfully defends indemnification argument by Addecco, the temporary hiring agency for the employee injured in the course of working at Columbia Forest Products. Court found no express indemnification language in the contract between Addecco and Columbia Forest Products and implied indemnification language fails as well. "Because the parties' contractual arrangement essentially required CFP to pay for workers' compensation as part of the mark-up it paid to Adecco, there is no viable equitable argument that it would now be fair to shift the cost of [the injured employee's] workers' compensation benefits to" Columbia Forest Products.

VERMONT SUPREME COURT DECISION

Conant v. Entergy Corp. 2016 VT 74 (J. Eaton July 8, 2016)
Court overrules Commissioner's determination and reiterates holding of Yustin v Department of Public Safety, 2011 VT 20 to allow for credits against TTD benefits for payments made by employer pursuant to a collective bargaining agreement for short term disability. "[A]n employer complies with the Act when a claimant 'receive[s] full and direct payment of wage replacement from the employer during the disability period.'" Justices Robinson and Dooley dissent arguing that: "Absent statutory authority for applying an offset, the Commissioner has no authority to offset statutory workers' compensation benefits to account for transactions between employer and employee that took place outside of the workers' compensation proceedings. The majority's holding that not only authorizes, but apparently requires, the Commissioner to do so as a matter of law is inconsistent with our ordinary deference to the Commissioner on such matters, expands the Commissioner's responsibilities beyond her statutory authority and expertise, undermines the private contracts, introduces unnecessary complexity into the calculation of workers' compensation benefits, and expands this Court's prior decision on the subject far beyond its rationale and holding."

Bindrum v American Home Assurance Co. 2016 WL 4446533 (unpublished Entry Order)(August 19, 2016).
Claimant sues MSA Vendor alleging the MSA was undervalued. Couort upholds trial court's summary judgment ruling finding that "plaintiff had produced no evidence of any economic damage sustained due to the alleged undervaluation of the MSA. Nor could he, reasoned the court, because any inadequacy in the MSA would harm only Medicare, which had indicated that it would cover any shortfall- not plaintiff. According to the court, as long as the MSA was approved by CMS, plaintiff had no cause of action...."

DEPARTMENT OF LABOR DECISIONS

Hall v Safelite Group, Opinion No. 10-16WC (July 15, 2016)(ALJ Phillips).
Defendant ordered to pay for teeth extraction and dentures which were not injured in work accident but necessary for treatment of Claimant's work-related injury and the "replacement teeth are both medically necessary and vocationally advantageous." Commissioner adopts the "ancillary treatment" principle which requires Defendant to pay for non-work related medical treatment if "effective treatment of a compensable injury requires ancillary treatment for an otherwise non-work-related condition.... I stress the fact-specific nature of my determination, however. Here, the evidence is support is both clear and undisputed. In another case, the nature of the ancillary treatment at issue, the extent to which it is medically necessary as a condition precedent to treating the work injury, and/or the injured workers' previously established plan to undergo it might dictate a different result."

Meunier v. The Lodge at Shelburne Bay Real Estate LLC., Opinion No. 11-16WC (July 27, 2016)(ALJ Woodruff).
Claim compensable even though Claimant unable to articulate how or why she fell. "Cases involving unexplained falls, as Claimant alleges occurred here, also may trigger positional risk analysis. The neutral force that caused the injury to occur in these cases is simply unknown. The situation is often confused with, but is entirely distinguishable from, so-called 'idiopathic' injury cases, in which the medical evidence establishes that the injury resulted for a purely persona condition and therefore is not unexplained.... In truly unexplained fall cases, most courts have awarded benefits notwithstanding the claimant's inability to prove that the cause of the fall was directly connected to the employment. Instead, they have applied positional risk 'but for' reasoning to satisfy the 'arising out of' component of compensability..... But for the employment and Claimant's position at work, her injury would not have occurred as it did. Lacking any evidence of an idiopathic cause for her fall, I am left with one of two conclusions- either it was work-related, or it was unexplained. Under Vermont law, either cause is sufficient to establish compensability."

Hilliker v Synergy Solar Inc., Opinion No. 12-16WC (Aug. 9, 2016)(ALJ Woodruff).
Dispute as to where Claimant was hired Vermont or Massachusetts. Claimant injured in Massachusetts in 2015 and collects WC benefits pursuant to MA WC Statute. Claimant wants to collect pursuant to VT WC Act instead. Claimant found to be hired in Vermont. "Defendant confuses the last act essential to the making of the hiring contract - Claimant's assent to its terms - with actions which were triggered once she did so, such as completing federal tax and

homeland security forms. Had Claimant been injured on her first day at the Sheffield work site, there is no doubt that her injury would have been compensable notwithstanding that she had not yet submitted the forms that [Employer] had requested. These documents may have evidence her hiring, but they did not in anyway create it." "[B]ecause Claimant was hired in Vermont, jurisdiction lies here under 21 V.S.A. §619, and second, that neither the Full Faith and Credit Clause of the United States Constitution nor principles of comity, waiver and/or estoppel bar her claim for a supplemental award here. So long as any such award is consistent with the facts underlying her Massachusetts claim, and provided that Defendant is allowed full monetary credit for the benefits it already has paid, she is free to proceed in this forum."

Clayton v J.C.Penny, Opinion No. 13-16WC (Aug. 24, 2016)(ALJ Woodruff)
Pro se Claimant settled on a full and final basis for compensable left foot injury but Settlement Addendum included language purporting to release Defendant, Insurance Carrier and TPA from "any and all" claims. Subsequently Claimant makes claim for right foot condition which she alleges arose out of her employment with Defendant but separate and distinct from the left foot injury. Commissioner holds that "a release that purports to cover not only injuries arising form a pending claim, but also those that might arise from completely unrelated causes at any time during the injured worker's employment is impermissibly broad. It undermines the employer's incentive to manage its risk appropriately, and absolves it from responsibility for protecting its employees from work-related harm. Because it thus violates critical public policy objectives, it is void." Commissioner allows factual determination to see if right foot injury arose out of settled left foot injury (which would be barred by the settlement agreement) or some other non-covered incident which would allow Claimant to proceed with the litigation.

Haller v. Champlain College Corp., Opinion No. 14-16WC (Aug. 24, 2016) (Belcher ALJ).
Tuition free college credits utilized by claimant in the 26 weeks prior to her injury included in AWW calculation for permanency benefits award, but not for TTD benefits as Claimant continued to receive them while on TTD. Refusing to extend Lydy analysis barring health insurance benefits from being included in the AWW calculation to facts of this case. "If ther are broader policy implications, these may be addressed by the legislature."

Chartrand v General Electric Aviation, Opinion No. 15-16WC (Aug. 24, 2016)(Belcher ALJ)
Defendant denies claim based upon physician's report on causation. At subsequent deposition, physician now agrees with treating physician "that Claimant's current condition represents the natural progression of her compensable 1990 and 2003 work-related injuries, without any contribution form non-work-related causes or events, Defendant's only issue in this case evaporated." Summary judgment prior to formal hearing was granted to Claimant with an award of attorney fees and costs.

Lamont v Agri-Mark Inc., Opinion No. 16-16WC (Sept. 16, 2016)(ALJ Phillips)
Dispute over causation of Claimant's shoulder condition, Claimant's IME doctor found more credible then Defendant's IME doctor based upon third factor ("clarity, thoroughness and objective support underling the opinion") of the five part Geiger test for determining which of the competing medical opinions was more persuasive.

VERMONT WORKERS' COMPENSATION UPDATE
OCTOBER TO DECEMBER 2016

by Keith J. Kasper Esq.

Attorney Beth DeBernardi is the new Administrative Law Judge. She had previous workers' compensation experience while employed for Kohn and Rath.

DEPARTMENT OF LABOR DECISIONS

Weston v. Velan Valve Corp., Opinion No. 17-16WC (Oct. 20, 2016)(ALJ Phillips). Claimant's treating physician's opinion as to reasonableness and necessity of Ketamine prescription for Claimant's compensable chronic pain condition found more persuasive then Defendant's IME doctor's opinion that "the research on ketamine's efficacy is not yet sufficiently high quality to justify its use as a treatment for chronic neuropathic pain conditions...."

Houle v. Valley Crane Services Inc., Opnion No. 18-16WC (Oct. 28, 2016)(ALJ DeBernardi) Claimant's request for attorneys fees denied as after Defendant reaches settlement on permanency award. Neither WC Act nor pre-August 2015 WC Rules provide authority for an award of attorney fees to Claimant as both Act and Rules "require[] at a minimum that a formal hearing be 'requested' in order for a fee request to be considered."

Nelson v Federal Express Freight, Opinion no. 19-16WC (Nov. 1, 2016)(ALJ Woodruff) Pro se Claimant awarded permanency benefits and chiropractic care. Claimant's treating chiropractor found more persuasive then Defendant's IME doctor. No finding of intervening work -related aggravation as increase in symptoms deemed a recurrence as no medical end result and Claimant working through pain complaints and no specific incident or change in condition relative to his work at second employer. As treating chiropractor "put it, Claimant had pain and paresthesia aggravated by normal activities that prior to his 2012 injury he could perform without difficulty." Higher level permanency awarded as treating chiropractor interpreting the AMA Guides found that "it is inapproriate to consider just one test to determine veracity of a cervical radiculopathy diagnosis. Rather, all tests and information must be considered in concert."

Vohnoutka v Ronnie's Cycle Sales of Bennington Inc.II, Opinion No. 20-16WC (Nov. 7, 2016) Pro se Claimant found to have compensable neck injury and entitled to ongoing medical treatment but no TTD benefits despite Claimant not seeking medical benefits for one year after the disputed work injury. 6 month notice defense of Section 660 inapplicable as notice was allegedly given to supervisor even though supervisor does not recall incident. Furthermore, Defendant not prejudiced by delay.

Diamond v Burlington Free Press, Opinion No. 21-16WC (Nov. 7, 2016)(ALJ Phillips) Claim barred by statute of limitations even though Claimant filed claim for additional permanency benefits within "four months after her claim for additional compensation arguably accrued by becoming reasonably discoverable and apparent" and filed the initial claim for benefits within one year of the injury. However, Claimant is seeking a modification of a prior

award and is governed by a six year statute of limitation requiring claimant to seek a modification based upon a change in circumstances from her prior permanency award within 6 years of the original permanency award.. "[A]greements for permanent partial disability compensation are intended to be permanent and that modifying such agreements must be closely scrutinized."

Moulton v Peter and Gertrude Davis, Opinion No. 22-16WC (Nov. 16, 2016)(ALJ DeBernardi)
Pro se Claimant fails to respond to Defendant's motion for summary judgment on whether Claimant willfully made false statements or representation for the purpose of obtaining temporary total disability benefits but summary judgment still denied as Defendant unable to show Claimant's intent in failing to report said income. Claimant does not dispute that she received unreported income during the time she was also receiving TTD benefits. Claimant's income was as a independent contractor

Harrness v Therrien, Opinion no. 23-16WC (Dec. 2, 2106)(ALJ Phillips)
Claimant had a 1998 work related injury resulting in loss of his spleen which results in a lifelong increased risk of infection. In 2014, Claimant is hospitalized for an infection which is never definitivly diagnosed but most likely was community-acquired pneumonia. Defendant's IME doctor's opinion found more credible then treating physician because of the clarity, thoroughness and objective support of the expert's opinion.

Farr v Rite Aid Corp., Opinion no. 24-16WC (Dec. 12, 2016)(ALJ Phillips)
Defendant's IME doctor's opinion found more credible than that of treating surgeon in denying compensability of third surgery. IME doctor's opinion "was clear, thorough and objectively supported. Drawing both on the lack of objective findings on electrodiagnostic testing and on Claimant's failure to realize sustained improvement form her prior surgeries, he concluded that the likelihood of success from a third surgery was 'extremely low.' I concur.... I acknowledge that Claimant realized some benefit from her third surgery, however short-lived it proved to be. I must believe that [treating doctor] was anticipating more sustained improvement; yet according to [IME doctor's] credible analysis, he had no reasonable basis for doing so."

VERMONT WORKERS' COMPENSATION UPDATE
JANUARY TO MARCH 2017

by KEITH KASPER, ESQ.

Harmon v. Central Vermont Council on Aging, Opinion No. 1-17WC (Feb. 1, 2017)(ALJ Phillips). Claimant's treating neuropsychiatrist's opinions found more persuasive then IME doctor's opinions as to cause of Claimant's dementia from work-related hip injury. Claimant found to be permanently and totally disabled, but Claimant cannot concurrently collect both PPD and PTD benefits. "Claimant incorrectly infers that because §645(b) does not specifically prohibit concurrent payment of both permanent partial and permanent total disability benefits arising form the same compensable injury, it must therefore be read to permit it....[However pursuant to] §648(a), permanent partial disability benefits are payable only when 'the injury results ina partial impairment which is permanent and which does not result in permanent total disability...." Defendant allowed a credit for the PPD benefits paid to date against the minimum PTD award of 330 weeks.

Souligny v PB& J, Inc., Opinion No. 2-17WC (ALJ Belcher).
Treating chiropractor's opinion as to reasonableness of ongoing chiropractic care 5 years post injury found more persuasive then a jointly retained IME doctor and Defendant's IME doctor who did not find such ongoing care reasonable and necessary to treat her back condition. "[T]he fact that a claimant remains unable to work is not necessarily disqualifying. Depending on the circumstances, treatment that allows a permanently disabled workerto maintain function in daily living activities may be equally important."

Hathaway v. Engineers Construction, Inc., Opinion 3A-17WC (Feb. 27, 2017(ALJ Phillips). Only claimant's claim for traumatic brain injury found compensable and the accepted right shoulder injury. Claims for an aggravation of his pre-existing low back pain, erectile dysfunction and depression were denied. Competing IMEs Defendant's IME do found more persuasive as to the TBI as Defendant's IME doctor "failed to utilize clear and specific criteria for diagnosing a traumatic brain injury. He also overlooked the contemporaneous medical evidence establishing that Claimant demonstrated amnesia for the events immediately following the 2013 accident. These omissions weaken his opinion." However, Claimant fails to show that he is disabled for that TBI as he returned to work for almost 6 months until he went out of work for the compensable shoulder injury. As to depression both IME doctor's opinions were unpersuasive as conclusory but as Claimant bore the burden of proof in this matter this claim failed as well. As Claimant only partially prevailed he is only allowed costs associated with the single issue he prevailed upon.

Jalbert v. Springfield School District, Opinion No. 4-17WC (Feb. 16, 2017)(ALJ Phillips). Change in Atty Fee provision of the WC Rules found to be substanative not procedural but not "compensation benefits" either, thus distinguishable from statutory scheme application enunciated in Montgomery v, Brinvner, 142 Vt. 461 (1983) limiting an award of compensation benefits to those in existence at the time of the injury. "Attorney fees occupy a different position in the statutory scheme. They are payable only at the Commissioner's discretion, and only insofar

as they are deemed 'reasonable' in amount. 21 V.S.A. §§). If awarded, they are paid not to the injured worker, but directly to his or her attorney, Workers' Compensation Rule 20.1700." Thus allowing for award of attorney fees at the new $200/hour rate for all fees incurred after the effective date of the WC Rule change on November 1, 20016.

Griffin v Houle Brothers Granite Co. Inc., Opinion No. 5-17WC (Feb. 27.2017)(ALJ Phillips). Claimant has a lifting injury on Friday lies to ER attendant about work-relatedness of back injury and at followup appoint at PCP does not correct that inaccuracy. Claimant alleges that he lied as he was worried about negative reprecussions from his employer about work-related injuries even though he had had a prior work-related injury with no negative action by the Employer. However, Claimant's testimony found credible over that of employer that Claimant somehow hurt his back over the weekend. "Defendant's version of events was speculative and implausible. To assert, with no evidentiary support whatsoever, that because Claimant asked to leave work early on a Friday, he must therefore have injured himself at some point before returning to work on the following Monday, is a leap in reason I simply cannot fathom."

Perrault v Chittenden County Transportation Authority, Opinion 6-17WC (Mar. 13, 2017)(ALJ De Bernardi).
Volunteer drivers who are reimbursed for their mileage are not "employees" under the Act entitled to WC benefits. Mileage reimbursement is merely reimbursing the volunteer for expenses incurred on behalf of Defendant. "Unlike the non-cash remuneration in the above cases, all of which provided a new advantage to the employee, Claimant's mileage reimbursement merely paid her back for out-of-pocket costs associated with using her personal vehicle. She did not derive an economic benefit form such reimbursement. She may have believed she was profiting from mileage reimbursement because the sums received exceeded her cost of gasoline, but such payments reimburse drivers for more than gasoline...."

VERMONT WORKERS' COMPENSATION UPDATE
APRIL TO JUNE 2017

by: KEITH KASPER ESQ.

VERMONT SUPREME COURT DECISIONS

LeClair v. LeClair, 2017 VT 34 (May 12, 2017).
In premises liability claim, split court reverses trial court's grant of summary judgment to defendant and allows Plaintiff to amend complaint to include new liability theory of violation of 21 V.S.A. §687 (mandatory WC insurance coverage) thus giving rise to burden shifting on negligence and proximate cause pursuant to 21 V.S.A. §618(b). Utilizing the right to control test the Court finds sufficient contradictory evidence exists to avoid summary judgment and allow the jury to decide if an employment relationship existed between the son and his grandson even though contract of hire was between grandson and father not grandson and grandfather. "The definition of employer for purposes of the Workers' Compensation Act is contained in 21 V.S.A. §601(3). We have consistently held that the statutory definition is broader that the common law definition. Our cases interpreting the statue suggest, however, the expansion beyond the common law is because of language in the statute that defines a person as an employer of an independent contractor in certain circumstances not applicable here. In other respects, we conclude that the statutory section is consistent with the common law. As a result, our conclusion with respect to plaintiff's common law claim is also applicable to his claim with respect to 21 V.S.A. §618(b)." The dissent (Justices Robinson and Eaton) dissented as to the premises liability claim but concurred in the allowance of the right to amend to include this new theory of liability based upon workers' compensation issues.

DEPARTMENT OF LABOR DECISIONS

Goodrich v. FAHC (II), Opinion No. 7-17WC (Apr. 14, 2017).
For neuropsychological evaluation Claimant allowed to videotape oral testing but not paper and pencil testing of IME. "Short of barring Claimant from videotaping the test portion of the exam, there is no way to safeguard the interests underlying Defendant's right" for an IME "to test a central theory underlying her case in chief.... I cannot imagine that the legislature intended this result."

Mansfield v. TPW Management LLC, Opinion No. 8-07WC (May 8, 2017)(ALJ Phillips).
Mixed decision in which Claimant is found entitled to TTD benefits retroactive to November 22, 2014 and certain medical procedures, but Defendant's position sustained as to certain other conditions including tapered termination of hydrocodone even without the benefit of the new opiate medication rule which came into effect in November of 2016 after the date of the hydrocodone prescriptions in this matter. "Claimant has been using hydrocodone since later 2014. According to her own testimony, the pain relief she derives from it has not translated into significantly increased function. Dr. Keepers, her current prescriber, did not offer a specific rationale for its continued use. In contrast, Dr. Binter offered a clear and concise rationale for immediately tapering and then discontinuing the medication."

Freeman v Pathways of the River Valley, Opinion No. 9-17WC (May 31, 2017)(ALJ Phillips) Defendant's motion for summary judgment granted that Claimant's injury did not arise out of and in the course of her employment when she was injured commuting to a location where she was on indeterminate assignment due to short staffing at that location. Claimant not "on the clock" nor reimbursed mileage for travel to this location. Premises exception to the going and coming rule applies barring compensability of claim as Claimant does not fall within the "Traveling Employee" or "Special Errand" exceptions to this rule. Claimant found to be "a fixed situs employee, albeit one with two separately designated workplaces.... Her commute did not constitute a 'substantial part of the services' for which she was employed at either location." Nor the fact that Claimant received higher compensation for this dual situs role: "It does not matter that the job pays more because it is undesirable; the benefit to the employer derives from the worker's attendance, not the journey there and back." Work not a "special errand as" it was a regularly scheduled assignment with no set end date, not an isolated or haphazardly assigned obligation... [and t]he journey to and from, though longer then her commute to and from Claremont, was not unduly onerous in terms of either time, distance or other circumstances...."

Reis v Ben & Jerry's Homemade, Inc., Opinion No. 10-17WC (June 13, 2017(ALJ DeBernardi). Defendant's motion for summary judgment granted on basis of laches and statute of limitations when Claimant waits 22 years to bring claim. Defendant's motion for failure to prosecute fails as since "the date when [Claimant] filed [the claim] forward, he appropriately prosecuted his claim. Dismissal under V.R.Civ.P 41(b)(2) is therefore not warranted."

Conant v Entergy Corp. II, Opinion No. 11-17WC (June 22, 2017)(ALJ Phillips) Following reversal of Departments 2015 decision disallowing offset of short term disability benefits to TTD benefits due to Claimant, Department allows offset of overpayment against 2016 impairment determination. "'Timing is everything' is a popular expression, dating back centuries. For Claimant the timing of the Supreme Court's ruling may seem to have worked an arbitrary and harsh result. Had the ruling come a month later, perhaps Defendant would have felt its sting, or perhaps not. It is useless to speculate. The Court's ruling issued on a date when Defendant's obligation to pay permanency benefits was as yet undetermined, it was thus an 'amount to be paid as compensation,' not an amount already owed."

VERMONT WORKERS' COMPENSATION UPDATE
JULY TO SEPTEMBER 20017

by KEITH J. KASPER ESQ.

Argentina Kearney, WC Specialist II is leaving the Department

VERMONT SUPREME COURT DECISIONS

Clayton v. J.C. Penny Corp, 2017 VT 87 (Sept. 22, 2017)
Reversing Commissioner's decision that general release settlement language was void against public policy and thus relieving Claimant of the effects of the Agreement. Absent allegations of fraud or material mistake of fact, Commissioner's authority in this matter is limited by Section 662(a) "the only consideration to be made is whether it is in the claimant's best interests and the Commissioner is given latitude to make that determination only at the time of the initial approval of the settlement agreement." Case remanded to determine whether claimant's left- and right-foot injuries are causally related.

Haller v. Champlain College, 2017 VT 86 (Sept. 29, 2017).
Split decision upholds Commissioner's determination that value of tuition free college credits earned in the 26 weeks prior to the work injury are included in Average Weekly Wage calculation for permanency benefits as a "other advantage" as set forth in the statute 21 V.S.A. §601(13). Justice Skoglund dissents: "Including in the calculation of weekly wage any fringe benefits that are not paid in lieu of wager or are not an explicit substitute for wages will create a morass that will overwhelm employers and the workers' compensation system." Justice Eaton also dissents citing to Lydy v. Trustaff, Inc. 2013 VT 44 which rejected including health insurance premiums paid in the Average Weekly Wage calculation as not remuneration, similar analysis would apply to free college tuition as not remuneration but rather a fringe benefit.

DEPARTMENT OF LABOR DECISIONS

Collette v. Hannaford Bros. Co., Opinion No. 12-17WC (Sept. 1, 2017)(ALJ Phillips).
Claimant's treatment after September 2015 "when his previously stable low back condition acutely worsened negated his prior August 2012 medical end result determination. The course of treatment upon which he embarked thereafter was not merely palliative, but rather carried with it the expectation of significant medical improvement. It culminated in the October 25, 2016 radio-frequency ablation procedure which *at the time it was contemplated* "In most cases, an injured worker attains the point of end medical result only once-he or she reaches a plateau following treatment and does not treat or become disabled again. Not every case follows this path, however. Even after reaching an end medical result, an injured worker's condition might still worsen to the point where additional curative treatment becomes necessary, and along with it, an additional period of temporary disability.' "[T]o the extent that Claimant was still functionally restricted from full employment as a consequence of his work injury after September 1, 2015, and until such time as he reached an end medical result, he was once again eligible for temporary total disability compensation."

Green v. Oldcastle, Inc., Opinion No. 13-17WC (Sept. 27, 2017)(ALJ DeBernardi) Defendant's Motion for Summary Judgment denied as material issue of fact in dispute as to whether Claimant had a fixed place of employment when he was injured on his way to a construction site. Fact that Claimant paid for portion of travel time when injured not determinative of compensability as Defendant argues payment mere inducement to encourage employees to work at far flung locations.