STATE OF VERMONT
DEPARTMENT OF LABOR

Thomas Kibbie

v.

Killington, Ltd.

Opinion No. 05-16WC

By: Jane Woodruff, Esq.
Administrative Law Judge

For: Anne Noonan
Commissioner

State File No. Z-58225

OPINION AND ORDER

Hearing held in Montpelier, Vermont on December 29, 2014
Record closed on August 21, 2015

APPEARANCES:

Thomas Bixby, Esq., for Claimant
Erin Gilmore, Esq., for Defendant

ISSUES PRESENTED:

1. Is ongoing treatment for Claimant's neck pain within the terms of the medical benefits foreclosed by the parties' Modified Form 15 Settlement Agreement?

2. To what other medical benefits is Claimant entitled?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	Modified Form 15 Settlement Agreement, August 18, 2010
Claimant's Exhibit 2:	Addendum to Modified Form 15 Settlement Agreement, August 18, 2010
Claimant's Exhibit 3:	Letter from Dr. Miller to Attorney Mabie, May 15, 2012
Claimant's Exhibit 4:	Letter from Dr. Miller to Barbara Hewes, May 29, 2012
Claimant's Exhibit 5:	Letter from Dr. Miller to Attorney Bixby, February 24, 2014
Claimant's Exhibit 6:	Letter from Attorney Mabie to Director Monahan, August 27, 2010
Claimant's Exhibit 7:	Letter from Attorney Mabie to Ms. Bard, March 3, 2011
Claimant's Exhibit 8:	Letter from Attorney Mabie to Attorney Valente, April 23, 2012

Claimant's Exhibit 9:	Letter from Attorney Mabie to Department specialist, June 6, 2012
Claimant's Exhibit 10:	Two prescription co-payments
Claimant's Exhibit 11:	Mileage reimbursement request
Claimant's Exhibit 12:	Saint Francis Hospital bill
Claimant's Exhibit 13:	Multiple health insurance claim forms
Claimant's Exhibit 14:	Saint Francis bills, November and December 2010
Claimant's Exhibit 15:	Physical therapy itinerary, November and December 2010
Claimant's Exhibit 16:	TENS unit denial letter, May 13, 2011
Claimant's Exhibit 17:	Mount Sinai Hospital collection letter, January 18, 2011
Claimant's Exhibit 18:	Dentist bill, May 7, 2008
Claimant's Exhibit 18A:	Letter from dentist office to Attorney Bixby, December 19, 2013
Claimant's Exhibit 19:	Insurance payment history, September 16, 2011
Claimant's Exhibit 20:	Summary of unpaid medical bills
Claimant's Exhibit 21:	Pharmacy printout for 2010 and 2011
Claimant's Exhibit 22:	Expired prescription card
Claimant's Exhibit 23:	Physical therapy prescriptions from Dr. Miller, November and December 2011
Defendant's Exhibit A:	Approved Modified Form 15 Settlement Agreement, September 2, 2010
Defendant's Exhibit B:	Email from Attorney Mabie to Attorney Valente with marked up Form 15 Settlement Agreement, August 10, 2010

CLAIM:

Medical benefits pursuant to 21 V.S.A. §640
Costs and attorney fees pursuant to 21 V.S.A. §678

Ruling on Defendant's Motion to Exclude Evidence

During the formal hearing, Claimant proffered testimony from his former attorney, John Mabie, Esq., who had represented him at the time that the Modified Form 15 Settlement Agreement at issue in this case was negotiated. Attorney Mabie sought to testify regarding the intended scope of the settlement agreement, specifically, which ongoing medical treatments the parties meant to foreclose thereby. Defendant moved to exclude the testimony on the grounds that the parol evidence rule rendered it inadmissible. The administrative law judge reserved ruling on the motion pending further briefing by the parties.

The parol evidence rule is well settled in Vermont. When contracting parties embody their agreement in writing, the rule prohibits the admissibility of "evidence of a prior or contemporaneous oral agreement . . . to vary or contradict the written agreement." *Big G Corporation v. Henry*, 148 Vt. 589, 591 (1987) (internal quotations omitted).

The purpose of the parol evidence rule is to prevent fraud and eliminate confusion in the making of written agreements. *Id.* at 594. The law presumes that a written contract contains the parties' entire agreement. *Economou v. Vermont Electric Coop*., 131 Vt. 636, 638 (1973) (internal citations omitted). Contract terms that are unambiguous on their face cannot be modified by extrinsic evidence. *Hall v. State*, 2012 VT 43, ¶21.

As will be seen *infra*, Conclusion of Law Nos. 4-16, because I have concluded in this case that the parties' Modified Form 15 Settlement Agreement was unambiguous on its face, I presume that its terms fully embody the parties' intent. For that reason, I conclude that Attorney Mabie's proffered testimony is inadmissible.

Defendant's Motion to Exclude Evidence is hereby **GRANTED**.

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

3. Claimant was a volunteer ski ambassador for Defendant, a position he had held for ten years prior to the 2008 winter season. His duties included helping other skiers, putting their equipment back on if they fell and generally being pleasant to the paying customers.

4. Claimant resides in Vernon, Connecticut. On weekends during the ski season, he traveled to Defendant's ski area to perform his ambassador duties. He did not introduce any evidence to establish either where he stayed while in Vermont or what his regular commute distance to and from work was.

Claimant's January 2008 Work Injury

5. At the end of the day on January 12, 2008, Claimant was conducting a final trail sweep as part of his ambassador duties. His son was accompanying him. During the run, Claimant fell and hit his head so hard that it cracked his ski helmet. He credibly testified that he has no real memory of the fall or its immediate aftermath.

6. Claimant's son called for emergency assistance. Claimant went by ambulance to Dartmouth-Hitchcock Medical Center, where he was later admitted. A CT scan revealed a very small hemorrhage in his right temporal lobe, but no skull fracture. Claimant was discharged home four days later. While he could not specifically recall at formal hearing what his injuries were upon discharge, he credibly

testified that he remembered not being able to see very well, having a difficult time walking due to right ankle pain, having pain in his right arm, and just wanting to get home.

7. Defendant accepted Claimant's injury, which it initially described as **"**head/face/concussion," as compensable, and began paying workers' compensation benefits accordingly.

Claimant's Course of Treatment from March 2008 through August 2010

(a) Traumatic brain injury, occipital neuralgia, headaches and neck pain (Dr. Miller)

8. In March 2008, Claimant entered the traumatic brain injury program at Mount Sinai Rehabilitation Hospital under the care of Dr. Miller, a board certified physiatrist with a subspecialty in brain injuries. Dr. Miller diagnosed a traumatic brain injury with occipital neuralgia, that is, an injury to or inflammation of the occipital nerves. Dr. Miller also diagnosed a cervical whiplash injury and vision problems, all causally related to Claimant's January 2008 work injury.

9. Claimant has treated with Dr. Miller continuously from March 2008 to the present. His initial complaints included headaches, neck pain, loss of taste and smell, loss of concentration, attention and memory, vision problems and mood swings.

10. For Claimant's whiplash injury, Dr. Miller initially prescribed a muscle relaxant and administered a cervical injection, which provided only short-term relief. To address his ankle injury, Dr. Miller referred him to physical therapy. Claimant also underwent both occupational and speech therapy. For his chronic headaches and neck pain, Dr. Miller prescribed oxycodone, which Claimant continues to this day to take for this purpose.

11. In April 2008 Claimant underwent a cervical spine MRI in an attempt to identify the source of significant pain complaints between his right shoulder and the back part of his head. The results were negative for any pathology. Thereafter, Dr. Miller administered a series of occipital nerve blocks to address both occipital neuralgia and neck pain, but these provided only short-term symptom relief.

12. During the ensuing months, Dr. Miller continued to administer nerve blocks for short-term relief of Claimant's pain. Unfortunately, none of the treatments provided long-term pain relief. Thereafter, he referred Claimant for craniosacral therapy. This is a subset of physical therapy that uses gentle hands-on manipulation of the head and neck to relieve pain.

13. Claimant saw Dr. Miller on a monthly basis throughout 2009. He continued to complain of headaches, neck pain, difficulty processing his thoughts, vision

problems and drastic mood swings. Dr. Miller strongly recommended that Claimant undergo a neuropsychological evaluation with counseling thereafter. Defendant approved one counseling session, but none after that until its own expert, Dr. Drukteinis, recommended psychological counseling in July 2012, *see* Finding of Fact No. 58, *infra*. The evidence does not reflect any basis for Defendant's refusal to pay. Claimant also continued to engage in craniosacral therapy during this time, which provided him with some measure of pain relief.

(b) *Fractured teeth and dental work (Dr. Shlafstein)*

14. Claimant credibly testified that prior to his January 2008 work injury, his teeth were "perfect."

15. The work injury caused damage to seven teeth. Specifically, in March 2008 Claimant's treating dentist, Dr. Shlafstein, diagnosed fractures to tooth numbers 25, 26 and 30, and chips and possible fractures to tooth numbers 7, 8, 9 and 10, all causally related to the January 2008 work injury.

16. Dr. Shlafstein repaired the fractures to tooth numbers 25 and 26 in March 2008. To repair the other injured teeth, he determined that Claimant would require full coverage crowns. Otherwise, he risks further damage to the roots, which might necessitate root canals and/or excision. I find this analysis credible.

17. Defendant accepted the repairs to tooth numbers 25 and 26 as causally related to the work injury and paid the associated dental bills accordingly. As for the repairs to tooth numbers 7, 8, 9, 10 and 30, it is unclear from the record at what point Claimant first sought coverage from Defendant for this treatment and was denied. He has yet to undergo the repairs to these teeth. It is unclear whether he has suffered the additional damage Dr. Shlafstein feared would occur were treatment delayed.

(c) *Vision deficits (Dr. Danberg)*

18. Claimant first reported vision problems to Dr. Miller in March 2008. He began treating with Dr. Danberg, a behavioral optometrist, in October 2008.

19. Dr. Danberg administered several tests to measure Claimant's visual and perceptual deficiencies. Based on the results, she diagnosed convergence insufficiency and ocular motor deficiency. Dr. Danberg causally related both conditions to Claimant's January 2008 work injury. I find her opinion on this issue credible.

20. Dr. Danberg treated Claimant's visual deficiencies with Optometric Visual Rehabilitation Therapy (OVRT). The purpose of this therapy was to address some of the functional difficulties Claimant had encountered – skipping words and transposing letters while reading, veering out of his lane while driving and

seeing double, for example. She also prescribed glasses with prism, which are designed to correct double vision and convergence difficulties.

21. Claimant underwent three OVRT sessions from February through April 2009. Defendant paid for these sessions, but then refused to authorize any more. The record does not indicate the basis for its denial. Similarly, Defendant paid for Claimant's first pair of glasses with prism, but when his prescription changed in October 2009, it refused to cover the cost of a new pair.

The September 2010 Modified Form 15 Settlement Agreement

22. In January 2009, Claimant retained Attorney John Mabie to represent him in his claim for workers' compensation benefits causally related to his January 2008 work injury.

23. On August 18, 2010 Claimant executed a Modified Form 15 Settlement Agreement (the "Agreement") that Attorney Mabie had negotiated on his behalf. In pertinent part, the Agreement, which included handwritten language that Attorney Mabie had inserted (shown in **bold**), stated:

> This is an agreement in which the Claimant agrees to accept $50,000.00, in full and final settlement of all claims for: All claims occurring as a result of the work incident including but not limited to right ankle, head/TBI[1] and right elbow/biceps, however as noted in the addendum attached the carrier will continue to furnish all reasonable and related future medical treatment pursuant to the Rules necessary for the treatment of his cognitive **or other** head injury **including neurological, psychological, ophthalmological, TBI care and treatment;** and prior care for his covered injuries sustained as a result of the accident referred to above, including his claim for past, present and future compensation for temporary total disability, temporary partial disability, permanent partial disability or permanent total disability, dependency benefits, medical, hospital, surgical and nursing expenses, and vocational rehabilitation benefits.

24. The Agreement incorporated by reference a typewritten Addendum. Paragraph 2 of the Addendum, which again included handwritten language that Attorney Mabie had inserted (shown in **bold**), stated:

> As part of this agreement the carrier agrees it will continue to furnish all reasonable and related future medical treatment pursuant to the Rules, necessary to [sic] for the treatment of his cognitive **or other head** injury, **including neurological,**

[1] The acronym "TBI" stands for "traumatic brain injury."

> **psychological, ophthalmological, TBI care and treatment;** and to pay for care for his covered injuries prior to the time of settlement.

25. The Agreement and Addendum thus purported to settle, on a full and final basis, all claims for future indemnity and vocational rehabilitation benefits causally related to any of the injuries Claimant suffered as a consequence of his January 2008 accident.

26. As for medical benefits, however, the settlement terms sought to differentiate between Claimant's "cognitive or other head injury" and all of his other injuries. As to medical treatment for the former, which specifically included "neurological, psychological, ophthalmological, TBI care and treatment," Defendant would continue to bear responsibility into the future. As to treatment for the latter, it would no longer be responsible.

27. After both parties had executed the settlement documents, on August 27, 2010 Attorney Mabie submitted them to the Department for its review, along with the explanatory letter required by Workers' Compensation Rule 17.0000.[2] The letter described the settlement terms as follows:

> [T]he parties are desirous of resolving their dispute with respect to indemnity benefits and certain medical benefits insofar as the claimant's right ankle and right elbow/bicep are concerned. Medical benefits will continue to be paid by the carrier/employer for head injuries and TBI care and treatment, including but not limited to cognitive, neurological, psychological and ophthalmological care. The head injuries are significant and will require on-going assessment and care.

28. The settlement letter, which was copied to Defendant's attorney, but neither reviewed beforehand nor signed by him,[3] also referenced the settlement documents themselves, stating:

> The terms of the settlement agreement are fully set forth in the settlement documents to be submitted to the Department under separate cover by [Defendant], including the Settlement Agreement (DOL Form 15) and Addendum to Modified Form 15 Settlement Agreement, both of which will have been duly executed by the parties.

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[2] Effective August 1, 2015, the pertinent subsections of Rule 17.0000 have been re-codified as Rule 13.1600.

[3] Claimant acknowledged in the Rule 17.0000 letter that Defendant's attorney "has been away this week and has not approved this letter, but he did draft the settlement documents and agreed they could be submitted in his absence."

29. The Department approved the parties' proposed settlement on September 2, 2010.

30. Claimant credibly testified that he had ample opportunity to review the settlement documents with Attorney Mabie, and to ask questions if he so chose, before he signed them. He further testified that he believed the settlement meant that Defendant would continue to be responsible for medical treatment "for everything from the shoulders up." I do not doubt that Claimant was sincere in this belief.

Claimant's Course of Treatment from September 2010 Forward

(a) Traumatic brain injury, occipital neuralgia, headaches and neck pain (Dr. Miller)

31. Claimant underwent ongoing treatment with Dr. Miller in 2010 for his traumatic brain injury, occipital neuralgia, persistent headaches and neck pain. The latter two conditions he continued to manage with oxycodone.

32. As treatment for Claimant's ongoing headaches and cervical symptoms, in November 2010 Dr. Miller prescribed physical therapy, with both mechanical traction and deep tissue mobilization. Claimant attended seven sessions during November and December 2010.

33. Defendant denied payment for the November and December 2010 physical therapy sessions, which totaled $1,364.94, on the grounds that the terms of the parties' approved settlement agreement now excused it from doing so. Specifically, it asserted that Claimant's headaches were causally related to his cervical injury, that the cervical injury was not subsumed under the category of either "cognitive or other head injury" or "traumatic brain injury," and that therefore its ongoing responsibility had ended. Thereafter, Dr. Miller prescribed additional sessions, but because Defendant continued to deny payment Claimant was unable to continue them.

34. Defendant also denied payment of several of Dr. Miller's bills. Nine of the unpaid bills Claimant submitted at hearing covered treatments rendered between November 8, 2010 and April 5, 2011. The diagnosis noted on eight bills is "cervicalgia;" the ninth bill, for services rendered on November 8, 2010, indicates treatment for "brain injury." From reviewing the medical records corresponding to the eight "cervicalgia" bills, I find that the treatments rendered were in fact related to Claimant's cervical injury. Similarly, the medical record corresponding to the November 8, 2010 bill reflected treatment for his brain injury.

35. Defendant also denied payment for treatment rendered by Dr. Miller on March 15, 2012. From my review of the corresponding office note, I find that Dr. Miller's treatment on that date involved ongoing evaluation of both Claimant's cervical

pain, for which he administered a cervical injection, and his traumatic brain injury.

36. In February 2014 Dr. Miller became increasingly concerned that Claimant was not receiving any treatment for depression. In his opinion, Claimant's psychological condition is causally related to his traumatic brain injury. As noted above, Finding of Fact No. 13 *supra*, until July 2012 Defendant had denied responsibility for all but one counseling session. The record does not establish any basis for its denial of psychological treatment. According to Dr. Miller, all of Claimant's physical injuries have been exacerbated as a consequence of his inability to access mental health services. I find this analysis credible.

37. Claimant continued to treat with Dr. Miller at least through June 2015. Currently he continues to suffer from chronic neck pain, headaches, visual problems and difficulty sleeping. Defendant having denied payment for additional physical therapy, Dr. Miller's treatment has consisted of medications: oxycodone for pain management, zolpidem tartrate for sleep disturbance and paroxetine for depression. Defendant has denied payment for all of these; again, however, the record does not clearly establish any basis for its denials.

38. Dr. Miller also recommended that Claimant obtain a TENS unit, a device that sends electrical impulses along the skin surface and nerve strand to relieve pain. Defendant refused payment for the device, on the grounds that its purpose was to treat Claimant's neck pain, for which it was no longer responsible under the terms of the parties' approved settlement. Claimant has since purchased one on his own, and credibly testified that it has helped to alleviate his neck pain.

39. Claimant also has paid for at least some of the medications Dr. Miller has prescribed from his own funds. He introduced evidence of payments totaling $719.99 for prescriptions of oxycodone, zolpidem tartrate and paroxetine that he filled between January 2011 and January 2013.

40. Claimant also paid $157.37 for a prescription for Catapres-TTS, a blood pressure medication, in September 2010. The medical evidence does not address whether his need for this medication is causally related in any way to his January 2008 work injuries.

(b) *Dental work (Dr. Shlafstein)*

41. As noted above, Finding of Fact No. 17 *supra*, Claimant has yet to undergo the remaining dental work that Dr. Shlafstein recommended in March 2008. Defendant has refused payment on the grounds that under the terms of the parties' approved settlement agreement, it is no longer covered.

(c) *Visual deficits (Dr. Danberg)*

42. Claimant continues to suffer from various visual deficiencies, including difficulty tracking and focusing and eye-teaming deficits. Functionally, he continues to skip letters and read words out of sequence.

43. In May 2012 Claimant returned to Dr. Danberg to assess whether he might still benefit from additional OVRT treatment. Dr. Danberg credibly concluded that he would.

44. As noted above, Finding of Fact No. 21 *supra*, since at least October 2009 Claimant has required new glasses with prism, as his prescription has changed. Defendant has denied payment, for reasons that are unclear from the record.

Expert Medical Opinions

45. The parties introduced conflicting expert medical evidence regarding the causal relationship between the various treatments at issue in this claim and the injuries for which Defendant remains responsible in accordance with the September 2010 settlement agreement.

(a) Dr. Miller

46. As noted above, Finding of Fact No. 8 *supra,* Dr. Miller diagnosed Claimant with a traumatic brain injury with occipital neuralgia, cervical pain from a whiplash injury and vision problems, all causally related to his January 2008 work accident.

47. Dr. Miller had difficulty separating out which of the medical treatments he prescribed were referable specifically to Claimant's head and/or traumatic brain injury and their associated sequelae (neurological, psychological and/or ophthalmological), and which were referable to his neck injury. I acknowledge his credible opinion that all of Claimant's head and neck symptoms were causally related to the work injury, but standing alone, this opinion is not responsive to the question whether, under the terms of the parties' settlement, Defendant remains responsible for specific treatments or not.

48. Dr. Miller credibly concluded that Claimant's trigger point injections, occipital nerve blocks, craniosacral therapy, physical therapy with traction, TENS unit, and vision treatment were all medically necessary and causally related to his work injuries. Of these, he acknowledged that the trigger point injections, physical therapy with traction and use of a TENS unit were treatments specifically prescribed to treat Claimant's cervical pain, and not his traumatic brain injury. According to Dr. Miller, the occipital nerve blocks, craniosacral therapy and vision treatments were causally related to the latter condition. I find this analysis credible.

49. As for prescription medications, as noted above, Finding of Fact No. 37 *supra*, Dr. Miller prescribed oxycodone for Claimant's persistent headaches and chronic

neck pain, zolpidem tartrate for his sleep disturbance and paroxetine for depression. Although Claimant's chronic neck pain very well may have contributed to all three of these conditions, according to Dr. Miller they are common sequelae of traumatic brain injury as well. I accept as credible his opinion that all three medications are necessitated at least in part by Claimant's traumatic brain injury, therefore.

(b) *Dr. Conway*

50. At Defendant's request, in September 2013 Claimant underwent an independent medical examination with Dr. Conway, a board certified neurologist. Dr. Conway also reviewed Claimant's relevant medical records.

51. Dr. Conway diagnosed Claimant with a closed head injury, causally related to his January 2008 accident, which has affected his cognition, impaired his memory and processing ability, triggered concussive headaches and made him frustrated and psychologically distressed. I find this analysis credible.

52. As for which of Dr. Miller's prescribed treatments were necessitated by Claimant's cervical injury as opposed to his cognitive and other head injuries, Dr. Conway concluded that the physical therapy with traction that Claimant underwent in November and December 2010, Finding of Fact No. 32 *supra*, was directed at the former, while the craniosacral therapy he underwent in 2008 and 2009, Finding of Fact Nos. 12 and 13, *supra*, was focused on the latter. In this he concurred with Dr. Miller, *see* Finding of Fact No. 48 *supra*.

53. Dr. Conway disputed the necessity for occipital nerve blocks as causally related to Claimant's traumatic brain injury, however. Unlike Dr. Miller, in Dr. Conway's opinion Claimant did not suffer from occipital neuralgia. For that reason, after the first, diagnostic, nerve block he concluded that further blocks were neither causally related to the brain injury nor medically necessary.

54. Consistent with Dr. Miller's emphatic recommendation, Finding of Fact No. 36 *supra*, Dr. Conway also concluded that Claimant was in need of psychological counseling causally related to his traumatic brain injury.

55. Dr. Conway disagreed with Dr. Danberg regarding the causal relationship between Claimant's vision deficits and his work injuries. In his opinion, the problems Claimant was experiencing were simply due to the natural aging process, and not to any injury. Given Dr. Conway's lack of expertise in this field, I do not find his opinion on this issue convincing.

(c) *Dr. Drukteinis*

56. At Defendant's request, in July 2012 Claimant underwent an independent psychiatric examination with Dr. Drukteinis, a board certified psychiatrist. Dr. Drukteinis also reviewed Claimant's relevant medical records.

57. Dr. Drukteinis diagnosed Claimant with a residual traumatic brain injury, a cognitive disorder and a pain disorder. He also found that Claimant exhibited clear signs of a depressive disorder. In Dr. Drukteinis' credible opinion, all of these conditions are causally related to Claimant's January 2008 work accident.

58. As treatment for Claimant's psychological disorders, Dr. Drukteinis recommended both psychological counseling and anti-depressant medication. According to his analysis, Claimant's depression is an impediment to his recovery. Therefore, the recommended treatments are medically necessary and causally related. I find Dr. Drukteinis credible in all respects.

Mileage Reimbursement

59. Claimant introduced a mileage log documenting his travel for injury-related medical treatment with Drs. Danberg, Drukteinis, Shlafstein and Miller on various dates between November 2011 and January 2014. In all, he calculated a total of 660 round-trip miles traveled to and from his home in Connecticut. I find that none of these miles were incurred solely to obtain treatment for his cervical condition; to the contrary, all were necessitated at least in part by his dental injuries and/or traumatic brain injury and psychological sequelae. Claimant also calculated a total of 1,068 round-trip miles traveled to and from a pharmacy for the purpose of obtaining prescription medications.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). 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 resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

The Scope of the Parties' Approved Settlement Agreement

2. Claimant here seeks to hold Defendant responsible for various medical treatments that he contends remain open under the terms of the parties' approved settlement. To resolve this issue, it is necessary to determine the scope of that agreement as it relates to treatment for the specific conditions from which he still suffers.

3. As I already have found, Finding of Fact No. 26 *supra*, with respect to medical benefits, the settlement agreement established two distinct categories of injuries. For treatment of Claimant's "cognitive or other head injury," including "neurological, psychological, ophthalmological and TBI," by the terms of the settlement agreement Defendant would remain liable into the future. For all other injuries, the agreement relieved Defendant from future responsibility.

(a) *Treatment Directed at Neck Pain and Headaches*

4. The most hotly contested area of disagreement between the parties concerns Defendant's post-settlement responsibility for treatments directed at Claimant's ongoing neck pain and headaches. As noted above, Finding of Fact No. 30 *supra*, Claimant credibly testified as to his understanding that even after the settlement Defendant would remain liable "for everything from the shoulders up." Defendant consistently has denied responsibility for any cervical-related treatment, however, on the grounds that it is not subsumed under the category of "other head injury" and therefore is no longer covered.

5. The term "head" is defined as "the upper part of the human body . . . typically separated from the rest of the body by a neck, and containing the brain, mouth and sense organs." *Oxford Dictionaries, www.oxforddictionaries.com/definition/english/head; see also, Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/head* (defining "head" as "the part of the body containing the brain, eyes, ears, nose and mouth"); *Merriam-Webster Medical Dictionary; www.merriam-webster.com/medical/head* (defining "head" as "the division of the human body that contains the brain, the eyes, the ears, the nose and the mouth").

6. The term "neck" is defined as "the part of a person's . . . body connecting the head to the rest of the body." *Oxford Dictionaries, www.oxforddictionaries.com/definition/english/neck; see also, Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/neck* (defining "neck" as "the part of the body between the head and the shoulders"); *Merriam-Webster Medical Dictionary, www.merriam-webster.com/medical/neck* (defining "neck" as "the usually narrowed part of an animal that connects the head with the body, *specifically*, the cervical region of a vertebrate" (emphasis in original)).

7. As these definitions establish, in both their common and their medical usages the terms "head" and "neck" each connote separate and distinct body parts. Notwithstanding their anatomical connection, the neck is no more a part of the head than the leg is a part of the hip, or the hand a part of the forearm.

8. Claimant argues that by referencing only his "head injury," but not his "neck injury" in either inclusionary or exclusionary language, the settlement agreement created sufficient ambiguity as to negate any "meeting of the minds" between the

parties. Therefore, he asserts, the agreement must either be voided, or else enforced as if the two terms were synonymous. *See, e.g., Evarts v. Forte*, 135 Vt. 306, 310 (1977) (real estate contract voided where property description was too vague to establish parties' mutual agreement as to what was being conveyed).

9. I cannot accept this analysis. As the above definitions establish, there is no ambiguity in the term "head" injury. Reasonable people would not disagree that its plain meaning signifies something other than an injury to the "neck," *see Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 578 (1988) (internal citations omitted).

10. Claimant asks a legitimate question, however. If his neck injury, which Defendant has never disputed is causally related to the January 2008 work accident, does not qualify as a "head injury," where in the settlement agreement does it fit?

11. Again, the agreement's plain language provides the answer. It defines the general scope of the injuries to be covered by the settlement as "*including but not limited to* right ankle, head/TBI and right elbow/biceps," and the subcategory of those for which Defendant will be liable only for "prior care" as "his *covered injuries* sustained as a result of the [January 2008] accident (emphasis supplied)." There being no question but that the neck injury is causally related and compensable, it thus fits under both the "including but not limited to" and the "covered injuries" descriptors. Though admittedly less specific than the "cognitive or other head injury" category descriptors, I cannot conclude that these phrases are themselves ambiguous, in either meaning or application.

12. I acknowledge the fact that, in describing the terms of the parties' settlement in his Rule 17.0000 letter to the Department, Claimant omitted any reference to his cervical injury, either as one of the injuries for which medical benefits were to be closed out, or as one of those for which medical benefits were to continue, *see* Finding of Fact No. 27 *supra*. Claimant argues that the reason for this omission was that it was "clear as day" that the parties' intended for the "head" to include the "neck." *See* Claimant's Findings of Fact and Memorandum of Law at p. 22.

13. I disagree. Had the matter been as clear as Claimant asserts, Defendant would not have begun denying coverage for treatment of his neck pain almost immediately after the settlement was approved, a position it has maintained ever since, and one which I already have concluded is consistent with the agreement's plain language, *see* Conclusion of Law No. 9 *supra*. And while the Rule 17.0000 letter did not contain the same inclusive category descriptors ("including but not limited to" and "covered injuries," *see* Conclusion of Law No. 11 *supra*), it specifically deferred to the settlement documents themselves for a more complete description of the agreement's terms, Finding of Fact No. 28 *supra*. Notably, furthermore, Defendant neither reviewed the Rule 17.0000 letter before its submission nor signed it.

14. I conclude that the Rule 17.0000 letter neither created nor resolved any ambiguity in the settlement agreement's terms. Instead, at best it signified a unilateral mistake on Claimant's part. A misunderstanding of this type does not preclude contract rescission in all cases. *Town of Lyndon v. Burnett's Contracting Co., Inc.*, 138 Vt. 102, 107 (1980). However, "if the mistake has resulted solely from the negligence or inattention of the party seeking relief, and the other party is without fault, relief will not be granted absent unusual circumstances that would make enforcement of the agreement manifestly unjust." *Id.* at 108.

15. Claimant's mistake here occurred solely as a result of his "erroneous assumption," *Burnett, supra* at 108, that an injury to the "neck" was equivalent to an injury to the "head." The evidence does not suggest that Defendant was in any way to blame for this misunderstanding. Nor does it suggest any unusual circumstances sufficient to render enforcement of the parties' agreement "manifestly unjust." The facts necessary to justify rescission do not exist.

16. I do not dispute that the settlement agreement Claimant executed may not have said what he wanted it to say. I cannot conclude that this was a consequence of ambiguous or inadequately defined terms, however. Merely because the agreement's plain language led to an unfavorable outcome for him is not an appropriate basis for finding ambiguity. *Brault v. Welch*, 2014 VT 44, ¶13. Nor does his unilateral misunderstanding of the agreement's scope provide sufficient grounds for rescission. Absent a mutual mistake of fact, "one of the parties can no more rescind the contract without the other's express or implied assent, than he alone could have made it." *Maglin v. Tschannerl*¸174 Vt. 39, 45 (2002) (quoting *Enequist v. Bemis*, 115 Vt. 209, 212 (1947). I am bound to enforce it according to its terms, therefore.

17. I thus conclude that the parties' approved settlement agreement does not obligate Defendant to provide ongoing medical coverage for Claimant's neck injury.

18. I turn now to the specific treatments at issue for that condition. The parties presented conflicting expert medical opinions regarding the causal relationship and/or medical necessity of at least some of these treatments, which is the standard for determining an employer's liability under the statute, 21 V.S.A. §640(a). *See, e.g., MacAskill v. Kelly Services*, Opinion No. 04-09WC (January 30, 2009). In such cases, the commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

19. As to the trigger point injections, physical therapy with traction and the use of a TENS unit, both Dr. Miller, Claimant's treating physician, and Dr. Conway, Defendant's medical expert, agreed that these treatments were necessitated by Claimant's neck injury, and not by his traumatic brain injury. Therefore, under the terms of the parties' approved settlement agreement, after September 2, 2010 Defendant was no longer obligated to pay for them.

20. Similarly, I conclude that Defendant is not obligated to pay for the treatments reflected on the eight "cervicalgia" bills referenced in Finding of Fact No. 34 *supra*. Dr. Miller's corresponding office notes reflect treatment for Claimant's cervical injury on the dates covered by those bills, and therefore Defendant is not responsible for them.

21. I conclude that Defendant is responsible, however, for the ninth bill referenced in Finding of Fact No. 34 *supra*, as the treatment Dr. Miller rendered on that date (November 8, 2010) was directed at Claimant's traumatic brain injury, not his cervical condition.

22. I conclude that Defendant is also liable for the office evaluation portion of Dr. Miller's March 15, 2012 bill, as it concerned at least in part Claimant's traumatic brain injury. However, Defendant is not responsible for the charges incurred for administering a cervical injection on that date, as Dr. Miller himself conceded that such therapy was causally related to Claimant's neck injury, not his traumatic brain injury.

23. The experts agreed as to the post-concussive nature of Claimant's headaches, and therefore I conclude that under the terms of the approved settlement agreement reasonable treatment for that condition remains Defendant's responsibility.

24. Based on Dr. Miller's credible testimony, and with no countervailing expert testimony to negate it, I conclude that the medications Dr. Miller prescribed, specifically oxycodone for pain, zolpidem tartrate for sleep disturbance and paroxetine for depression, are all causally related at least in part to his cognitive or other head injury rather than exclusively to his cervical condition. Under the specific terms of the parties' approved settlement agreement, these medications are all still covered and Defendant is obligated to pay for them, therefore.

25. I conclude that Defendant is responsible for medically necessary treatment of Claimant's occipital neuralgia, including the occipital nerve blocks that Dr. Miller administered in 2008 and 2009. In reaching this conclusion, I accept Dr. Miller's diagnosis as more credible than Dr. Conway's.

26. Last, I conclude that Claimant has failed to sustain his burden of proving any causal relationship between his need for Catapres-TTS, a blood pressure

medication, and any of the injuries or conditions for which Defendant is still responsible. For that reason, he is not entitled to reimbursement.

(b) *Treatment for Dental Injuries*

27. Claimant introduced credible medical evidence from his treating dentist, Dr. Shlafstein, that as a direct result of the January 2008 work injury he now requires full coverage crowns on tooth numbers 7, 8, 9, 10 and 30. Defendant failed to offer any expert medical opinion to contradict the medical necessity of these treatments. I therefore accept Dr. Shlafstein's opinion on this issue as persuasive.

28. As noted above, Conclusion of Law No. 5 *supra*, in both its common usage and its medical usage, the term "head" includes the mouth, and therefore the teeth as well. I thus conclude that the dental treatments at issue are causally related to Claimant's head injury. Under the terms of the parties' approved settlement agreement, Defendant remains responsible for them, therefore.

(c) *Treatment for Visual Deficits*

29. The parties presented conflicting expert medical opinions regarding whether ongoing treatment for Claimant's visual deficits is causally related to his head injury, as Dr. Danberg asserted, or is simply a consequence of the natural aging process, as Dr. Conway concluded.

30. Considering the factors listed in Conclusion of Law No. 18 *supra*, I conclude that Dr. Danberg's opinion is the most credible. As a behavioral optometrist, Dr. Danberg has specialized training and expertise in this area, which Dr. Conway does not share. Having tested and treated Claimant in the past, she is best positioned to evaluate his current and future needs, and also to determine their relationship back to his work injury. Her opinion thus merits greater weight than Dr. Conway's.

31. I therefore conclude that Dr. Danberg's ongoing treatment, including but not limited to resumed sessions of optometric visual rehabilitation therapy, is both causally related to Claimant's work injury and medically necessary. Under the terms of the parties' approved settlement agreement, which specifically included "ophthalmological" treatment as one of the enumerated medical services associated with Claimant's head injury, I conclude that Defendant remains obligated to pay for it. Similarly, I conclude that Defendant is responsible for providing Claimant with replacement glasses with prism, in order to accommodate periodic changes in his prescription.

(d) *Psychological Treatment*

32. Defendant proffered no explanation to account for its continued denial of coverage for Claimant's antidepressant medications and other psychological treatment. Its own medical expert, Dr. Drukteinis, confirmed Claimant's pressing need for treatment and its causal relationship to the January 2008 work accident. Psychological treatment was another of the specifically enumerated medical services associated with Claimant's head injury for which Defendant remains responsible under the terms of the approved settlement agreement, furthermore. I conclude that Defendant is obligated to pay for both mental health services and medications, therefore.

Mileage Reimbursement

33. As a final matter, Claimant seeks reimbursement for 660 miles traveled to and from medical appointments necessitated by his work injuries, and 1,068 miles traveled to and from a pharmacy for the purpose of obtaining prescription medications.

34. According to Workers' Compensation Rule 12.2100,[4] an injured worker who is "required to travel for treatment, or to attend an employer's independent medical examination," is entitled to reimbursement for mileage "beyond the distance normally traveled to the workplace." The purpose of the rule is to make the worker whole, by providing compensation for expenses that he or she would not have incurred but for the work injury. At the same time, the rule is phrased so as to deny reimbursement for regular commuting expenses that presumably the worker would have had to bear even had there been no injury. *Fosher v. FAHC*, Opinion No. 11-11WC (May 6, 2011).

35. Claimant here failed to introduce any evidence from which I might calculate his regular commute distance to and from work while he was in Vermont engaging in his ambassador duties for Defendant. On that basis alone, it is impossible to determine the amount due him in mileage reimbursement.

36. The language of Rule 12.2100 has never been interpreted to cover travel to and from a pharmacy. *Dain v. AIHRS*, Opinion No. 85-95WC (November 17, 1995). Presumably, most injured workers have access to a local pharmacy that is at least within their commuting distance to and from work, and if not, mail order likely presents a viable alternative, *see* Workers' Compensation Rule 26.3000.[5] I thus conclude that Claimant is not entitled to reimbursement for the 1,068 miles claimed for that purpose.

37. I conclude that Claimant has failed to sustain his burden of proving any entitlement to mileage reimbursement in the amounts claimed.

[4] Effective August 1, 2015 Rule 12.2100 has been re-codified as Rule 4.1300.
[5] Effective August 1, 2015 Rule 26.3000 has been re-codified as Rule 3.2510.

Attorney Fees

38. As Claimant has only partially prevailed, he is entitled to an award of only those costs that relate directly to the claims he successfully litigated. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997). As for attorney fees, in cases where a claimant has only partially prevailed, the Commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. Subject to these limitations, Claimant shall have 30 days from the date of this opinion to submit evidence of his allowable costs and attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for medical benefits covering the following medical services and supplies is hereby **DENIED**:

1. Physical therapy services rendered on November 19 and 22, 2010 and December 1, 2, 6, 8, and 13, 2010;

2. Evaluation and treatment of Claimant's cervical condition by Dr. Miller as reflected on the eight "cervicalgia" bills described in Finding of Fact No. 34 *supra*;

3. Trigger point and other cervical injections, including those reflected on Dr. Miller's March 15, 2012 billing, as described in Finding of Fact No. 35 *supra*;

4. TENS unit and associated supplies;

5. Catapres-TTS or other prescription blood pressure medications; and

6. Mileage reimbursement.

Defendant is hereby **ORDERED** to pay medical benefits covering the following medical services and supplies, in accordance with 21 V.S.A. §640(a):

1. Evaluation and treatment of Claimant's cognitive or other head injury, occipital neuralgia and concussive headaches, including evaluation and treatment rendered by Dr. Miller on November 8, 2010 and March 15, 2012, as described in Finding of Fact Nos. 34 and 35 *supra*, and occipital nerve blocks;

2. Reimbursement to Claimant for prescription medication costs (oxycodone, zolpidem tartrate and paroxetine) totaling $719.99, with interest from the date of purchase in accordance with 21 V.S.A. §664;

3. Prescription medications, including oxycodone, zolpidem tartrate and paroxetine, or other medications prescribed for pain control, sleep disturbance and/or depression, all as causally related to Claimant's cognitive or other head injury;

4. Ongoing treatment for visual deficits, including specifically optometric visual rehabilitation therapy and glasses with prism;

5. Full coverage crowns and other dental treatment necessary to repair accident-related damage to tooth numbers 7, 8, 9, 10 and 30;

6. Mental health counseling and anti-depressant medications, all as causally related to Claimant's cognitive or other head injury; and

7. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this _____ day of _____, 2016.

_____
Anne M. Noonan
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.