STATE OF VERMONT
DEPARTMENT OF LABOR

David Flood

v.

Feed Commodities, Inc.

Opinion No. 09-16WC

By: Phyllis Phillips, Esq.
Administrative Law Judge

For: Anne M. Noonan
Commissioner

State File No. GG-00758

OPINION AND ORDER

Hearing held in Montpelier on September 21, 2015
Record closed on November 6, 2015

APPEARANCES:

Bruce Hesselbach, Esq., for Claimant
Corina Schaffner-Fegard, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant suffer a compensable work-related injury on January 19, 2015?

2. If not, did Claimant willfully make false statements and/or representations for the purpose of obtaining workersô compensation benefits, in violation of 21 V.S.A. §708?

EXHIBITS:

Joint Exhibit I:	Medical records
Joint Exhibit II:	Supplemental medical records
Joint Exhibit III:	Supplemental medical records
Joint Exhibit IV:	Deposition of Isaac Smith, July 16, 2015
Joint Exhibit V:	Deposition of Emily Stone, July 16, 2015
Claimantôs Exhibit 1:	Diagram of Grassy Brook Road homes
Claimantôs Exhibit 2:	Various medical records
Claimantôs Exhibit 3:	Newbrook Rescue Squad record
Claimantôs Exhibit 4:	2014 Prehospital Care Report for incident date 01/19/2015
Claimantôs Exhibit 5:	Physician Clinical Report, 01/19/2015
Claimantôs Exhibit 6:	Observation Detail Report, 1/20/2015

Claimantôs Exhibit 7:	Employer First Report of Injury (Form 1)
Claimantôs Exhibit 9:	Various medical bills[1]
Claimantôs Exhibit 10-A:	Photograph of video surveillance notice, truck loading area
Claimantôs Exhibit 10-B:	Photograph of video surveillance notice, office door
Defendantôs Exhibit A:	Certified transcript of 911 recording, 1/19/2015[2]
Defendantôs Exhibit B:	Rescue Inc. records, 1/19/2015
Defendantôs Exhibit C:	Newbrook Volunteer Fire & Rescue records
Defendantôs Exhibit D:	Docuweather, USA daily weather summary, Bernardston, MA, January 17-19, 2015
Defendantôs Exhibit E:	Docuweather, USA daily weather summary, Brookline, VT, January 17-19, 2015
Defendantôs Exhibit F:	Various x-ray images
Defendantôs Exhibit G-1:	Laura Floodôs cell phone records
Defendantôs Exhibit G-2:	Claimantôs cell phone records
Defendantôs Exhibit G-3:	Doris Floodôs telephone records
Defendantôs Exhibit H:	Various photographs of truck yard
Defendantôs Exhibit H-1:	Mapquest photograph of truck yard
Defendantôs Exhibit H-2:	Photograph of truck and hitching post
Defendantôs Exhibit I:	Timeclock entries, 01/19/2015
Defendantôs Exhibit J:	GPS tracking, 1/19/15
Defendantôs Exhibit K:	Radiology reports with handwritten notes, 01/19/2015
Defendantôs Exhibit L:	Sand and salt records
Defendantôs Exhibit M:	Driverôs daily log, 1/19/15
Defendantôs Exhibit N:	Photograph of trucks in truck yard
Defendantôs Exhibit O:	Photograph of truck
Defendantôs Exhibit P:	Claimantôs recorded statement[3]
Defendantôs Exhibit Q:	Certified audio copy of 911 call, 1/19/2015[4]
Defendantôs Exhibit R:	Google Maps route information and driving distance, Feed Commodities International, Inc. to 252 Grassy Brook Rd, Brookline, VT

CLAIM:

All workersô compensation benefits to which Claimant proves his entitlement as causally related to his alleged January 19, 2015 work-related injury
Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

Procedural Rulings

[1] *Claimant's Exhibit 9* was admitted only to show medical treatments rendered, and not to establish the appropriate charges incurred under Vermontôs Workersô Compensation Medical Fee Schedule.
[2] *Defendant's Exhibit A* is admitted solely to establish the substance of the 911 call itself, and not the truth of the matters asserted therein.
[3] See discussion regarding admissibility, *infra* at p.4.
[4] See n.2 above.

1. *Assertion of Attorney-Client Privilege during Depositions of Nancy Jean Flood, Doris Flood and Laura Flood*

Defendant seeks reconsideration of a ruling made in the course of discovery in which the Administrative Law Judge upheld as proper the assertions of attorney-client privilege made by Claimantôs wife (Nancy Jean Flood), mother (Doris Flood) and sister (Laura Flood) during their respective depositions.

In addition to representing Claimant, his attorney also represents the three deponents with respect to Defendantôs allegations that they fraudulently misrepresented the circumstances surrounding Claimantôs injury for the purpose of furthering his claim for workersô compensation benefits. Notwithstanding these allegations, Defendant argues that because the family members are not parties to the pending claim for workersô compensation benefits, they should have been barred from asserting the attorney-client privilege in the context of the pending action.

Rule 502 of the Vermont Rules of Evidence provides that a client ñhas a privilege to refuse to disclose . . . confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself . . . and his lawyer; . . .ò V.R.E. 502(b). A ñconfidentialò communication is defined as one ñnot intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client. . . .ò V.R.E. 502(a)(5).

As Defendant correctly notes, ordinarily a non-party fact witness would not be allowed to assert an attorney-client privilege in proceedings involving another personôs workersô compensation claim. Here, however, Defendantôs defense of the claim is based in large part on allegations of fraud involving not only Claimant but also his family members. Because of that, the question of attorney-client privilege as it applies to the latter group merits close scrutiny.

According to 21 V.S.A. §708, a person who ñwillfully makes a false statement or representation, for the purpose of obtaining any benefit or payment under the provisions of this chapter, either for her or himself *or for any other person*, [emphasis supplied]ò is subject to both administrative and criminal penalties, including even imprisonment, *see* 13 V.S.A. §2024. Given the fraud statuteôs broad coverage, Defendantôs allegations, if proven, could implicate any or all of the deponents and expose them to both civil and criminal liability. With that in mind, to the extent that they retained Claimantôs attorney to represent them in any legal proceedings that might arise under §708, their communications with him are thus subject to the attorney-client privilege to the same extent that Claimantôs communications are.

Defendantôs request for reconsideration of the Administrative Law Judgeôs prior ruling on its Motion Regarding Claimed Attorney-Client Privilege and Request to Re-depose Three Witnesses at Claimantôs Expense is hereby **DENIED**.

2. *Admissibility of Claimant's Prior Recorded Statement*

At the formal hearing, Defendant proffered as evidence a transcript of a recorded statement (*Defendant's Exhibit P*) that Claimant gave to its workersô compensation insurance adjuster on or about February 10, 2015, less than a month after his alleged work injury. Claimant objected to the proffer on the grounds that, considered in light of his formal hearing testimony, the statement was cumulative and therefore inadmissible.

Under Vermont Rules of Evidence 613 and 801(d)(2), a statement made by a party-opponent does not constitute hearsay, and is admissible as evidence. Under Vermont Rule of Evidence 403, however, even relevant evidence can be excluded ñif its probative value is substantially outweighed by . . . considerations of undue delay, waste of time or needless presentation of cumulative evidence.ò

I conclude here that the proffered statement is not cumulative, and therefore is properly admitted.

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 Vermontôs Workersô Compensation Act.

2. Judicial notice is taken of all relevant forms and correspondence contained in the Departmentôs file relating to this claim. Judicial notice is also taken as follows: (a) that *Defendant's Exhibit Q* is a certified audio copy of a 911 call made by Doris Flood on January 19, 2015; and (b) that *Defendant's Exhibit R* is an accurate Google Maps representation of the driving distance from Feed Commodities International, Inc. in Bernardston, Massachusetts to 252 Grassy Brook Road in Brookline, Vermont.

3. Claimant worked as a tractor-trailer driver for Defendantôs feed company. Typically, he began his work day at around 5:00 AM, having driven from his home in Brookline to Defendantôs Bernardston mill, a distance of approximately 31 miles. During the day he would travel back and forth between Defendantôs mill and various farms, loading and unloading cornmeal and grains. Depending on his daily route, his work day might end as early as 5:00 PM, or as late as 10:00 PM.

4. Claimantôs Brookline home is situated in close proximity to that of his parents and sister. All three homes are clustered around a circular driveway, with a flower bed at its center. Claimantôs home is accessed by a short, downhill-sloping walkway to his front door. *Claimant's Exhibit 1.*

5. Claimant has a prior medical history that includes two arthroscopic surgeries to repair a meniscal tear in his left knee, the first in December 2013 and the second in mid-September 2014.

6. At least two signs are posted at Defendantôs Bernardston facility indicating that video surveillance ñis in use on these premises.ò *Claimant's Exhibits 10-A and 10-B*. Defendantôs operations manager, Randy Bigelow, and Claimantôs direct manager, James Peterson, both credibly testified that in fact there were no surveillance cameras on site; they were in boxes in the basement, and had never been installed. However, Claimant credibly testified that Defendantôs employees were unaware of this, and believed instead that video surveillance was operational.

The Events of January 19, 2015 – Claimant's Version

7. Before leaving for work on Monday, January 19, 2015 Claimant first drove his pickup truck to the Brookline town garage to get a load of sand for his driveway. Because his parents are elderly, he, his wife Nancy and his sister Laura all help out to ensure that the drive- and walkways are well sanded in the wintertime. On this day, upon returning from the town garage, Claimant sanded in front of all three homes, left his pickup truck and drove to work in his minivan. Later, Laura used a small shovel to throw additional sand down around the circular driveway, along the path from her house to her parentsô house and down towards Claimantôs house. Nancy as well sanded the walkway in front of hers and Claimantôs home and up the path towards the spot where Claimant typically parked his minivan. It had rained the day before, so the ground was covered with wet snow, slush and ice. Towards evening, as the temperature dropped, patches of ice likely formed in spots. *Defendant's Exhibit E*.

8. Claimantôs work duties on January 19th took him first to Canaan, Connecticut and then to Vergennes, Vermont to pick up a load. The day had been clear and cold, but a storm came in while he was waiting for the truck to be loaded in Vergennes, and his drive back to Bernardston was through snow and freezing rain.

9. The storm had ended by the time Claimant arrived back at the Bernardston mill. According to the truckôs GPS tracking system, *Defendant's Exhibit J*, he entered the premises at 8:32 PM. By this time, the facility was empty and he was alone. Claimant parked in the designated truck parking area, in the same spot he always chose, the farthest right, in front of the telephone pole. *Defendant's Exhibit H*. While the truck was idling down, he completed his log book, *Defendant's Exhibit M*, and mileage sheet. Then he exited the truck and began his ñpost-trip,ò walking down the driverôs side and checking the tires and lights. However, because the truck was covered in snow that had accumulated during the drive back from Vergennes, he did not continue around the rear to check the tires and lights on the other side of the truck. Instead, he reached inside and, at 8:53 PM according to the GPS monitor, shut the truck off.

10. Claimant next walked up to the office, a distance of approximately 1,000 to 1,200 feet. *Defendant's Exhibit H-1.* On the way, he stopped at his minivan, which was parked nearby, and started it so that it would begin to warm up. At this point, he was wearing Chippewa logging boots, Dickie construction pants, a t-shirt under a green hooded sweatshirt and fingerless motorcycle gloves. He was not wearing a winter coat. The parties dispute the exact temperature ï Claimant estimated it to be in the teens, with a cold wind blowing, Defendantôs meteorological expert estimated it to be slightly warmer, in the low 20ôs, *Defendant's Exhibit D.* I find that it was a cold and wintry night in any event. During the day, the ground had been covered with wet snow, slush and ice; by evening patches of ice were likely present. *Defendant's Exhibit D.*

11. After starting his car, Claimant proceeded into the office and punched out on two timeclocks ï one manual, at 8:54 PM, the other computerized, at 8:56 PM. *Defendant's Exhibit I*. Then he got into his minivan and drove back down to his truck so that he could plug in the block heater.

12. The block heater, which is used in cold weather to keep the truckôs diesel engine warm overnight, is accessed by way of a plug attached to a short cord located under the passenger side door. *Defendant's Exhibit H*. A ñhitching postò ï essentially a metal rail with electrical outlets attached ï runs along the rear of the truck parking area. *Defendant's Exhibit H.* Power is supplied by running an extension cord from one of the outlets to the truckôs plug. Parked in its usual spot, in front of the telephone pole marking one end of the hitching post, Claimantôs truck was approximately 25 feet away. *Defendant's Exhibit H-2*.

13. What happened next is hotly contested.[5] After plugging the extension cord into the truckôs heater, Claimant testified that he turned, took one step towards his minivan, slipped on the icy ground and fell, landing on his right side. On the way down, he scraped his knuckles on the truckôs metal step. He felt pain in his right hip from having landed on his cell phone holder, and heard a pop and felt pain from his left knee down.

14. Having undergone arthroscopic surgery only a few months previously, Finding of Fact No. 5 *supra*, Claimant believed he had again ñblown outò his knee. He was upset, and his first thought was to get home, ice the joint and call Dr. Vranos, his orthopedic surgeon, in the morning. But when he tried to stand up, his leg hurt and it was too slippery to even get up on his knees.

15. Claimant knew he could not stay where he was ï it was a cold night, there was nobody around to help him and cell phone coverage was sporadic at best. Using his hands for support, pushing with his right leg and holding his left leg extended

[5] As will be seen *infra*, Finding of Fact Nos. 43-52, Defendant disputes the veracity of the testimony given by Claimant, his wife and his sister regarding the sequence of events discussed in Finding of Fact Nos. 13-22 *infra*.

out in front of him, he ñscootedò backwards to his minivan, which was parked fifteen or twenty yards away, and lifted himself in. Once in the car, he tried to call his manager, Mr. Peterson, but could not get through. He did not try to call his wife, for fear of waking their children.

16. Claimant typically drives fast, and he estimated that on this night it took him about a half hour to get home. On the way, he passed both the highway exit for Brattleboro Memorial Hospital and the road to Grace Cottage Hospital. Still thinking that he had reinjured his knee, rather than seeking immediate medical attention at either hospital his plan was to go home for the night and call Dr. Vranos in the morning.

17. Upon arriving home, Claimant parked in his usual spot in the circular driveway, approximately 30 to 35 feet from his front door. *Claimant's Exhibit 1*. He shut off the minivan and opened the car door. Using a four-foot crowbar (one of the tools he typically kept with him in his van) for support, he exited the vehicle and attempted to walk. The pain was too severe, and he could only manage one or two steps, however. As he had in Defendantôs truck yard, he lowered himself to the ground and scooted backwards, using his hands and his right foot as support and with his left leg extended out in front of him, along the driveway and down the path to his front door. Sometime later, either that night or the following day, Nancy Flood discovered his car keys in the walkway, and both the crowbar and his eyeglasses lying on the ground a few feet from the minivan.

18. Claimant realized that he would not be able to negotiate his front door and get inside without assistance. Thus, when he was almost to the end of the walkway, he called Nancy on his cell phone and told her he was on the ground outside and could not get in. Claimantôs cell phone records place the time of this call at 9:38 PM. *Defendant's Exhibit G-2*.

19. Nancy Flood was in the living room, and saw the headlights when Claimant drove into the driveway. Her phone rang very shortly thereafter. She immediately went to the front door, opened it and found him on the ground, leaning up against the post that supports the doorôs overhang, with his legs outstretched. She asked what had happened, and Claimant told her that he had fallen at work and needed help getting inside. Her initial understanding was that he had reinjured his knee. Knowing that she would not be able to move him herself, she used his cell phone to call his sister, Laura Flood, who lives next door. Cell phone records place the time of this call at 9:40 PM. *Defendant's Exhibits G-1 and G-2*.

20. Laura Flood was sitting on her couch, watching television and perusing her laptop computer, when she saw the headlights from Claimantôs minivan as he pulled into the driveway. She had turned off the television, shut down her computer and gone into the bathroom to get ready for bed when Nancy called and said that Claimant had fallen and she needed her help. Laura immediately ran outside and down the path to Claimantôs house. Claimant was lying on the ground, and she

observed both that he ñlooked like he was in a lot of painò and that his left leg ñjust didnôt look right to me.ò

21. Both Laura and Nancy recalled that Claimant initially thought that he had reinjured his knee. However, almost immediately after arriving on the scene Laura determined that his left leg was, in her words, ñf***ed up,ò and his foot was ñflopped overò and crooked. Neither she nor Nancy felt comfortable attempting to move him in this condition. Instead, over Claimantôs protestations, they decided to call an ambulance.

22. While Nancy stayed with Claimant, Laura ran to her parentsô house, which has a landline telephone. Claimantôs mother, Doris Flood, was in the bedroom when Laura rushed in and told her to call 911 because Claimant was on the ground with what appeared to be a broken leg. Doris immediately grabbed her telephone, and Laura ran back outside to wait with Claimant and Nancy for the ambulance to come.

23. Dorisô cell phone records place the time of her 911 call at 9:44 PM, *Defendant's Exhibit G-3,* just seven minutes after Claimantôs initial call to Nancy. During the call, she made the following statements: ñMy son just fell. I think he broke his leg. . . . Heôs outside. He fell on the ice going down to his place. He just got home from work . . . My daughter just came in and said that I need to call 911 for him because weôre not able to get him up.ò *Defendant's Exhibits A and Q.* At hearing, Doris testified that she did not learn until the next morning that Claimant had fallen at work, and not ñon the ice going down to his place,ò as she had presumed at the time of her 911 call. I find her testimony in this regard credible.

24. The Newbrook Volunteer Fire and Rescue Squad arrived first on the scene, followed shortly thereafter by Rescue, Inc. emergency medical technicians. According to the Vermont EMS Incident Reporting System record, *Defendant's Exhibit C*, the first responders arrived at 9:55 PM and the last unit cleared the scene at 10:42 PM. Claimant was transported by ambulance to Brattleboro Memorial Hospital, where he was admitted at 11:02 PM. *Joint Exhibit I at p. 000066.* X-rays revealed a low mid-shaft fracture of the tibia (down near the ankle) and a high shaft fracture of the fibula (up near the knee). *Defendant's Exhibit F*. The fractures were displaced, meaning that the broken ends were no longer aligned, slightly comminuted, meaning that some bone fragments had splintered off, and spiral or oblique, meaning that the mechanism of injury must have involved a rotational component. Dr. Vranos surgically repaired the fractures the following day, January 20, 2015. *Joint Exhibit I at p.000086.*

25. While Claimant was being transported to the hospital, Nancy Flood telephoned Mr. Peterson, and left a voice mail message advising that he had fallen at work and was on his way to the hospital. She called again early the next morning, at which time she spoke to Mr. Peterson directly. In his formal hearing testimony, Mr. Peterson acknowledged having received the call. Upon learning that

Claimant allegedly had slipped on ice in the truck yard, he promptly called Mike Scoville, Defendantôs snow plowing contractor, and arranged to have the area salted and sanded anew. *See infra* at Finding of Fact No. 44.

26. A day or two after his surgery, Claimant and his wife returned to Defendantôs truck yard to drop off some paperwork and retrieve some personal belongings from his truck. Claimant spoke briefly with Mr. Peterson. Mr. Peterson acknowledged in his testimony that during the conversation he observed that Claimantôs knuckles were scratched, and that Claimant explained that he had hit them on the truckôs step as he fell.

27. Nancy, Laura and Doris Flood all testified credibly regarding their past observations of Claimantôs high tolerance for pain. Nancy and Laura both recalled that while awaiting surgery after injuring his knee in 2013, Claimant iced it every evening but still continued to work for some months. And Nancy and Doris recalled an occasion when he broke his finger while using a sledgehammer, but just taped it up and kept working. Doris credibly described a family culture in which everyone was encouraged to ñjust get on with itò rather than complain.

Medical Evidence Pertinent to the Events of January 19, 2015

(a) Contemporaneous medical records

28. Contemporaneous medical records document the initial response to Claimantôs injury and give somewhat varying accounts of how it occurred. The Newbrook rescue squadôs handwritten report, *Claimant's Exhibit 3*, notes a chief complaint of ñleft tib-fib pain,ò a past medical history of ñleft knee surgery in Sept.ò and a description of ñeventsò as ñfell @ work heard a snap tried to walk 9:00 PM.ò Another handwritten report, this one also apparently generated by the Newbrook rescue squad, states, ñThe patient informs us that the injury happened about 1 hour ago while at work. He is a truck driver and when jumping down from his truck he injured his leg.ò *Defendant's Exhibit C*. And a third handwritten report, this one completed at the scene by Rescue, Inc.ôs emergency medical technician Isaac Smith, states Claimantôs complaint as ñlower leg pain secondary to ground level fall,ò and notes exam findings of ñlower left leg pain with deformity and outward rotation.ò *Defendant's Exhibit B*.

29. Mr. Smithôs ñPrehospital Care Report,ò *Defendant's Exhibit B*, which he completed immediately after releasing Claimant to the hospital, provides additional details, as follows:

> [Ambulance] responded priority 1 . . . for a 52 YOM that experienced a [ground level fall] and believes that he broke his leg.
>
> Pt c/o 10-10 [pain] to his lower left leg with a marked deformity to his tibia with outward rotation.

> Pt reports that about 2100 he was stepping from his truck at work and slipped and fell on his L leg. Pt reports hearing a crack followed with [pain]. Post fall pt reports that he drove himself home and attempted to walk into his house. Pt slipped on the ice and reports falling into snow. [Ambulance] arrived to find pt laying supine in his driveway.

30. Brattleboro Memorial Hospital records also recount the circumstances of Claimantôs injury. The ñPhysicianôs Clinical Report,ò recorded at 11:04 PM, *Joint Exhibit I at p.000080*, states:

> The injury occurred about 2-1/2 hours ago. Fell; slipped (on ice). Occurred at work. . . . (Pt. got out of his truck at work, slipped on the ice and fell. Then he got up, hobbled to his van and drove himself home. Once there he tried to negotiate the downhill driveway using a crowbar for support, but was unable to go more than a few feet so lowered himself to the ground and had wife call EMS).

31. Also from Brattleboro Memorial Hospital, the ñObservation Detail Reportò states the following, *Joint Exhibit I at p.000077*: ñTriage time [11:04 PM] . . . Chief Complaint: INJURY TO LEFT KNEE. INJURY TO THE LEFT LEG. ï [11:13 PM].ò

32. Also from Brattleboro Memorial Hospital, a handwritten notation on the radiologistôs x-ray report, taken at 11:05 PM, *Joint Exhibit I at p.000063*, states, ñlanded wrong when getting out of his truck.ò

33. In his formal hearing testimony, Claimant agreed that the above descriptions were mostly, but not completely, accurate. According to his version of events, he neither slipped on the ice nor fell in the snow at his home, as the emergency medical technician stated in his Prehospital Care Report, Finding of Fact No. 29 *supra*. And he did not ñhobble to his vanò as reported in the Physicianôs Clinical Report, Finding of Fact No. 30 *supra*.

(b) <u>*Expert medical opinions*</u>

34. Both parties proffered expert medical opinions regarding whether Claimantôs version of events ï particularly his ability to make his way home after allegedly falling in Defendantôs truck yard ï was plausible given the nature and extent of his injuries. Both experts, Dr. Vranos for Claimant and Dr. Wieneke for Defendant, are board certified in orthopedic surgery and well experienced in treating leg fractures.

35. In his formal hearing testimony, Dr. Vranos acknowledged that displaced tibia-fibula fractures are among the most painful orthopedic conditions a patient can suffer. Nevertheless, in his opinion, to a reasonable degree of medical certainty Claimantôs version of events ï maneuvering himself to his car, hoisting himself in and then driving home and making his way down the path to his front door ï was medically feasible.

36. Having treated Claimant for his 2013 knee injury, Dr. Vranos has observed his tolerance for pain, and credibly described him as ñtough.ò He has encountered other patients who managed to drive themselves to the hospital with severe fractures. For Claimant to have acted as he did certainly would have been difficult, but the alternative would have been to remain lying on the ground outside on a cold January night without even a winter coat. In Dr. Vranosô opinion he would have risked hypothermia had he done so.

37. Dr. Vranos did not review any witness statements or depositions, and could not recall where or when he learned the exact circumstances of Claimantôs injury or the conditions he allegedly faced on the night in question. Nevertheless I find his analysis of the medical feasibility of Claimantôs actions credible.

38. Dr. Wienekeôs opinion stands in sharp contrast to Dr. Vranosô. In his experience, displaced long bone fractures in weight-bearing extremities are so painful that patients who sustain them do not move, but rather remain ñexactly where they fell.ò With that in mind, Dr. Wieneke characterized Claimantôs story as ñabsurd and concocted.ò

39. Specifically, Dr. Wieneke described Claimantôs account of pushing himself along the ground and then pulling himself up into his car as ñnot possible,ò and maintained that ñcategoricallyò he could not then have managed a 30-minute drive home. That he passed in the vicinity of two hospitals along the way Dr. Wieneke found similarly improbable. In his opinion, a patient who sustains a spiral, oblique tibia-fibula fracture of the type Claimant suffered knows ñwith absolute certaintyò that he has broken his leg. For Claimant to have chosen not to go directly to the hospital because he believed instead that he had reinjured his knee was simply implausible.

40. Much of Dr. Wienekeôs formal hearing testimony was based on his understanding that Claimant alleged to have maneuvered himself *forward*, with his legs extended out in front of him, rather than scooting *backwards*, using his hands and his right foot for support and with his left leg extended straight out, as Claimant credibly testified he did.[6] He conceded on cross-examination that in the latter position, it might have been possible for Claimant to move a short distance. However, even

[6] In its proposed findings of fact and conclusions of law, Defendant asserts that Claimant first testified that he was scooting *forward* towards his front door, and then changed his testimony in response to questioning by the Administrative Law Judge. I acknowledge that his initial description was somewhat unclear, which is what prompted the need for further clarification.

this would have been very difficult, and likely at a very slow pace. His left foot, which according to hospital records was externally rotated to 90 degrees, would have been ñflopping around,ò and the displaced bones and comminuted fragments, which had pushed out into the surrounding soft tissue, would have made every movement extremely painful.

41. Having dismissed Claimantôs version of events as completely fabricated, Dr. Wieneke concluded instead that he likely fell at his home, in the exact spot where the first responders found him, on the walkway just outside his front door.

42. Dr. Wieneke never personally examined Claimant, and his opinion is therefore based solely on his review of the pertinent medical records, witness depositions and other relevant documentary evidence. That he thus concluded that Claimant was not a truthful person, without even once having met or interacted with him, is troubling. In addition, the fact that, as noted above, his analysis was based at least in part on his erroneous understanding regarding the manner in which Claimant alleges he dragged himself along the ground, first to his minivan and later to his front door, further undermines his opinion.

The Events of January 19, 2015 – Defendant's Version

43. With Dr. Wienekeôs opinion as support, Defendant asserts that Claimantôs alleged fall at work on January 19, 2015 never happened, and that the pending claim is his fraudulent attempt to collect workersô compensation benefits for an injury that in fact occurred at his home.

(a) Ground conditions at Bernardston facility

44. To refute Claimantôs version of events, Defendant first sought to establish that the ground next to where he allegedly parked his truck was not icy on the evening in question. To do so, it proffered testimony from Mike Scoville, with whom it regularly contracted to snowplow and salt the Bernardston mill premises during the winter months. Mr. Scoville testified as follows:

- He first checked the facility at approximately 3:00 AM on January 19th. There was a small accumulation of light snow, sleet and freezing rain on the ground. He salted the entire complex, including the roadways, driveways, around every door and as close as he could get to the trucks parked in the yard. Because there was so little snow on the ground, he did not plow or scrape, for fear of turning the surface into a ñskating rink.ò Instead, he decided to wait until the temperature rose and the snow turned loose and slushy.

- He returned to the facility mid- to late morning, between 10:00 and 11:00 AM. By this time, it had stopped precipitating, the

temperature was above freezing and some of the trucks had left the lot. He scraped and re-salted all of the roadways, parking lots and parking areas, except for an area to the left-hand side of the hitching post, where some trucks were still parked.

- He returned to the facility again at around 9:30 PM, and spent approximately ten minutes scraping and salting the areas he had been unable to reach earlier, particularly the employee and truck parking lots. There were no cars in the employee lot, and only one tractor trailer (presumably Claimantôs) parked at the far right end of the hitching post. He did not discern any sign of a disturbance in this area. He believed that the temperature was still above freezing, and observed from his truck that the ground was ñmealy,ò meaning that the salt he had laid down earlier in the day was still preventing it from becoming icy. Thus, while he did not get out and walk, he assumed that it was not slippery.

- At approximately 8:00 AM on January 20th, he received a telephone call from Defendantôs office, advising that someone had been injured in the truck yard the night before and requesting that he sand or salt the area where the accident had occurred. This he did, at approximately 9:00 AM.

45. I find credible most of Mr. Scovilleôs testimony, with two important exceptions. First, as established by Barry Grossman, Defendantôs meteorological expert, the temperature in Bernardston at 9:00 PM on January 19th was 22 degrees, and likely remained below freezing for most of the night. *Defendant's Exhibit D*. I find inaccurate Mr. Scovilleôs recollection to the contrary, therefore.

46. Second, I find unpersuasive Mr. Scovilleôs assertion that the ground in the vicinity of Claimantôs alleged fall was completely clear of ice. As he acknowledged, the surfaces in that area were dirt, not asphalt, such that even after being scraped, pockets of slush likely remained. Again, according to Mr. Grossmanôs report, *Defendant's Exhibit D*, these patches of wet snow, slush and ice likely refroze during the evening and were present throughout the night.

(b) <u>*Ground conditions at Claimant's home*</u>

47. Defendant next sought to establish that the driveway and paths in the vicinity of Claimantôs Brookline home were icy on the evening of January 19, 2016. I accept as credible Laura Floodôs testimony that she sanded the drive- and walkways at various times during the morning, Finding of Fact No. 7 *supra*. However, she admitted on cross-examination that she did not do so after 1:00 PM. Similarly, Nancy Flood testified that she sanded the walkway in front of her house, but only during the day, Finding of Fact No. 7 *supra*. Both witnesses credibly asserted that

they sanded the area mostly as a precaution, because it was not slippery at the time.

48. As the meteorological evidence establishes, *Defendant's Exhibit E*, by nightfall the temperature had fallen below freezing, and patches of ice likely had formed, however. Emily Stone, one of the emergency medical technicians who responded to the 911 call at Claimant's home, credibly recalled that she had to walk carefully down the path to reach him because it was slippery, and equally carefully when the crew carried him by stretcher back up the path to the ambulance. I find from this evidence that, as was the case at the Bernardston location, by 9:00 PM patches of ice likely had formed on the ground in the area of Claimant's Brookline home.

(c) *Inconsistencies in Claimant's version of events*

49. Last, Defendant sought to establish that Claimant's version of events was both internally inconsistent and at odds with other, more credible evidence. Most notably, as discussed above, Finding of Fact Nos. 38-41 *supra*, it proffered Dr. Wieneke's expert medical opinion that having suffered displaced, comminuted fractures of both his tibia and his fibula, Claimant could not possibly have moved himself from the spot where he fell; therefore, he must necessarily have fallen after arriving home rather than before leaving work.

50. Defendant also questioned the timing of events as Claimant alleged they occurred, beginning with the time it likely took him to get from the Bernardston facility to his Brookline home on the night of his injury. In his February 10, 2015 recorded statement, *Defendant's Exhibit P*, Claimant advised that his daily commute typically took 45 to 50 minutes. On the night in question, however, he was still at Bernardston at least as of 8:56 PM, as evidenced by the timeclock records, *Defendant's Exhibit I*, and was telephoning his wife while lying on the ground at his front door at 9:38 PM, as evidenced by his cell phone records, *Defendant's Exhibit G-2*. This was a span of only 42 minutes. Defendant asserts that this was insufficient time for him to have (a) exited the office after clocking out, then walking to his minivan and driving back down to his truck; (b) plugging in the truck's block heater, falling on the ice and then dragging himself to his minivan; (c) driving 31 miles home, *Defendant's Exhibit R*; and then (d) dragging himself down the driveway and to his front door.

51. After carefully reviewing the evidence adduced at hearing, I find that when, in the context of his February 2015 recorded statement, Claimant had estimated his regular commute time to be 45 to 50 minutes, this likely was inaccurate. I further find that the estimate Claimant gave during his formal hearing testimony ï that driving faster than usual, it took him approximately 30 minutes to get home on the night in question ï was likely accurate. This would have left 12 minutes for Claimant to (a) get to his truck, plug in the block heater, fall and then drag himself to his minivan in Bernardston; and (b) exit his minivan in Brookline and drag

himself to his front door. Admittedly this is a brief timeframe, but I find that it is feasible nonetheless.

52. Defendant also proffered testimony to contradict Claimantôs assertion that cell phone coverage at its Bernardston facility was poor. Mr. Peterson credibly testified that aside from the mill itself, he had no problems with cell reception either in the office or in the rail shed, the areas where he typically worked. He further testified that he was not aware of any complaints of poor cell coverage in the truck yard. He did not testify to having personal knowledge of cell reception in that location, however. His testimony is not so contradictory as to undermine Claimantôs credibility on this issue, therefore.

CONCLUSIONS OF LAW:

1. In workersô 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).

2. In many disputed workersô compensation claims, the question whether the claimantôs injury was work-related turns on whether it satisfies the legal definition of having arisen ñout of and in the course of the employment,ò 21 V.S.A. §618(a)(1). Here the issue is even more fundamental ï simply, did Claimantôs injury occur when and as he claims it did? If yes, then it is surely work-related and compensable. If not, as Defendant claims, then just as surely it is neither work-related nor compensable.

3. As a starting point to determining this question, the parties proffered conflicting expert medical opinions regarding whether Claimantôs version of events was even plausible given the severity of the injury he suffered. In such situations, the Commissioner traditionally uses a five-part test to determine which expertôs 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).

4. In most cases, applying this traditional test is a useful exercise; it facilitates a better understanding of how each expert came to conclude, to the required degree

of *medical* certainty, that from a *medical* perspective the claimantôs injury either was or was not causally related to work. Here, however, the test is of only limited value, because medical causation *per se* is not at issue. There is no doubt in this case that when Claimant fell, he broke his leg; the question is where did he fall? In this situation, the best the medical experts can do is address whether it was medically plausible for him to have taken the actions he claims to have taken ï dragging himself to his minivan, driving home and then dragging himself to his front door. Dr. Vranos concluded that he could have done so, while Dr. Wieneke concluded quite emphatically that it would have been impossible.

5. I conclude that Dr. Vranosô opinion is the most credible. True, he did not conduct as thorough a review as Dr. Wieneke did of the various depositions, statements, photographs and diagrams developed in the course of first investigating and then litigating Claimantôs claim. Nevertheless, I accept as valid his assertion that it was at least medically feasible for Claimant to have withstood the pain involved with moving rather than remain where he was.

6. I reject Dr. Wienekeôs conclusion to the contrary for two reasons. First, as noted above, Finding of Fact No. 40 *supra*, his opinion was based on an erroneous understanding of the manner in which Claimant managed to maneuver himself ï not by scooting *forward*, as Dr. Wieneke presumed, but *backwards*. Even Dr. Wieneke admitted that the latter position would have been somewhat less painful and therefore more plausible than the former.

7. More important, I reject Dr. Wienekeôs conclusion because it assumes a level of pain so great that Claimant could not possibly have chosen to endure it, no matter what the alternative. But pain tolerance varies so widely from person to person that a blanket statement regarding the point at which it somehow becomes medically intolerable for everyone is simply not credible. A mountain climber amputates his own arm with a pocketknife rather than remain pinned against a canyon wall, *https://en.wikipedia.org/wiki/Aron_Ralston*. A farmer trapped under a tree amputates his own leg, *see http://www.nbcnews.com/id/19099572/ns/us_news-life/#.V2wTZ47cQ7A*. How else to explain events such as these other than to acknowledge that when a person is faced with what seems in the moment to be an untenable situation, he or she might feasibly endure ñimpossibleò pain in order to survive? Dr. Wienekeôs analysis fails to account for such deviations from his own pain tolerance barometer, and for that reason I cannot accept it.

8. Having disposed of the medical plausibility question, it remains to determine whether Claimant has sustained his burden of proving not just that the events of January 19, 2015 could have unfolded as he claims, but that in fact they likely did so. I conclude that he has.

9. I acknowledge what I consider to be relatively minor inconsistencies in the initial medical records regarding Claimantôs report of where he fell, *see* Finding of Fact

Nos. 28-32 *supra*. It is entirely understandable that emergency room personnel in particular would be focused almost exclusively on assessing Claimant and treating his injury, and not at all on recording specific details that are relevant only to insurance adjusters and attorneys.

10. Nor do I view the statements recorded in Doris Floodôs 911 call as fatal to Claimantôs case. The credible evidence establishes that at the time of her call, all she knew about Claimantôs accident was what Laura Flood had told her moments earlier when she ran inside ï that he had broken his leg and was on the ground outside, Finding of Fact No. 23 *supra*. For Doris to have mistakenly assumed that he had only just done so while walking down to his house, and thus to have misstated the facts to the 911 operator, is not surprising.

11. Last, I acknowledge that at least in hindsight, it seems Claimant should have deduced when he fell in Defendantôs truck yard that he had severely fractured his leg, and therefore should have gone directly to the hospital rather than home. Analytically, his decision not to do so seems illogical, but considering the circumstances he faced in the moment, emotionally it rings true to me nevertheless. He was alone, in pain, and just wanted to get home safely.

12. In fact, it is Defendantôs version of events that I find implausible. For me to accept its account, I must conclude that Claimant, his wife, his sister and possibly his mother as well conspired together to defraud his employer. They would have had only 17 minutes ï from 9:38 PM, when he called his wife from his front door, to 9:55 PM, when the first responders arrived ï to concoct their story, presumably with him directing the effort while lying on the ground in severe pain. They would have had to do so notwithstanding his understanding that Defendantôs video surveillance system was fully operational, Finding of Fact No. 6 *supra*. And they would have had to think to include such extraneous details as finding his crowbar and eyeglasses on the ground next to his minivan, Finding of Fact No. 17 *supra*.

13. Having carefully examined the facts and theories underlying each partyôs version of events, I conclude that Claimantôs is credible, while Defendantôs is not. I thus conclude that Claimant has sustained his burden of proving that he broke his leg in Defendantôs truck yard, as he claims, and not at his home, as Defendant would have me believe. I further conclude that he did not willfully make any false statements or misrepresentations for the purpose of obtaining workersô compensation benefits, as Defendant contends. To the contrary, his injury arose out of and in the course of his employment, and is therefore compensable.

Costs and Attorney Fees

14. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. He has submitted a request for costs totaling $1,650.00, paralegal fees totaling $125.00 (5 hours at $25.00 per hour) and attorney fees

totaling $31,987.00 (220.6 hours at $145.00 per hour). Defendant has objected to the latter request on the grounds that many of the time entries submitted in support were impermissibly ñblock billed.ò[7]

15. I conclude that the time entries are sufficiently detailed for me to determine whether the work performed was related to the litigation at issue, which is all that is required under Vermont law. *Perez v. Travelers Insurance*, 2006 VT 123 at ¶13. Beyond that, the touchstone for an award of fees is reasonableness, *id.* To satisfy that standard, it is appropriate to adjust the claimed fee up or down based on such factors as ñthe novelty of the legal issue, the experience of the attorney, and the results obtained in the litigation,ò *id.* at ¶10 (citations omitted).

16. The legal issue here was not novel, but the factual issues were varied and complicated. I commend Claimantôs attorney on the extent of his trial preparation, especially with respect to direct and cross-examination of the witnesses. However, his unfamiliarity with Vermontôs workersô compensation law and process was also evident at times. With that in mind, I conclude that it is appropriate to reduce his attorney fee request by ten percent, or $3,198.00.

ORDER:

Based on the foregoing findings of facts and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. All workersô compensation benefits to which Claimant proves his entitlement as causally related to his January 19, 2015 work injury, with interest as provided in 21 V.S.A. §664; and

2. Costs totaling $1,650.00, paralegal fees totaling $125.00 and attorney fees totaling $28,789.00, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 28th day of June 2016.

_____
Anne M. Noonan
Commissioner

Appeal:

[7] Defendant also objected to the statements made in Paragraph 8 of Attorney Hesselbachôs Affidavit in Support of Motion for Attorney Fees, in which he referenced the barriers Claimant allegedly has faced in finding another job after Defendant terminated his employment on account of his alleged fraud. I agree that the statements made are beyond the scope of Attorney Hesselbachôs personal knowledge, and also that they have no bearing on the reasonableness of his fee request. For that reason, I have stricken them from the record.

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.