

Susan Carpenter v. Bell Atlantic

(05/03/04)

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Susan J. Carpenter)	Opinion No. 03A-04WC
)	
)	By: Margaret A. Mangan
v.)	Hearing Officer
)	
Bell Atlantic Yellow Pages)	For: Michael S. Bertrand
)	Commissioner
)	
)	State File No. M-17961

Because of two errors in the opinion dated on February 4, 2004, it is amended as follows.

Conclusion of Law:

8. Finally, is the question of permanent partial impairment. Claimant had a minor work related injury involving her back, and, at most, a mild traumatic brain injury. Dr. Kenosh's impairment rating logically takes all into consideration with the 5% whole person impairment rating for the spine and 5% for the traumatic brain injury.

ORDER:

Based on the foregoing findings of fact and conclusions of law, the claims for benefits for claimant's psychological injury and for permanent total disability are DENIED.

Dated at Montpelier, Vermont this ____ day of May 2004.

Michael S. Bertrand
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.

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Hearing held in Montpelier on June 9, 10 and 30 and July 8, 2003
Record closed on August 20, 2003

APPEARANCES:

Steven P. Robinson, Esq., for the Claimant
Jennifer K. Moore, Esq., and Andrew C. Boxer, Esq., for the Defendant

ISSUES:

1. Is claimant’s psychological condition causally related to her work-related injury?
2. Is the claimant permanently and totally disabled?
3. If not permanently and totally disabled, what permanency, if any, does she have as a result of her work-related injury?

EXHIBITS:

Claimant’s Exhibit 1 a.b.:	Medical records, reports and curriculum vitae of experts
Claimant’s Exhibit 2:	Police Report
Claimant’s Exhibit 3:	Recorded statement (i.d only; not admitted)

Defendant's Exhibit A:	Handwritten notes (4 pages)
Defendant's Exhibit B:	Handwritten notes (5/11/01)
Defendant's Exhibit C:	Medical Records
Defendant's Exhibit D:	Letter from Chris Pratt to Dr. Matthew
Defendant's Exhibit E:	Claimant's handwritten notes (4 pages)
Defendant's Exhibit F:	Claimant's notes
Defendant's Exhibit G:	Article
Defendant's Exhibit H:	Claimant's handwritten notes (3 pages)
Defendant's Exhibit I:	Claimant's handwritten notes
Defendant's Exhibit J:	Claimant's handwritten notes (2 pages)
Defendant's Exhibit K:	Article
Defendant's Exhibit L:	Claimant's notes (2 pages)
Defendant's Exhibit M:	Adult Review of Systems (3 pages)
Defendant's Exhibit N:	Daytimer 2000
Defendant's Exhibit O:	Daytimer 2001
Defendant's Exhibit P:	Telephone message/ Dr. Shenk's office
Defendant's Exhibit Q:	Defendant's Supplemental Exhibit
Defendant's Exhibit R:	Table of Text Findings
Defendant's Exhibit S:	Fran Plaisted's Final Report

CLAIM:

Permanent Total Disability

FINDINGS OF FACT:

1. Claimant was an "employee" and Bell Atlantic Yellow Pages her "employer" under the Vermont Workers' Compensation Act at the time of her February 1999 motor vehicle accident.
2. Claimant was a passenger in an automobile accident that arose out of and in the course of her employment on February 26, 1999. The car was traveling north on Route 89. When the driver missed the exit, she tried to make a U-turn to reverse her direction. In the process, claimant could see that they were headed to a guardrail. She then put her right hand on the dashboard. The car crashed into a guardrail; the airbags deployed. Afterwards, claimant's right hand was bloody. A man who approached her side of the car and told her he would call for help. When the Ambulance Service arrived at the scene, claimant was alert and oriented. She reported that she had not been wearing a seatbelt and had not lost consciousness. However, she complained of pain in her lower back.
3. At the Central Vermont Hospital Emergency Room, claimant complained of pain in her right hand and lower back. A fracture of a finger was diagnosed and treated. Her neurological examination was normal.

4. On March 2, 1999, claimant visited her chiropractor, Dr. William Schenk with complaints she related to the MVA the previous week. She reported having lost consciousness during or immediately after the accident and having experienced “shock and back pain.” That report is inconsistent with the emergency department records from the day of the accident and was clearly exaggerated.
5. On March 9, 1999 claimant told Dr. Schenk that she could not work due to pain and muscle fatigue. Later that month she went on a vacation.
6. Dr. Jamie Asnis, a neurologist, evaluated the claimant on March 17, 1999. Claimant told Dr. Asnis that she had lost consciousness in the motor vehicle accident and had been experiencing difficulty with concentration ever since. The neurological examination was normal.
7. About a month after the accident, claimant had lunch with Larry Kimball, her direct supervisor. Mr. Kimball does not recall that there was anything unusual about his conversation with the claimant that day.
8. On April 4, 1999, Dr. Schenk released the claimant to return to work part-time with restrictions. Bell Atlantic was unable to accommodate the restrictions.
9. In mid-April 1999 Dr. Asnis described claimant’s prognosis as excellent, but claimant expressed concern that she might not be able to multi-task at her job.
10. When claimant saw an occupational therapist on May 11, 1999, claimant expressed concern that her memory deficits might have an adverse impact on her ability to work.
11. On May 13, 1999, claimant told a speech and language pathologist, Lakshmi Joshi-Boyle, that she had lost consciousness in the motor vehicle accident and since had lost attention to detail, was shifting words and was making written transposition errors. Ms. Joshi-Boyle suggested that she stay out of work for 6 to 8 months because of claimant’s inability to multi-task in a fast-paced job.
12. In late May 1999 claimant presented to Dr. Asnis disheveled and with difficulties finding the right words. Dr. Asnis then prescribed medication for sleep and a mood disorder. Later that month, an EEG revealed suspicious activity in the left temporal lobe, but not frank signs of seizure activity. Dr. Asmis did not think there was strong evidence clinically or from the EEG to support a diagnosis of seizures.
13. In June of 1999 claimant told Dr. Schenk that she wanted to be released from the expectation of returning to work at Bell Atlantic. In July, she told Dr. Schenk that she had resolved not to return to work at Bell Atlantic.

14. Also in July 1999 claimant told her occupational therapist that she had mistaken conductors at the top of telephone poles for people. However, on a visual-perception test, she had a perfect score. At home, she had no difficulty handling her personal checkbook and, at the time, was doing the books for her fiancé's business. She was discharged from further physical therapy.
15. On July 23, 1999, claimant told Dr. Asnis that she had tried to open a can of cat food with an ice cream scoop. Paxil was prescribed.
16. On August 18, 1999 claimant presented to Dr. Bagley, a psychiatrist at the Hitchcock Clinic in Windsor, with complaints of problems with memory and concentration. Dr. Bagley noted that claimant suffered a probable head injury at the time of the MVA and was unable to return to work in her prior position with Bell Atlantic because she could no longer juggle many tasks. Dr. Bagley referred claimant to Dr. Dorie Rapp for a neuropsychological testing and specifically noted that she wanted to look at a return to work program after the testing.
17. On August 30, 1999 claimant presented to the Fletcher Allen Brain Injury Clinic where she reported that she was having trouble paying her bills. Dr. Owen Drudge noted that she presented as "unusually disabled" from an accident that produced a minimal loss of consciousness. A month later, he noted that she was preoccupied with her symptoms.
18. When she went to Dr. Rapp for testing, claimant reported that her relationship with her fiancé was strained, and refused to give Dr. Rapp permission to talk with him. She also told Dr. Rapp that she had been researching brain injuries on the internet and that she was keeping a diary of her problems, which included seeing a clothes rack as a male intruder and shopping in her pajamas. Other care providers also recorded reports of bizarre behaviors, although in each instance, the behavior was different. And, in each instance, the report came directly from the claimant.
19. Dr. Rapp recommended a 24 hour EEG and referral to Dr. Thomas McAllister. Then, in September 1999 Dr. Rapp wrote to claimant with the "good news" that test scores were largely normal, but that she did have some temporal lobe dysfunction.
20. Despite claimant's continued reports of unusual behaviors, she continued to drive alone without mishap. She visited Dr. Drudge, driving alone, on six occasions. During that time, she reported difficulty sleeping, for which she was taking medication.

21. At a visit to Dr. Drudge on September 7, 1999, he noted that claimant “had many questions about brain injury mechanisms, sequelae and recovery.” Her last visit with him was on October 12, 1999 when he noted improvement in sleep, alertness and concentration, although there is no indication in the note for that day that it was to be the last visit. Claimant later told Dr. Kenosh that going to Dr. Drudge was a waste of time.
22. In a September 1999 letter to the claimant after testing, Dr. Rapp reported the “good news” that she “appear[ed] to have recovered from the common post-concussion syndrome difficulties, and the majority of your cognitive abilities are quite functional.” However, she also noted that complex problem solving and maintaining abstract strategies were difficult for her, which Dr. Rapp attributed to temporal lobe dysfunction. On other parts of the testing, claimant scored within the range of severe depression and anxiety. At the time of the September 18, 1999 visit, Dr. Rapp determined that claimant’s self-research and self-treatment were counterproductive.
23. In October 1999 and after reviewing claimant’s records, Dr. Asnis, a neurologist, wrote, “I simply cannot convince myself that she is experiencing anything that could represent actual ictal [seizure] activity.” Also in that month, claimant told Dr. Schenck that she thought the woodstove was a camel. Later, she said she tried to put her cell phone in a toaster.
24. Claimant told Doctors Mirolo and McAllister that her fiancé had psychologically abused her. In February 2000 she told Dr. Schenk that she had obtained a restraining order against Steve Jerome, her fiancé, and was afraid of leaving the house.
25. A February 2000 EEG revealed abnormal activity over the right temporal leads.
26. Claimant reported to physicians that her fiancé had been physically and emotionally abusive.
27. Claimant insisted that her condition was severe, even when clinicians were suggesting otherwise, as indicated in Ms. Boyle’s May 19, 2000 note.
28. On May 24, 2000 Dr. Bagley discussed the pros and cons of a limited return to work program with the claimant.
29. In July 2000 claimant told Dr. Bagley that she had been volunteering at the Brain Injury Association and that her symptoms had substantially improved, although she reported problems with writing.

30. At a visit to Dr. Bagley on November 2, 2000 when the doctor began a discussion of claimant's returning to work, claimant was "adamant that she would not be able to return to work in her previous environment because of the stresses..." Dr. Bagley offered to contact Chris Pratt from the Vermont Brain Injury Foundation and her lawyer in the hope of resolving this case.
31. In January of 2001 claimant began psychotherapy with Dr. Richard Davis who noted that claimant kept a "memory notebook."
32. On February 15, 2001, Dr. Schenck wrote that claimant was physically unlimited in walking, sitting or standing. He characterized her mental abilities as "inconsistent," noting that her memory at times was not dependable at other times was "uncannily accurate."
33. On February 15, 2001, claimant saw Dr. McAllister to whom she reported washing her hair with toothpaste and seeing an armadillo and kangaroo. Dr. McAllister wrote, "there are several features which make it difficult to tie much of this disability to a simple mild TBI [traumatic brain injury]." He noted that her subjective reports were inconsistent with her demonstrated abilities to perform activities of daily living. His note reads in part: "It should be noted that she made it to the appointment on time, brought her entire packet of medications with her, as well as two very neatly printed and well organized sheets of paper which detail her various complaints as well as significant events during the month of October to February of 2001. Dr. McAllister diagnosed depression, anxiety and an unspecified cognitive disorder. He concluded that most of her distress fell within the psychiatric realm.
34. Later that month, Dr. Asnis documented claimant's reports of putting laundry in the dishwasher, believing pearls were medication and seeing a kangaroo. Dr. Asnis noted that claimant was spending much time on the internet researching information about cognitive injuries and expressed doubt that claimant was having actual epileptic activity.
35. On February 28, 2001, claimant saw Dr. Bagley for a reassessment. Dr. Bagley noted that claimant was spending much time on line gathering information on cognitive injuries. Overall, Dr. Bagley determined that claimant was much improved cognitively, but still had intermittent episodes of staring and stuttering.
36. Claimant became involved in a group for people with brain injuries and worked on designing a pin for that group.
37. On April 30, 2001 claimant began treating with Dr. John Matthew, a primary care physician who documented her history of a head injury with a 10 to 15 minute loss of consciousness and multiple problems since.

38. At a subsequent visit with Dr. Matthews, claimant described her continued problems with memory and concentration, yet listed the names and categories of each of her medications, Trileptal, Proxil, Provigal and Amitriptylene. She described inattentive driving, almost driving into a train, yet continued to drive.
39. On July 20, 2001, claimant again saw Dr. Bagley who noted “significant visual, spatial, perceptual and memory deficits.” During the interview, Dr. Bagley noted language deficits.
40. Claimant continued to report what was described as “bizarre” behaviors, picking up a baby skunk, putting eyeglasses in the freezer, driving a convertible through a car wash, confusing an ant trap with a peanut butter cup, trying to start her car with a dog’s collar.
41. On November 16, 2001, claimant met with Dr. Rapp for a second neuropsychological test. Claimant’s boyfriend, Chris Pratt, President of the Vermont Brain Injury Association, accompanied her. Claimant reported pseudo-blindness. The results of the neuropsychological testing indicated a deterioration, which would not be expected with a brain injury, leading Dr. Rapp to attribute it to temporal lobe dysfunction.
42. In December of 2001, claimant reported to Dr. Davis that she had driven to Rochester, New York.
43. On December 21, 2001, Claimant saw Dr. Rapp, who noted her performance had deteriorated since testing in 1999 and that what she said was different from what she did. Dr. Rapp would not have expected a deterioration in test results due to a mild TBI, but suggested that there were other accident-related medical conditions that could explain the deterioration. Dr. Rapp noted that claimant had been driving, and suggested that she not drive independently. She predicted that it was unlikely that claimant would return to competitive employment in the near future.
44. After an eight-month hiatus, claimant visited Dr. Asnis for the last time on February 6, 2002 when she reported that her alertness and mental processing had improved.
45. In June of 2002, claimant reported to Dr. Davis that she thought her speech was getting worse.
46. A January 16, 2003 EEG was interpreted as normal. A CT taken that day was also normal.

Medical Expert Opinions

47. Dr. Schenk, the chiropractor who treated the claimant and who was the first to suspect traumatic brain injury, testified for the claimant. He testified that claimant's June 1998 and January 1999 examinations, both before the accident at issue here, revealed abnormalities in the cranial nerves, which he had attributed to a previous cervical injury. As noted in the facts, claimant's initial report to Dr. Schenk was inaccurate and exaggerated, thereby tainting the many opinions that followed.
48. Dr. Bagley opined that the claimant's condition is casually related to the MVA, an opinion based on the positive EEG, history and clinical observations. She testified that the 1999 MVA caused the claimant's head injury, which caused cognitive problems, which in turn caused depression. Further, she opined that claimant is unable to work at a functional capacity because of her cognitive injuries, which include problems with processing and sequencing information and the ability to follow through.
49. On August 15, 2002, Dr. Bagley placed claimant at medical end result with a 34% whole person impairment, 29% of which was attributable to cognitive and behavioral dysfunction, based on the Central and Nervous System chapter in the 5th edition of the AMA Guides to the Evaluation of Permanent Impairment. In her note for that visit, Dr. Bagley determined that claimant's cognitive and depressive symptoms were referable to her motor vehicle accident.
50. Dr. Rapp, a treating neuropsychiatrist, opined that the "constellation of symptoms and functional impairments are the result of the development of a post-traumatic temporo-limbic dysfunction (due to secondary scar tissue and/or post-traumatic biochemical imbalances affecting the electrical functioning of her brain)." She noted that claimant had recovered from what Dr. Rapp accepted was a concussion and post-concussion syndrome and that she had reached a medical end result for the concussion and fractures. However, claimant's cognitive condition deteriorated, which Dr. Rapp found consistent with the abnormal brain activity seen on EEG. In her opinion, claimant had not reached a medical end for the cognitive problems.
51. Dr. McAllister also offered an opinion in support of the claimant at the hearing. He opined that she fell into the minority of those who do not recover from a mild head injury and actually do worse than expected. Because her current condition followed the motor vehicle accident, he opined that the accident caused it.

52. On July 17, 2000, at the request of the defendant, claimant underwent an IME with Dr. Michael Kenosh, who declined to place claimant at medical end result. He attributed her problems to behavioral and emotional issues and recommended behavioral therapy. His report reflects a diagnosis of TBI.
53. When claimant underwent a second IME with Dr. Kenosh in October 2001, he noted a history of brain injury that had evolved into a conversion disorder. He determined that she had reached medical end result with a 4% whole person impairment rating for the spine and 5% for the traumatic brain injury. He did not rate the conversion disorder although he described it as “significant.” At that visit, claimant reported that she no longer had problems with activities of daily living. She specifically reported having no difficulty driving.
54. When he testified at the hearing, Dr. Kenosh could not exclude the work injury as a possible cause of the claimant’s disorder, although he attributed it to other psychological factors.
55. Dr. Richard Levy, a neurologist, performed an IME at the request of the defendant on February 6, 2003. Claimant presented with pseudo-blindness and reported having broken her hand, back and head in the February 1999 accident.
56. On examination, Dr. Levy noted that her “testing was bizarre to say the least.” She spoke in a staccato pseudo-aphasic pattern. Dr. Levy was unable to find any organic basis for claimant’s subjective reports. He did not believe that she had either a seizure disorder or the sequelae of a brain injury. He explained that EEGs are fraught with false positives and that seizures would present with a repeat pattern. Furthermore, the medical records do not support her contention that she suffered a concussion in the 1999 accident, and even if they did, her symptoms should have improved, not deteriorated, in time. Claimant’s symptoms do not resemble anything he has seen with hundreds of patients. For example, claimant tested worse than his patients with Alzheimer’s disease on the mental status examination, results at odds with her presentation and obvious abilities. He concluded that claimant had a psychogenic disorder, factitious disorder or was malingering. Dr. Levy’s opinion was limited to his area of neurology.
57. A defense expert, Dr. Nancy Hebben, also examined claimant for a neuropsychological examination. Claimant reported that she had difficulty following a ball at a basketball game from one end of the court to the other, yet had no trouble performing the tasks necessary to drive a car.
58. On the tests Dr. Hebben administered, claimant demonstrated progressive and diminished performance in almost all measures as compared to the two earlier neuropsychological tests. Dr. Hebben opined that claimant’s poor test performance could not be explained by the 1999 MVA, brain injury or seizure disorder.

59. Further, Dr. Hebben found no evidence in the medical records, including early ambulance and ER records, to support a finding that claimant suffered a concussion in the motor vehicle accident. In her opinion, a conversion disorder or malingering, or a combination of both, account for claimant's continued symptoms.

Vocational rehabilitation opinions

60. On March 24, 2003, claimant underwent a vocational evaluation with Daisy Wojewoda. Claimant arrived disheveled and reported she could not even do basic internet searches due to difficulty "sequencing the steps." Claimant performed poorly on all the tests. Ms. Wojewoda concluded that claimant could not work for vocationally relevant periods of time or maintain any type of competitive employment. However, she recommended vocational rehabilitation services, job coaching in particular.
61. Diane Aja, Occupational Therapist, performed a Functional Capacity Evaluation for the claimant. She concluded that claimant had a sedentary-light physical work capacity, but that due to her cognitive problems, visual-spatial problems, fine motor problems and irritable back, claimant was totally disabled from gainful employment.
62. Myron Smith performed a Vocational Rehabilitation Analysis on May 28, 2003 at the claimant's request. His lengthy report includes the interview with the claimant, synopsis of medical records and a questionnaire completed by the claimant in which she identified problems. In only two areas did she report no difficulty: driving and walking.
63. Mr. Smith was unable to identify any jobs for the claimant at the sedentary level.
64. In May of 2003 claimant underwent a driving evaluation with Miriam Watson. She scored 40 out of 40 on a visual test and also within normal limits on the clinical evaluation, which included "sustained concentration, divided attention, and attention to a stimulus within a competing stimulus."
65. On June 4, 2003, claimant underwent a second FCE with Ginni Reeves who concluded that claimant was physically capable of engaging in light duty employment for an 8-hour day.
66. On June 5, 2003, Iris Banks performed a Vocational Assessment. To Ms. Banks, claimant reported difficulty sitting for long periods of time and said she could not type. Ms. Banks recommended the claimant work with a vocational counselor to pursue gainful employment.

67. Fran Plaisted also rendered a vocational opinion in this case, based on the claimant medical and vocational records. She noted discrepancies in the test results from previous vocational assessments and neuropsychological testing. As a result, Ms. Plaisted could not discern claimant's actual cognitive abilities.
68. Vocational rehabilitation efforts were not made in this case.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).
2. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).
3. Understandably, claimant's treating physicians have taken her word at face value and pursued a treatment regime based on that history. Also, understandably, the defense expert, Dr. Kenosh, initially accepted the claimant's history of a traumatic brain injury, but later changed that opinion as her condition deteriorated and the complete history came into clearer focus.
4. Throughout the medical records are words such as "bizarre" to describe the claimant's symptoms. They do not fit any known clinical pattern. Although she has been treated for seizures, the behaviors on which that diagnosis is based do not follow known seizure patterns where symptoms may be unusual, but are consistent from one seizure to another. Such is not the case here, as Dr. Levy cogently explained. Claimant's own treating neurologist, Dr. Asnis, did not think she exhibited true seizure activity, although she was willing to observe the claimant over time.

5. Although Dr. McAllister offered an opinion in support of causation at the hearing, that opinion was based on a temporal relationship and was made without the benefit of the claimant's complete history. Furthermore, it stands in contrast with the treatment notes in which he described in some detail the claimant's clear abilities. Based on his and other the medical records, history of the accident and the credible opinions proffered, I reject the claimant's assertion that her current psychological condition was caused by her work-related MVA. The evidence in support of her claim is that a head injury set a cascade of events in motion. Yet, there is no contemporaneous credible evidence that she ever had a head injury or loss of consciousness. And even if she had, her initial progress showed the expected improvement. Objective tests were negative, with the exception of an EEG that revealed activity that her neurologist Dr. Asnis did not believe was true seizure activity and which Dr. Levy opined was a false positive. The worsening of her symptoms coincided with personal problems and persistent internet searches. To causally link her current clinical condition to the MVA, with at most a mild traumatic brain injury, is a speculative theory that falls below the required standard of probability.
6. Nor can I conclude that claimant is permanently and totally disabled. Her symptoms are inconsistent with known abilities. Their onset followed documented and objective clinical improvement and a suggestion that she return to work. It was the claimant, not her physicians, who expressed initial doubts about her ability to return to work. After that, her reported bizarre experiences continued, treatment was prescribed and testing got worse. Documentation of the unusual behaviors has been based almost exclusively on claimant's descriptions. She "tested" worse than those with Alzheimer's disease, yet can drive a car, travel alone, arrive at appointments on time and passed a 1 ½ hour driving test.
7. Claimant's poor performance on functional capacity evaluations must be viewed with the same skepticism needed for an evaluation of her clinical symptoms. She is in greater control than she would like us to believe, performing poorly on those tests when doing so advances her claim and yet being independent with driving, keeping a history and documenting medications when doing so helps her. Those tests, therefore cannot serve as a basis for permanent total disability.
8. Finally, is the question of permanent partial impairment. Claimant had a minor work related injury involving her back, and, at most, a mild traumatic brain injury. Dr. Kenosh's impairment rating logically takes all into consideration with the 4% whole person impairment rating for the spine and 5% for the traumatic brain injury.

ORDER:

Based on the foregoing findings of fact and conclusions of law, the claims for benefits for claimant's psychological injury and for permanent partial disability are DENIED.

Dated at Montpelier, Vermont this 4th day of February 2004.

Michael S. Bertrand
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.