STATE OF VERMONT
DEPARTMENT OF LABOR

Joanne Perreault	Opinion No. 06-17WC
v.	By: Beth DeBernardi, Esq. Administrative Law Judge
Chittenden County Transportation Authority	For: Lindsay H. Kurrle Commissioner
	State File No. HH-00417

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Jennifer Moore, Esq., for Defendant

ISSUE PRESENTED:

Was Claimant an employee of Defendant, as defined in 21 V.S.A. §601(14), at the time of her December 1, 2015 injury?

EXHIBITS:

Claimantøs Exhibit 1:	GMTA Volunteer Driver Application
Claimantøs Exhibit 2:	Deposition of Donna Gallagher, September 19, 2016
Claimantøs Exhibit 3:	GMTA Volunteer Driver Manual with Claimantøs signed receipt
Claimantøs Exhibit 4:	National criminal background check
Claimantøs Exhibit 5:	Excerpt from Defendantøs website (õVolunteer Driver Programö)
Claimantøs Exhibit 6:	Wage Statement (Form 25) and mileage reimbursement check stubs
Claimantøs Exhibit 7:	Claimantøs affidavit, October 13, 2016
Defendantøs Exhibit A:	First Report of Injury (Form 1)
Defendantøs Exhibit B:	Excerpt from Defendantøs website (õAbout CCTAö)
Defendantøs Exhibit C:	Excerpt from Defendantøs website (õVolunteer Driver Programö)
Defendantøs Exhibit D:	GMTA Volunteer Driver Manual
Defendantøs Exhibit E:	Claimantøs signed receipt

FINDINGS OF FACT:

As a preliminary matter, Defendant filed a Statement of Undisputed Material Facts, which Claimant does not dispute. Claimant also filed a Statement of Undisputed Material Facts, a portion of which Defendant disputes. Taking the disputed facts in the light most favorable to Claimant as the nonmoving party, *Madden v. Omega Optical, Inc*., 165 Vt. 306, 309 (1996), I find the following facts:

1. Judicial notice is taken of all relevant forms contained in the Departmentøs file relating to this claim.

2. Chittenden County Transportation Authority (CCTA) and Green Mountain Transit Agency (GMTA) were parts of the same regional transit authority, which was created as a municipality. *Defendant's Exhibit B, CCTA website.* CCTA and GMTA became a single unified organization in 2011, with one board of directors and one budget. *Claimant's Exhibit 2, Gallagher Deposition at 10.* The authority was known as CCTA within Chittenden County and as GMTA outside the county.[1] *Defendant's Exhibit B, CCTA website*. The entity is referred to herein as Defendant.

3. Defendant operates a volunteer driver program providing transportation to medical and other appointments to eligible riders who live beyond the regular fixed-route bus service. *Defendant's Exhibit C, CCTA website*. Claimant was a volunteer driver for the program. *Claimant's Exhibit 7, Affidavit ¶ 1.*

4. On December 1, 2015 Claimant was transporting a rider to a medical appointment when she lost control of her vehicle on Interstate 89. *Defendant's Exhibit A, First Report of Injury.* She sustained significant injuries including a broken neck at her third and fourth vertebrae, a fractured spine and broken ribs. *Claimant's Statement of Undisputed Material Facts ¶ 32.*

<u>Nature of Defendantøs Business</u>

5. Defendant provides public transportation using its own vehicles and those of its volunteer drivers. The various modes of service that it provides are all within the nature of its business. *Claimant's Exhibit 2, Gallagher Deposition at 23-24, 27-28.* If Defendant did not have volunteer drivers, it would have to make other arrangements to provide transportation to some riders. *Claimant's Exhibit 2, Gallagher Deposition at 28.*

6. Defendant receives funding from various sources to provide transportation, including the Vermont Agency of Transportation, Medicaid, and directly from some riders. It has a funding source for each ride it provides. If a rider is not supported by a funding source, Defendant does not provide service to that rider, as it does not provide transportation to anyone for free. Some funding sources are available only to certain groups who meet eligibility requirements. *Claimant's Exhibit 2, Gallagher Deposition at 12-19, 21-22.*

7. The public transportation services Defendant provides are no different from those offered by Greyhound or Megabus. *Claimant's Exhibit 2, Gallagher Deposition at 24.*

[1] In 2016, the unified authority became Green Mountain Transit.

Community Rides Volunteer Driver Program

8. In Defendantøs Volunteer Driver Program, volunteers use their own personal vehicles to provide rides to eligible community members to medical appointments, social services offices and other locations. *Defendant's Exhibit C, CCTA website.* Defendantøs website, upon which it expects the public to rely, provides that it will reimburse volunteers for mileage at $0.54 per mile, õwhich is considered non-taxable income.ö *Claimant's Exhibit 5, CCTA website; Claimant's Exhibit 2, Gallagher Deposition at 50-52.*

9. Donna Gallagher is Defendantøs long-time office manager. *Claimant's Exhibit 2, Gallagher Deposition at 10-11.* Among other duties, she supervises the volunteer drivers. *Id.*

10. To become a volunteer driver, an interested person must complete an application and submit to a background check and vehicle inspection. If Defendant accepts the applicant as a volunteer driver, he or she must agree to comply with the policies set forth in the Volunteer Driver Manual (õVolunteer Manualö). *Claimant's Exhibit 3, Volunteer Manual.*

11. The Volunteer Manual expressly states that volunteer drivers are not employees. Section 1.3.1 provides:

> Nothing in this manual or the process for volunteering should be construed, or understood to mean, there is a contract of employment between the volunteer and GMTA. GMTA is not entering into an employment contract by allowing volunteers to transport riders.

12. The Volunteer Manual further provides:

> Volunteer drivers must provide proof of comprehensive automobile insurance that is currently in effect and meets the minimum coverage levels set by the driverøs state of residence. Volunteer drivers are encouraged to advise their insurance carrier of their volunteer driving activities, to carry coverage levels that exceed the State minimums, and to list GMTA as an additional named insured.

Claimant's Exhibit 3, Volunteer Manual §3.1.3.

13. Defendant provides automobile insurance on the volunteersøpersonal vehicles on a secondary basis. *Claimant's Exhibit 2, Gallagher Deposition at 29.* By encouraging volunteers to carry more than the minimum required level of coverage and to name Defendant as an additional insured on their own policies, Defendant is in effect attempting to shift some of the cost of insurance from itself to the volunteer drivers. *Claimant's Statement of Undisputed Material Facts ¶ 12.*

14. Defendant considers the individuals who accept rides through the Volunteer Driver Program its clients or customers, and its trip planners act like customer service representatives. *Claimant's Exhibit 2, Gallagher Deposition at 11, 41.* There are no substantive differences between its volunteer driversø skills and those of its the paid employee drivers, other than the fact that the latter have commercial driverøs licenses. *Claimant's Exhibit 2, Gallagher Deposition at 43-45.*

15. Defendant imposes certain obligations on its volunteer drivers, not only for the safety of the volunteers and riders, but also to satisfy the expectations of the organizations who fund their transportation services. As office manager, Ms. Gallagher supervises the volunteers to ensure their compliance with these expectations. *Claimant's Exhibit 2, Gallagher Deposition at 54-55.*

16. Volunteer drivers are Defendantøs representatives. They are therefore required to meet certain standards (*Claimant's Exhibit 2, Gallagher Deposition at 40-41)* and are subject to certain restrictions that are similar to those that govern paid employee drivers. Both categories of drivers are required to participate in mandatory trainings, are subject to discipline including dismissal, and are required to undergo background checks. *Claimant's Exhibit 2, Gallagher Deposition at 31-32, 36-37, 43-45.*

17. Mandatory requirements for volunteer drivers include not smoking, having a home telephone, not discussing politics with riders and not using a hand-held device while driving. Volunteers are also required to report traffic tickets to Defendant. *Claimant's Exhibit 3, Volunteer Manual §§4-5.* In this way, Defendant oversees the activities of its volunteers, including some activities that occur outside their volunteer hours. *Claimant's Exhibit 2, Gallagher Deposition at 40.*

18. Volunteer drivers are required to record the time they spend waiting for riders and submit that õwait timeö to Defendant. Defendant keeps track of the wait time because it derives a benefit from that information. *Claimant's Exhibit 2, Gallagher Deposition at 62-64; Claimant's Exhibit 3, Volunteer Manual §4.1.*

19. The Volunteer Manual provides: õA volunteer carrier bills for mileage from the time the vehicle leaves the drivers (sic) home until it returns to the driversø (sic) home.ö *Claimant's Exhibit 3, Volunteer Manual §5.8.* The same word õcarrierö appears in the phrase of general use õcommon carrier,ö which is often applied to transportation companies. *Claimant's Exhibit 2, Gallagher Deposition at 67.*

20. The safety and behavior of its volunteer drivers affect Defendantøs perception in the community, as well as its ability to maintain and grow the public transit system. *Claimant's Exhibit 2, Gallagher Deposition at 53; Claimant's Exhibit 3, Volunteer Manual Table of Contents.*

21. The Volunteer Manual makes one reference to volunteer drivers as õprofessional drivers.ö[2] *Claimant's Exhibit 3, Volunteer Manual § 4.* Regarding that reference, the following exchange took place during Ms. Gallagherøs deposition:

> Q [by Claimantøs counsel]: And professional drivers is one that gets paid for their services, right?
> A: That depends on how you want to interpret that. We want to ó our volunteers as well as professional drivers to represent the company being clean and professional looking.

Claimant's Exhibit 2, Gallagher Deposition at 60-61. Claimant asserts that by this statement Defendant acknowledges that a volunteer is a professional driver. *Claimant's Statement of Undisputed Material Facts ¶ 27.* I find that Defendant requires its volunteers to have a professional appearance, but even considering this evidence in the light most favorable to Claimant, I cannot find as a fact that they are professional drivers in terms of getting paid for their services.

22. Ms. Gallagher testified that the riders whom Defendant serves through the Volunteer Driver Program are in a fiduciary relationship with Defendant and with the volunteers providing rides.[3] *Claimant's Exhibit 2, Gallagher Deposition at 41-43.* I cannot find this as a fact, however, because the existence or non-existence of a fiduciary relationship is a legal conclusion.

23. Defendant recognizes that the policies contained in its Volunteer Manual apply to volunteer drivers like Claimant. *Claimant's Statement of Undisputed Material Facts ¶ 8.* Claimant also asserts that Defendant recognizes that the employment policies set forth in the Vermont employment statutes apply to its volunteer drivers. *Claimant's Statement of Undisputed Material Facts ¶ 8.* I cannot find this as a fact because it requires a legal conclusion.

24. Defendantøs sexual harassment policy applies to volunteers and employees alike. *Claimant's Exhibit 2, Gallagher Deposition at 56.*

<u>Claimantøs Application and Service as a Volunteer Driver</u>

25. Claimant submitted an application to the Volunteer Driver Program in 2014. *Claimant's Exhibit 1, Volunteer Application.* The application includes a section entitled õPublic Interest Information,ö which asks: õPlease briefly describe why you wish to volunteer as a community driver for GMTA.ö Claimant responded: õMy GAL [guardian ad litem] work is all I am doing. Too much time as volunteer w/o pay. Need little extra.ö *Claimant's Exhibit 1, Volunteer Application at 2.*

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[2]Section 4 states in part: õA neat and clean appearance is required as a professional driver. Volunteer drivers may not smoke while transporting a GMTA client or speak on a cellular telephone while in motion unless using a hands-free head set.ö

[3]Claimantøs counsel asked Ms. Gallagher whether there was a fiduciary relationship between the volunteer driver and the customer. Ms. Gallagher did not know what a fiduciary was. Claimantøs counsel informed her it was õbasically a relationship of trust between two individuals,ö and she then testified that there was a fiduciary relationship. *Claimant's Exhibit 2, Gallagher Deposition at 42-43.*

26. As office manager, Ms. Gallagher interviews the volunteer driver applicants. She interviewed Claimant, reviewed her application and was aware of her statement about why she wished to volunteer. *Claimant's Exhibit 2, Gallagher Deposition at 45-47; Claimant's Exhibit 1, Volunteer Application at 2.*

27. Volunteers are subject to the same background check procedures as bus drivers. When Defendant submitted Claimantøs name for a background check, the search document specified: õCustom Package: CCTA Bus Driver.ö *Claimant's Exhibit 2, Gallagher Deposition at 47-48; Claimant's Exhibit 4, National Criminal Background Check.*

28. Defendant accepted Claimant as a volunteer driver and provided her with the Volunteer Manual. On July 10, 2014 Claimant signed a receipt for the Volunteer Manual, acknowledging her obligation to read and comply with it. *Defendant's Exhibit E, Signed Receipt.* Claimant began volunteering for Defendant at that time. *Claimant's Statement of Undisputed Material Facts ¶ 2.*

29. In accordance with §§4.1 and 5.8 of the Volunteer Manual, the only money Claimant received from Defendant was mileage reimbursement at the federal reimbursement rate for the miles she drove while transporting riders. *Defendant's Exhibit D, Volunteer Manual.*

30. Claimant submitted check stubs for twenty-one weekly mileage reimbursement payments issued between July 2, 2015 and December 11, 2015, totaling $5,575.20. The average weekly mileage reimbursement for that period of time was $265.49 ($5,575.20 divided by 21 weeks). *Claimant's Exhibit 6, Wage Statement and mileage reimbursement check stubs.*

31. The mileage reimbursement that Claimant received became part of the household budget upon which she relied to pay living expenses. *Claimant's Exhibit 7, Affidavit ¶ 3.*

CONCLUSIONS OF LAW:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990). Summary judgment is appropriate only when the material facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979).

2. The legal question presented by this claim is whether Claimant, a volunteer driver, was Defendantøs employee for purposes of the Vermont WorkersøCompensation Act. Claimant asserts that the mileage reimbursement she received constituted remuneration and therefore established an employment relationship with Defendant. She further asserts that Defendant received a significant benefit from her service, that Defendant exercised control over her service and that her service was within the nature of Defendantøs business, all factors that she contends render her an employee under Vermontøs workersøcompensation statute.

Definition of Employee: Contract of Service or Hire

3. The workersøcompensation statute defines õemployeeö as õan individual who has entered into the employment of, or works under contract of service or apprenticeship with, an employer.ö 21 V.S.A. §601(14). Accordingly, the statute makes the existence of a contract of hire, whether express or implied, an essential element of the employment relationship. *Lyons v. Chittenden Central Supervisory Union*, Opinion No. 29-15WC (January 13, 2016), Discussion ¶3, *citing* 3 Lex K. Larson, *Larson's Workers' Compensation* §64.01 (Matthew Bender Rev. Ed.) A contract of hire may be written or oral, but it must include the partiesø agreement as to the payment of wages or remuneration to the employee. *Id.,* Discussion ¶7.

Remuneration vs. Reimbursement

4. As Claimant correctly asserts, remuneration under the statute is broader than simply cash payments for work performed; it encompasses a variety of non-cash advantages that an employer may provide. Section 601(13) of the statute defines õwagesö as follows:

> õWagesö includes bonuses and the market value of board, lodging, fuel, and other advantages which can be estimated in money and which the employee receives from the employer as a part of his or her remuneration; *but does not include any sum paid by the employer to his or her employee to cover any special expenses entailed on the employee by the nature of his or her employment* (emphasis added).

5. As used in the above definition, õremunerationö connotes something new and of value (whether cash or non-cash). In contrast, õreimbursementö connotes something that is repaid to the employee. Similarly, in its common usage õremunerationö is defined as õpay for work or services,ö whereas õreimbursementö means õthe act of paying back, or the money that is paid back.ö *Cambridge Online Dictionary*, Cambridge University Press (2008), http://dictionary.cambridge.org/.

6. When an employer provides board or lodging to an employee, the employee receives an economic benefit from that advantage. In contrast, when an employer reimburses an employee, it is paying the employee back for an outlay he or she has already made. The employee derives no new advantage from the reimbursement, but rather is made whole by it. This distinction is recognized in the statutory definition of õwagesö noted above, in that it specifically excludes sums õpaid by the employer to his or her employee to cover any special expenses entailed on the employee by the nature of his or her employment.ö

7. Mileage reimbursement is one such special expense. The federal mileage reimbursement rate is designed to reimburse an employee for the actual expense associated with using a personal vehicle, including not only gasoline, but also oil, repairs, tires, insurance, registration fees, licenses and depreciation. *IRS Tax Topic 510 – Business Use of Car,* https://www.irs.gov/taxtopics/tc510.html. The mileage reimbursement rate approximates the actual cost of using a personal vehicle; it is not designed to include profit to the employee. Defendantøs website notes that mileage reimbursement is considered non-taxable income for the same reason ó because the recipient has no economic gain in excess of his or her automobile expenses.

8. Although Vermont has not decided a workersø compensation case on this issue, other courts have considered mileage reimbursement in the workersø compensation context. For example, in *Mazzio's Corp. v. Dick,* 994 P.2d 96 (Okla.Civ.App. Div. 2 1999), a pizza deliveryman used his own vehicle to deliver pizza, and his employer paid him $0.24 per mile, in addition to his wages. The employee asked the court to consider his õentire compensation package,ö including wages, tips and mileage payments, in calculating his average weekly wage. The employer did not pay for the employeeøs gasoline, oil, insurance or depreciation, but rather intended the $0.24 per mile to cover the employeeøs expenses in running his vehicle. The court thus found that the mileage money the claimant received was clearly a reimbursement of special expenses, not remuneration.[4] *Id.* at 98, *citing* 5 *Larson's Workers' Compensation Law*, §60.12(a) at 10-648 through 10-660 (1998). The court continued:

> õ[W]agesö generally do not include amounts paid to the employee to reimburse him for employment-related expenditures of the type that would not be incurred *but for the particular employment*. This is because an employee who is given an allowance or reimbursement to cover such expenses suffers no economic loss when he õno longer incurs these extraordinary expenses.ö *Blake Stevens Constr. Co. v. Henion,* 697 P.2d 230, 232 (Utah 1985) (emphasis in original).

Mazzio's Corp., 994 P.2d at 98. The Court thus held that an employerøs payment of mileage reimbursement at or below the recognized IRS rate for an employeeøs use of a private automobile is prima facie an expense reimbursement that would not constitute wages. *Id.* at 99.

[4] The statutory definition of õwagesö in Oklahoma was õthe money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer.ö 85 Okla. Stat. §3(11) (Supp. 1998).

9. The Virginia Court of Appeals reached the same conclusion with a slightly different analysis. In *Bosworth v. 7-Up Distributing Co. of Fredericksburg, Inc.*, 355 S.E.2d 339 (Va.App.1987), the claimant used his own vehicle for his employment-related travel, and the employer paid him an automobile allowance of $75.00 per week õto cover the costs of depreciation, tires, oil, gas, insurance and other expenses associated with the operation of his automobile in his employment.ö *Id.* at 340. As a general rule, the court found that amounts paid to an employee as reimbursement for õexpenditures which he is called upon to make in the course of his employment, in activities which he has no occasion to pursue when not employed, are not part of his earningsö for the purpose of workersø compensation. *Id.* at 341. Applying that rule to the case at hand, the court determined that the automobile allowance was not part of Bosworthøs remuneration because he received no õeconomic gainö from it. Moreover, if the employer ceased paying the mileage allowance because the employee no longer incurred those expenses, the employee would not have suffered any economic loss. *Id.; see also Pan American World Airways v. Mash*, 573 So.2d 383 (Fla.App. 1 Dist. 1991) (remuneration does not include make-whole reimbursement for uniquely work-related expenses which are created by the employment); *Moorehead v. Industrial Commission*, 495 P.2d 866 (Ariz.App. Div. 1 1972) (mileage reimbursement not includable in average weekly wage).

10. Claimant cites several cases in which employees received non-cash advantages, the value of which was added to their average weekly wages. In each case, however, the non-cash advantage constituted something of new value to the employee, rather than reimbursement for an expense outlay. For example, in *Estate of Lyons v. American Flatbread*, Opinion No. 36R-03WC (November 3, 2003), the employee received hands-on massages provided by his employer in addition to his regular wages. In *Haller v. Champlain College Corp.*, Opinion No. 14-16WC (August 24, 2016), the employee received tuition-free college credits. It is also common for a ski area employee to receive a free ski pass as part of his or her remuneration, *see, e.g.*, *Heide v. Jay Peak*, Opinion No. 59-05WC (September 20, 2005).

11. Unlike the non-cash remuneration in the above cases, all of which provided a new advantage to the employee, Claimantøs mileage reimbursement merely paid her back for the out-of-pocket costs associated with using her personal vehicle. She did not derive an economic advantage from such reimbursement. She may have believed she was profiting from mileage reimbursement because the sums received exceeded her cost of gasoline, but such payments reimburse drivers for more than gasoline, as set forth in *IRS Tax Topic 510, supra.*

12. The rules governing the calculation of an employeeøs average weekly wage further underscore the importance of economic gain (or loss) as a basis for determining what is remuneration. WorkersøCompensation Rule 8.1130 provides that the calculation of an employeeøs average weekly wage shall include:

    > the fair market value of any room, board, food, electricity, telephone, uniforms or similar benefits provided to the injured worker; provided, *however, that if the injured worker continues to receive any of these benefits during the period of his or her temporary disability, the value of such benefit shall not be included in his or her temporary disability compensation rate* (emphasis supplied).

13. Under the rule, the value of an employer-provided benefit is includable in an injured workerøs average weekly wage, but only if access to it is withheld during the period of his or her disability. If access continues, then the employee suffers no economic loss, and thus there is nothing to compensate and no basis for including the value of the benefit in the average weekly wage calculation.

14. The same rationale applies to mileage reimbursement. An employee receives mileage reimbursement to defray the expense of using a personal vehicle for employment-related purposes. If he or she becomes disabled from working, then there are no longer any vehicle expenses to defray, and therefore no economic loss to be compensated. This is true regardless of whether mileage reimbursement is paid in conjunction with monetary wages, as is typically the case, or by itself, as was the case here.

15. I note, finally, that although Claimant now seeks to establish employee status, this directly contravenes the express terms of the partiesø agreement as set forth in Defendantøs Volunteer Manual, in which they specifically denied the existence of an employer-employee relationship. Finding of Fact No. 11 *supra*. Granted, this provision by itself is not determinative of Claimantøs status, *see, e.g., Falconer v. Cameron*, 151 Vt. 530, 532-33 (1989) (holding that what the parties call their relationship is not determinative of employment status if their course of conduct indicates otherwise). Nevertheless, particularly given the absence of any agreement as to remuneration, it gives further credence to Defendantøs position that no such relationship was established. *Lyons, supra* at Discussion ¶7 (internal citations omitted).

16. I conclude as a matter of law that the mileage reimbursement Claimant received from Defendant did not constitute remuneration. Remuneration being the key indicator of an employment relationship, *Lyons, supra,* I further conclude as a matter of law that Claimantøs status as a volunteer driver did not render her Defendantøs employee.

Benefit to the Employer Not Determinative

17. Claimant asserts that Defendant realized significant benefits from her volunteer service, as it was able to provide expanded services to the public and further its effort to grow its business. Findings of Fact Nos. 5, 13, 18 *supra*. However, the test for an employment relationship is not whether the employer benefitted from the volunteerøs service. The test is whether the parties intended the benefit to the volunteer as wages. *Lyons, supra* at Discussion ¶16.

18. The claimant in *Lyons* was an aspiring elementary school teacher. To fulfill the student teaching requirement for licensure, she entered an internship program and received a classroom placement within Defendantøs school district. Student teachers in the internship program would prepare and present lessons, participate in parent conferences, grade papers, and perform other tasks and services, receiving not just a path to licensure but also valuable teaching experience. The school districts would also benefit from student teacher placements by having an opportunity to assess the skills of potential future job applicants and by receiving no-cost classroom assistance. Unfortunately for Ms. Lyons, she sustained injuries in a fall at the school and could not complete her internship. Her subsequent claim for workersø compensation benefits was denied because she was a gratuitous volunteer, not a paid employee. The Commissioner upheld the denial, noting that the school district benefitted from Ms. Lyonsø service in the school, but that benefit did not render her an employee for workersø compensation purposes. *Id.*

Independent Contractor Tests Not Relevant

19. Claimant asserts that her volunteer driving was within the nature of Defendantøs business. *See, e.g.,* Findings of Fact Nos. 5-7, 14 *supra*. She also asserts that Defendant exercised control over her and the other volunteer drivers, performing background checks, requiring insurance, not allowing them to smoke, and other manifestations of control. *See, e.g.,* Findings of Fact Nos. 10, 12-13, 15-17, 20-21, 24 *supra*.

20. Both the õnature of the business testö and the õright to control testö are used to determine whether a worker is an employee or an independent contractor. *See, e.g., In re Chatham Woods Holdings, LLC*, 2008 VT 70. They are not tests to determine whether a worker is an employee or a gratuitous volunteer. Claimant has conflated two entirely different bases for disqualifying a person from receiving workersø compensation benefits on the grounds that no employment relationship exists.

21. Like an employee, a gratuitous worker may be subject to an employerøs control over the manner in which the work is performed. A gratuitous worker may also perform services that are within the nature of the employerøs business. This holds true whether they volunteer as drivers or in hospitals, schools or other venues. Unlike an employee, however, a gratuitous worker neither receives nor expects to receive payment for the services provided. *Lyons, supra* at Discussion ¶7, *citing Larson's Workers' Compensation*, *supra* at §65.01, p. 65-2. As the Commissioner stated in *Lyons*:

> The key indicator in these circumstances is not the right to control, but rather the right to bargained-for remuneration. Simply put, absent actual or expected payment of some form of remuneration by employer to employee, an employment relationship does not exist, and workersø compensation coverage does not attach. *Id.* at Discussion ¶7.

22. Accordingly, it is the gratuitous nature of Claimantøs service here that disqualifies her from receiving workersø compensation benefits, not whether her service is within the nature of Defendantøs business or whether her service is under its control.

Policy Considerations

23. The purpose of workersø compensation is to provide employees with prompt, no-fault compensation for work-related injuries and to provide employers with a liability that is limited and determinate. *Morrisseau v. Legac*, 123 Vt. 70, 76 (1962). In particular, the statute provides for wage replacement to support the injured worker during his or her period of recovery. 21 V.S.A. §642. The statute does not apply to, and was not intended to cover, volunteers who receive no remuneration. In *Lyons, supra* at Discussion ¶8, the Commissioner explained:

> Underlying virtually every stateøs workersø compensation program is the assumption that a worker is gainfully employed at the time of his or her injury. Restoring lost wages is the very essence of the protection that the system affords. *Larson's Workers' Compensation, supra* at §64.01, p. 64-4. With that in mind, as a practical matter, õit would be impossible to calculate compensation benefits for a purely gratuitous worker, since benefits are ordinarily calculated on the basis of earnings.ö

24. More broadly, if the requirement for workersø compensation coverage were extended to volunteers, that would upset the longstanding balance between employer and employee and erode the limited and determinate nature of the employerøs liability. Further, the effect of such extension would be to discourage nonprofits and other organizations from using volunteers to further their missions. Volunteers keep the costs of such organizations down, help to maximize the value of donations and serve client populations in a cost-effective way. If the law imposed workersø compensation requirements on gratuitous volunteers, there could be severe unintended consequences for these organizations and for the populations they serve as well.

25. In theory, allowing non-profit employers to avoid workersø compensation coverage for their volunteers could put those volunteers at greater risk for a work-related injury, if the organizations fail to take reasonable steps to promote their safety. In practice, however, an employer still has an incentive to maintain a safe workplace, both to reduce the cost of workersø compensation insurance for its paid employees and to comply with applicable workplace safety standards.

26. Finally, employee status is a two-edged sword. An employee is entitled to the limited benefits prescribed by the workersø compensation statute, but is barred from recovery in tort. In cases where tort recovery is more beneficial, the injured worker is disadvantaged by his or her employee status. In contrast, injured volunteers are free to pursue a tort claim and would lose that advantage if they were deemed employees. Employers thus have a definite incentive to take volunteer safety seriously, even without workersø compensation coverage.

<u>Conclusion</u>

27. I conclude as a matter of law that Claimantøs receipt of mileage reimbursement payments from Defendant did not constitute õremunerationö as that term is interpreted in the workersø compensation context. This being an essential element of any employment relationship, I conclude as a matter of law that Claimantøs volunteer service for Defendant did not render her an employee as that term is defined in 21 V.S.A. §601(14). For that reason, her claim for workersø compensation benefits must fail.

ORDER:

Defendantøs Motion for Summary Judgment is hereby **GRANTED**, and Claimantøs claim for workersø compensation benefits causally related to her December 1, 2015 injury is hereby **DISMISSED**.

DATED at Montpelier, Vermont this ___ day of March 2017.

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Lindsay H. Kerrle
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.