STATE OF VERMONT
DEPARTMENT OF LABOR

Michael Deuso	Opinion No. 13-18WC
v.	By: Beth A. DeBernardi, Esq. Administrative Law Judge
Shelburne Limestone Corporation	For: Lindsay H. Kurrle Commissioner
	State File No. JJ-00718

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Michael Deuso, *pro se*
Corina Schaffner-Fegard, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimantôs claim for workersô compensation benefits for injuries allegedly sustained in an April 21, 2017 workplace altercation barred as a matter of law under 21 V.S.A. § 649?

2. If not, is Claimant ineligible to receive temporary indemnity benefits as a matter of law due to his separation from employment for reasons unrelated to his work injury?

3. Is Claimantôs claim for workersô compensation benefits for hearing loss and tinnitus time-barred as a matter of law by the statute of limitations?

4. Is Claimantôs claim for workersô compensation benefits for a hernia time-barred as a matter of law by the statute of limitations?

5. Is Claimant unable to meet his burden of proof that his hernia is causally related to his employment as a matter of law?

EXHIBITS:[1]

Claimantôs Exhibit 12.1-12.3: Claimantôs August 9, 2017 written statement (excerpt, 3 pages)

[1] Claimant failed to file a separate and concise statement of disputed facts in response to Defendantôs summary judgment motion, as required by V.R.Civ.P. 56(c)(1)(A). Given both his *pro se* status and the relatively informal nature of these proceedings, *Workers' Compensation Rule 17.1100,* in ruling on Defendantôs motion I have considered Claimantôs exhibits as a statement of disputed facts. Claimantôs exhibits are listed in the order filed and with the exhibit designations he provided. Exhibits with no designation as listed as ñClaimantôs Exhibitò with no number designation.

Claimantôs Exhibit 2:	Claimantôs diagram of Defendantôs office [Defendantôs Exhibit A, attachment 2]
Claimantôs Exhibit 19-1:	Diagram of Defendantôs office produced by Mark Quintin
Claimantôs Exhibit 19-2:	Diagram of Defendantôs parts room produced by Mark Quintin
Claimantôs Exhibit:	Claimantôs February 20, 2018 deposition, pages 151-52 [Defendantôs Exhibit A, complete transcript]
Claimantôs Exhibit 2:	Defendantôs April 28, 2017 letter to the UI Benefits Unit
Claimantôs Exhibit:	Affidavits of Thomas Tibbits, Kenneth Commo and Nathan Harlow [Defendantôs Exhibits E, F and J]
Claimantôs Exhibit 20:	Nathan Harlowôs unnotarized August 31, 2017 statement
Claimantôs Exhibit:	Mark Quintinôs June 7, 2018 affidavit [Defendantôs Exhibit I]
Claimantôs Exhibit 17:	Mark Quintinôs unnotarized June 9, 2017 statement
Claimantôs Exhibit:	Timothy Whiteôs June 8, 2017 affidavit [Defendantôs Exhibit G]
Claimantôs Exhibit 16:	Timothy Whiteôs unnotarized June 13, 2017 statement
Claimantôs Exhibit:	Denise Rabtoyôs June 7, 2018 affidavit [Defendantôs Exhibit H]
Claimantôs Exhibit 6:	Denise Rabtoyôs August 15, 2017 email
Claimantôs Exhibit:	Defense counselôs March 19, 2017 letter to ALJ DeBernardi
Claimantôs Exhibit:	Defense counselôs August 25, 2017 letter to ALJ DeBernardi (excerpt, 3 pages)
Claimantôs Exhibit 15:	Denise Rabtoyôs unnotarized June 13, 2017 statement
Claimantôs Exhibit 5:	Theresa Michelôs August 15, 2017 email
Claimantôs Exhibit 13.1-13.2:	Theresa Michelôs unnotarized August 7, 2017 statement
Claimantôs Exhibit 14:	Theresa Michelôs unnotarized June 13, 2017 statement
Claimantôs Exhibit C1.1-1.6:	Claimantôs August 29, 2017 statement filed in connection with his unemployment benefits appeal
Claimantôs Exhibit 7:	Trampas Demersô August 12, 2017 email
Claimantôs Exhibit 11:	Trampas Demersô April 21, 2017 notarized statement
Claimantôs Exhibit 10.1-10.3:	Claimantôs April 21, 2017 sworn statement to St. Albans Police Department [Defendantôs Exhibit K]
Claimantôs Exhibit:	Colchester Police Department report
Claimantôs Exhibit 3.1-3.2:	Dennis Demersô June 16, 2017 affidavit [Defendantôs Exhibit D]
Claimantôs Exhibit 1.1-1.2:	Vermont Department of Laborôs Request for Separation Information and Payment Information
Claimantôs Exhibit 4.1-4.4:	Trampas Demersô June 16, 2017 affidavit [Defendantôs Exhibit C]

Claimantôs Exhibit:[2]	Unemployment benefits appeal hearing transcript before ALJ Jennifer Davis, September 6, 2017 [Defendantôs Exhibit B] and unemployment benefits appeal hearing transcript before the Vermont Employment Security Board, October 10, 2017
Defendantôs Exhibit A:	Claimantôs February 20, 2018 deposition transcript with exhibits: Deposition Exhibit 1: February 27, 2013 medical record Deposition Exhibit 2: Office diagram Deposition Exhibit 3: Parking lot diagram Deposition Exhibits 4-9: Photographs of Claimantôs head Deposition Exhibit 10: Claimantôs April 21, 2017 police report
Defendantôs Exhibit B:	Unemployment benefits appeal hearing transcript before ALJ Jennifer Davis, September 6, 2017
Defendantôs Exhibit C:	Trampas DemersôJune 16, 2017 affidavit
Defendantôs Exhibit D:	Dennis DemersôJune 16, 2017 affidavit
Defendantôs Exhibit E:	Thomas TibbitsôJune 11, 2018 affidavit
Defendantôs Exhibit F:	Kenneth Commoôs June 7, 2018 affidavit
Defendantôs Exhibit G:	Timothy Whiteôs June 8, 2018 affidavit
Defendantôs Exhibit H:	Denise Rabtoyôs June 7, 2018 affidavit
Defendantôs Exhibit I:	Mark Quintinôs June 7, 2018 affidavit
Defendantôs Exhibit J:	Nathan Harlowôs June 8, 2018 affidavit
Defendantôs Exhibit K:	Claimantôs April 21, 2017 sworn statement to St. Albans Police Department
Defendantôs Exhibit L:	Medical records from August 2007 to November 2017
Defendantôs Exhibit M:	Trampas DemersôJune 11, 2018 supplemental affidavit
Departmentôs Exhibit I:	Claimantôs Notice of Injury and Claim for Compensation (Form 5) filed May 4, 2017
Departmentôs Exhibit II:	Defendantôs Denial of WorkersôCompensation Benefits (Form 2) filed May 30, 2017
Departmentôs Exhibit III:	Claimantôs request for hearing filed June 7, 2017
Departmentôs Exhibit IV:	Claimantôs annual hearing test results from February 2006 through January 2017 submitted by Defendant on July 24, 2017

[2] 21 V.S.A. §§ 1301-1471 governs unemployment compensation claims. The statute provides that information obtained from any employing unit or individual in the administration of the unemployment benefits program shall be confidential and shall not be admissible in evidence in any proceeding other than the one arising out of that chapter. 21 V.S.A. § 1314(d)(1). In *Haverly v. Kaytec, Inc.*, 169 Vt. 350 (1999), the Supreme Court interpreted the confidentiality provision as a privilege that a party may use as a shield when the party is a defendant in a subsequent lawsuit. However, the Court held that the plaintiff in *Haverly* could not use the confidentiality privilege to exclude relevant evidence from a later proceeding that he himself initiated. By bringing the subsequent proceeding, the plaintiff waived any protection he might have had under 21 V.S.A. § 1314(d)(1). The same analysis applies here. Further, as both parties here have submitted transcripts from Claimantôs unemployment benefits proceeding, it appears that neither is asserting the confidentiality privilege. I thus find that the transcripts may be considered for purposes of this summary judgment motion.

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Claimant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), and taking judicial notice of all relevant forms and records contained in the Departmentôs claim file, I find the following facts:

Claimant's Employment and Job Duties

1. Claimant began work for Defendant in April 1983. *Statement of Undisputed Material Facts ¶ 1; Claimant's deposition at 21; Defendant's Exhibit B, at 10.*

2. Claimant was the plant manager for Defendantôs Swanton quarry for many years. As plant manager, he was responsible for reporting work-related injuries at the plant and was aware of Defendantôs policies and procedures regarding the reporting of work-related injuries. *Statement of Undisputed Material Facts ¶¶ 46-47; Trampas Demers' supplemental affidavit ¶¶ 2, 4-5; Claimant's deposition at 92.*

The April 21, 2017 Altercation and Claimant's Separation from Employment

3. In April 2017 issues arose concerning Claimantôs job performance.[3] *Statement of Undisputed Material Facts ¶ 3; Claimant's deposition at 68-82; Defendant's Exhibit B, at 19-23, 26-28; Trampas Demers' affidavit ¶¶ 8-12; Dennis Demers' affidavit ¶¶4-5; Tibbits' affidavit ¶¶2-4.*

4. Claimant was upset and knew that he might be terminated as a result of those issues. *Statement of Undisputed Material Facts ¶ 4; Claimant's deposition at 85; Defendant's Exhibit B, at 14; Tibbits' affidavit ¶¶2-4.*

5. On April 20, 2017, Defendantôs president, Trampas Demers, sent a text message to Claimant summoning him to a meeting with himself and vice president Dennis Demers at the corporate headquarters in Colchester, Vermont. The meeting was set for the next day, April 21, 2017, at 8:00 a.m. in Trampas Demersô office. *Statement of Undisputed Material Facts ¶¶ 5-6; Claimant's deposition at 122-25; Defendant's Exhibit B, at 11, 13; Trampas Demers' affidavit ¶¶13-14.*

6. When Claimant arrived at the Colchester office for the meeting, he slammed his truck door as he got out of the vehicle. He then walked into the building and up the stairs to Trampas Demersô office, arriving about ten minutes late. *Statement of Undisputed Material Facts ¶ ¶ 7-8; Claimant's deposition at 124-26; Defendant's Exhibit B, at 13; Commo's affidavit ¶¶ 2-3; White's affidavit ¶ 4; Rabtoy's affidavit ¶ 4.*

[3] Claimant disagreed with Dennis and Trampas Demersô decision to make certain adjustments to plant production. *See Trampas Demers' affidavit ¶¶ 7-12*. The details of their disagreement are not material to the workersô compensation claim beyond the fact that the disagreement led to the April 21, 2017 meeting about Claimantôs job performance.

7. Claimant left the meeting shortly after it began, loudly yelling obscenities, after it became apparent that the meeting was about his job performance. *Statement of Undisputed Material Facts ¶ 9; Claimant's deposition at 146-47; Defendant's Exhibit B, at 13-14, 17, 20, 24, 29; Trampas Demers' affidavit ¶ 15; Dennis Demers' affidavit ¶ 8; White's affidavit ¶ 5; Rabtoy's affidavit ¶¶ 5-9.*

8. Claimant was an ñemotional wreckò when he left the meeting. *Statement of Undisputed Material Facts ¶ 10; Claimant's deposition at 148.*

9. Claimant proceeded to walk through the building towards the exit with Trampas and Dennis Demers following him. Claimant continued to yell obscenities. *Statement of Undisputed Material Facts ¶ 12; Claimant's deposition at 149-59; Defendant's Exhibit B, at 17, 24, 29-33; Trampas Demers' affidavit ¶ 16; White's affidavit ¶¶ 7-9; Rabtoy's affidavit ¶¶ 6-9; Quintin's affidavit ¶¶ 4-9; Harlow's affidavit ¶¶ 5-10.*

10. Claimantôs exit path took him through the buildingôs ñparts room.ò When he entered the parts room, he slammed the door open with such force that he damaged the hinges, which had to be repaired later. *Statement of Undisputed Material Facts ¶¶ 13-14; Claimant's deposition at 155; Quintin's affidavit ¶¶ 4-5; Harlow's affidavit ¶ 4.*

11. After moving through the parts room, Claimant, Trampas Demers and Dennis Demers ended up in the ñtimeclock room,ò which also serves as the hallway leading outside. *Statement of Undisputed Material Facts ¶ 15; Claimant's deposition at 155-56; Trampas Demers' affidavit ¶ 16; White's affidavit ¶¶ 8-9; Quintin's affidavit ¶ 7; Harlow's affidavit ¶¶ 6-7.*

12. Claimant was in the timeclock room near the exit door when he heard Trampas Demers say, ñYou did this to yourself.ò Trampas Demers said this to him three times. *Claimant's Opposition to Summary Judgment at 7; Claimant's Exhibit 12.1.*

13. At his deposition, Claimant admitted: ñI would have been gone if, if Trampas would have just shut up, if he wouldnôt have said, ôYou did this to yourself.ô If he wouldnôt have said that.ò *Statement of Undisputed Material Facts ¶ 11; Claimant's deposition at 148.*

14. Claimant then ñwent to grab Trampasò or ñtriedò to grab Trampas. *Statement of Undisputed Material Facts ¶¶ 16 -17; Claimant's Deposition at 159; Trampas Demers' affidavit ¶ 16; Defendant's Exhibit K, at 2; Claimant's Exhibit 12.1.*

15. Claimant was therefore the instigator of the physical altercation. *Claimant's Exhibit 12.1 ("You were actually the instigator? . . . Yes, I made the first move.")*

16. Witnesses saw Trampas Demers up against the wall with his hands in a defensive position, blocking Claimantôs hands. They observed Dennis Demers trying to get Claimant off of Trampas. *Statement of Undisputed Material Facts ¶ 18; White's affidavit ¶ 8; Quintin's affidavit ¶ 8.*

17. Claimant said that when he ñwent to grabò Trampas Demers, Dennis Demers ñblock tackled me out the door.ò Claimant also described this as Dennis Demers ñbear huggingò him out the door. *Statement of Undisputed Material Facts ¶ 19; Claimant's deposition at 159, 161-63.*

18. Witnesses saw Dennis Demers and Trampas Demers push Claimant towards and then out the exit door. *Statement of Undisputed Material Facts ¶ 20; White's affidavit ¶ 9; Quintin's affidavit ¶ 9; Harlow's affidavit ¶ 7.*

19. Claimant, Trampas Demers and Dennis Demers all ended up outside in the parking lot. Claimant landed on the asphalt on his back and Dennis Demers landed on top of him. *Statement of Undisputed Material Facts ¶ 21; Claimant's deposition at 159, 161-64; Defendant's Exhibit B, at 18; Trampas Demers' affidavit ¶ 16; White's affidavit ¶ 9; Quintin's affidavit ¶ 9; Harlow's affidavit ¶ 10.*

20. Trampas and Dennis Demers subdued Claimant in the parking lot. *Statement of Undisputed Material Facts ¶ 21.* Dennis held him down, and Trampas put his forearm over Claimantôs throat to subdue him. Claimant got one arm free and tried to swing at Trampas. Then, according to Claimant, Dennis Demers took his head and slammed it onto the asphalt three times, before letting him get up. *Claimant's Opposition to Summary Judgment at 7; Claimant's deposition at 163-71; Claimant's Exhibit 12.1.*

21. No witnesses observed Claimantôs head being slammed onto the pavement. *Statement of Undisputed Material Facts ¶ 22; Trampas Demers' affidavit ¶ 16; Harlow's affidavit ¶¶ 9-11.*

22. Trampas Demersô finger was broken during the altercation. *Statement of Undisputed Material Facts ¶ 23; Trampas Demers' affidavit ¶ 16.*

23. Claimantôs employment with Defendant came to an end on April 21, 2017. *Statement of Undisputed Material Facts ¶¶ 2, 24; Claimant's deposition at 68, 82, 85, 147; Defendant's Exhibit B, at 10-11, 14-15, 19-23, 26-28; Trampas Demers' affidavit ¶¶ 12, 14-16; Dennis Demers' affidavit* ¶¶ 5-8; *Tibbits' affidavit ¶¶ 2-4.*

24. Defendant contends that Claimantôs employment ñended for causeò and for reasons unrelated to any claimed work injury. *Statement of Undisputed Material Facts ¶ 24; Claimant's deposition at 82, 85, 147; Defendant's Exhibit B, at 10-11, 14-15, 19-23, 26-28; Trampas Demers' affidavit ¶¶ 12, 14-16; Tibbits' affidavit ¶¶ 2-4.* Claimant disputes that he was fired for cause and raises several possible reasons for Defendantôs having fired him.[4] Nevertheless, he does not dispute that his employment ended for reasons unrelated to any claimed work injury. Accordingly, I make no finding as to whether Claimantôs employment terminated voluntarily, involuntarily, or for cause, but it is undisputed that his employment ended for reasons unrelated to any claimed work injury.

[4] *See Claimant's Exhibit 12.1 - 12.3,* wherein he states that he was fired without cause and did not voluntarily quit. He alludes to possible reasons for his termination, including his age and/or Defendantôs alleged need to reduce business expenses, but he never claims that his employment ended due to his alleged work injuries. *See, e.g., Claimant's deposition at 68, 85-86.*

25. During his employment, Claimant had use of a company-owned vehicle. After the April 21, 2017 altercation, he turned over his office and vehicle keys to Dennis Demers, and Dennis allowed him to retrieve his personal property from the company vehicle. Claimant then went home in a taxi. *Claimant's Opposition to Summary Judgment at 3; Claimant's Exhibit 11.*

26. Later on April 21, 2017, Claimant filed a report concerning the altercation with the St. Albans Police Department and provided a sworn statement. *Claimant's Opposition to Summary Judgment at 2; Defendant's Exhibit K.*

27. Claimant returned to work for another employer in an electrical apprentice program as of September 18, 2017. *Statement of Undisputed Material Facts ¶ 25; Claimant's deposition at 7.*

Claimant's Hearing Loss and Tinnitus

28. In 2006 Defendant instituted a workplace hearing loss program as required by the federal Mine Safety and Health Administration. *Statement of Undisputed Material Facts ¶ 26; Claimant's deposition at 56-58.* Beginning that year, the hearing of all employees, including Claimant, was tested on a yearly basis. *Statement of Undisputed Material Facts ¶ 27; Claimant's deposition at 58-60.*

29. Claimant received his hearing test results from the program on an annual basis. *Statement of Undisputed Material Facts ¶ 28; Claimant's deposition at 60.* Each year the test results indicated that Claimant had hearing loss, while also indicating: ñNo action required.ò *Department's Exhibit IV, annual hearing test results from 2006 through 2017; Medical records at 183-85.*

30. Claimant admitted that he had hearing loss and tinnitus prior to April 21, 2017 and as early as 2009. *Statement of Undisputed Material Facts ¶ 29; Claimant's deposition at 60, 101-02; Medical records at 3-5, 7-9, 11, 14-16, 18, 20, 25, 39, 50, 74.*

31. At a January 19, 2009 primary care provider office visit, Claimantôs chief complaint was identified as tinnitus, *beginning two to three years earlier* and worsening over the past two to three months. *Claimant's Opposition to Summary Judgment at 39; Medical records at 7-9* (emphasis added). His primary care provider noted that he had worked in a loud quarry operation for 28 years. She further noted: ñ[Claimant] confirms having hearing loss.ò *Id.* The provider made a referral to an otolaryngologist for hearing loss and tinnitus, but there is no record of any follow up with that specialist. At a March 12, 2009 health maintenance evaluation, the primary care provider again documented hearing loss and tinnitus. *Claimant's Opposition to Summary Judgment at 39; Medical records at 11-21.*

32. On February 27, 2013, Claimant underwent a physical examination at his primary care providerôs office for the purpose of maintaining his commercial driverôs license. The provider noted that his hearing was significantly decreased but still met the standard for driving commercial vehicles. Claimant was told that he *might* need hearing aids for his next recertification in two years, but that issue would be determined in two yearsô time. *Statement of Undisputed Material Facts ¶ 30; Medical records at 25-27; Claimant's Opposition to Summary Judgment at 40.*

33. Claimant did not disagree with the findings of his February 27, 2013 hearing examination. *Statement of Undisputed Material Facts ¶ 31; Claimant's deposition at 111.*

34. Claimantôs hearing loss and tinnitus were also reflected in his medical records on March 6, 2014. *Statement of Undisputed Material Facts ¶ 32; Medical records at 39; Claimant's Opposition to Summary Judgment at 40.*

35. Claimant had an annual physical examination on May 18, 2015. His primary care provider documented significant hearing loss and noted that his hearing is checked annually through work. *Claimant's Opposition to Summary Judgment at 40; Medical records at 50.*

36. Claimant never filed a workersô compensation claim for hearing loss or tinnitus prior to April 21, 2017. *Statement of Undisputed Material Facts ¶ 33; Claimant's deposition at 114.*

37. When Claimant visited the emergency department on April 21, 2017, after the workplace altercation, he did not complain of hearing loss or tinnitus. *Statement of Undisputed Material Facts ¶ 34; Medical records at 86-89.* The emergency department physician diagnosed a scalp contusion, with minimal scalp trauma and no signs of concussion. He did not identify or diagnose hearing loss or tinnitus. *Medical records at 88*.

38. On April 26, 2017, when Claimant followed up with his primary care provider, he reported tinnitus and hearing loss and attributed them to the April 21, 2017 workplace altercation for the first time. *Claimant's Opposition to Summary Judgment at 42; Medical records at 96.*

39. On June 5, 2017, Claimant saw his primary care provider, complaining of hearing loss and tinnitus for the previous six weeks. *Claimant's Opposition to Summary Judgment at 43; Medical records at 128, 130.*

40. On July 7, 2017, Claimant saw his primary care provider again, complaining of continuing tinnitus and hearing loss. He was referred for a brain MRI, which revealed no abnormalities. *Claimant's Opposition to Summary Judgment at 43; Medical records at 156, 162.*

41. On August 21, 2017, Claimant underwent an audiological evaluation at Northwest Hearing Services, PC. The audiologist measured hearing loss in both ears and recommended that ñpatient should consider scheduling for a hearing aid consult. Binaural hearing aids are recommended.ò *Medical records at 166-67*.

42. On November 1, 2017, Claimant underwent an independent medical examination at Defendantôs request with occupational and environmental medicine physician Verne Backus, MD. Dr. Backus reviewed Claimantôs annual hearing test results from 2006 through 2017. According to Dr. Backus, Claimantôs diagnoses included bilateral hearing loss and tinnitus. However, he concluded that neither of these conditions was caused by the workplace altercation on April 21, 2017. He explained that even mild head injuries do not cause hearing loss or tinnitus. *Medical records at 188-89*. Dr. Backus wrote:

> Not surprisingly, being terminated combined with a physical altercation with your employer at the same time leads to anger and a reactive depressive response to the loss of a meaningful job of 35 years and perceived wrongdoing could lead to a psychosomatic focus on subjective symptoms related to hearing loss and associated tinnitus. While he may be perceiving the injury caused or aggravated his hearing loss and tinnitus, it is only his increased focus or awareness of it based upon his incorrect belie[f] there is a relationship that increases his perception of these symptoms.

Medical records at 189; *Claimant's Opposition to Summary Judgment at 45.* Dr. Backus concluded: ñThe high frequency hearing loss and associated tinnitus were not caused by or aggravated by the incident on 4/21/17.ò *Medical records at 189*. As to whether the hearing loss and tinnitus were otherwise work-related, Dr. Backus stated that Claimant has high frequency hearing loss and tinnitus commonly associated with noise exposure, which could have come from his quarry work or from other, non-work activities. *Medical records at 190; Claimant's Opposition to Summary Judgment at 45.*

43. Using the results of Claimantôs August 2017 audiology evaluation and applying the fifth edition of the *AMA Guides to the Evaluation of Permanent Impairment*, Dr. Backus assessed Claimantôs bilateral hearing loss, including tinnitus, at a ten percent whole person impairment. *Medical records at 192*; *Claimant's Opposition to Summary Judgment at 45.*

<u>*Claimant's Hernia*</u>

44. Claimant had a history of hernias prior to April 21, 2017. *Statement of Undisputed Material Facts ¶ 36.* He had left inguinal hernia repair surgery in 1976, as a teenager. *Claimant's deposition at 106*. Further, his doctor identified another left inguinal hernia in 2015. *Statement of Undisputed Material Facts ¶ 36; Medical records at 106-08*.

45. Claimant saw his primary care provider on March 6, 2014 for his annual physical. Under the section designated ñgenitourinary,ò the provider wrote ñno hernia.ò *Medical records at 39, 41.*

46. Claimant saw his primary care provider on May 18, 2015 for another annual physical. His primary care provider noted the presence of a ñleft-sided inguinal hernia,ò for which Claimant declined a surgical referral. The records do not indicate the herniaôs cause or any connection between it and Claimantôs employment. *Statement of Undisputed Material Facts ¶ 37; Medical records at 52*. Claimant does not deny declining the surgical referral in 2015, even though his hernia was bulging at that time. *Statement of Undisputed Material Facts ¶ 38; Claimant's deposition at 112-13, 121.*

47. The medical record for May 18, 2015 includes the following notation in the discussion/summary section: ñImpression: health maintenance visit, healthy adult male, with left inguinal hernia and [another condition] for 2 years.ò *Medical records at 52*.

48. Defendant contends that Claimant did not deny that his hernia was present for about two years as of 2015, meaning that it would have been present in 2013. *Statement of Undisputed Material Facts ¶ 38; Claimant's deposition at 119-22*. The deposition transcript reflects the following:

> Q. Now the May 18, 2015 note from St. Albans Primary Care says that you had a hernia on the left for two years. Does that sound right?
>
> A. Who said this?
>
> Q. Primary Care at ï
>
> A. Oh, sure.
>
> Q. St. Albans.
>
> A. Yup. Yup. Yup.
>
> Q. Okay. So you wouldnôt disagree with that ï
>
> A. No.
> . . .
>
> Q. Okay. And if that note says that you declined to see a surgeon for your hernia at that point, you wouldnôt disagree with that note, that thatôs what you told them?
>
> A. Thatôs what I told them? If thatôs what I told them? I mean, no, I probably wouldnôt disagree. No.

Claimant's deposition at 119-20.

> Q. [With regard to the hernia] So in ï was it 2013 or ô14 that you saw a doctor or when do you recall seeing a doctor?
>
> A. Yeah. It was ô14 or ô15, something like that.

Claimant's deposition at 107.

49. Claimantôs left inguinal hernia is again noted in the records of his annual physical on June 7, 2016. Again, there was no indication of the herniaôs cause or any relationship to his employment. *Statement of Undisputed Material Facts ¶ 39; Medical records at 75.*

50. When Claimant went to the emergency department on April 21, 2017 following the workplace altercation, he made no complaint of hernia symptoms. *Statement of Undisputed Material Facts ¶ 40; Medical records at 86-89.*

51. Despite being aware of the hernia, Claimant did not seek treatment for this condition until after April 21, 2017. *Statement of Undisputed Material Facts ¶ 41; Claimant's deposition at 107.*

52. Claimant never filed a workersô compensation claim for his hernia prior to April 21, 2017. *Statement of Undisputed Material Facts ¶ 42; Claimant's deposition at 210-11.*

53. Nothing that occurred during the April 21, 2017 altercation affected Claimantôs hernia. *Statement of Undisputed Material Facts ¶ 43; Medical records at 190 (Dr. Backus' IME report, at 21).*

54. On April 26, 2017, five days after the altercation, Claimant told a medical provider for the first time that he felt something ñripò during the altercation. *Statement of Undisputed Material Facts ¶ 44; Medical records at 96.*

55. On May 16, 2017, at a surgical consultation with Joseph Salomone, MD, Claimant stated that two years prior, he felt a sharp pain in his left groin while performing heavy lifting, after which he said a bulge developed in that location, which increased in size over time. He did not say what he was lifting or where or when this occurred. He also did not repeat what he told another provider on April 26, 2017 that he felt something rip during the April 21, 2017 altercation. He only stated his belief that his two-year-old hernia resulted from work. *Statement of Undisputed Material Facts ¶ 45; Medical records at 108.*

56. On November 1, 2017, Claimant underwent an independent medical examination at Defendantôs request with Dr. Backus. Dr. Backus reviewed his medical records, interviewed him and performed a physical examination. *Medical records at 170-93*.

57. According to Dr. Backusô report, Claimantôs diagnoses included a recurrent left inguinal hernia, which was repaired on June 19, 2017. *Medical records at 170*. In his opinion:

> The recurrent hernia was present for 2 years before the 4/21/2017 incident (see his surgeonôs initial evaluation). There was no documentation of an injury to the inguinal region on 4/21/17 in the ER visit. It probably made sense to treat the hernia while he was out of work but it was not caused by or aggravated by the 4/21/17 incident.

Medical records at 190 (Dr. Backus' report, at 21).

Procedural History

58. On May 4, 2017, Claimant filed a *Notice of Injury and Claim for Compensation (Form 5)* seeking workersô compensation benefits for injuries he allegedly sustained in the April 21, 2017 workplace altercation, including a head contusion, a mild concussion, a left inguinal hernia, hearing loss and tinnitus.

59. On May 30, 2017, Defendant denied the entire claim on the grounds that, among other things, it did not arise out of and in the course of his employment. *Denial of Workers' Compensation Benefits (Form 2).* On June 7, 2017, Claimant appealed the denial. *Claimant's Request for a Hearing, Department's Exhibit III*.

60. The Departmentôs administrative law judge convened a pre-trial telephone conference on August 28, 2017. Because Claimant was *pro se*, she explained the process to him. Among other things, she specifically advised him that he would need expert medical evidence to establish a causal connection between his claimed injuries and his employment. Without such evidence, he would not be able to carry his burden of proof and could not prevail on his claims. Claimant indicated that he wished to proceed without an expert anyway and understood that ñif I lose, I lose.ò

61. On October 4, 2017 the administrative law judge convened a status conference, during which she again advised Claimant that he could not prevail on his claims without a medical expert to establish a causal link between his alleged injuries and his employment.

62. On October 25, 2017, the administrative law judge convened another status conference, again advising Claimant that he would need expert medical testimony to establish the required causal link between his claimed injuries and his employment. She then set a final disclosure deadline of March 19, 2018 and scheduled the case for a two-day formal hearing on April 19 and 20, 2018. Claimant disclosed no medical expert by the March 19, 2018 final disclosure deadline.

63. On April 3, 2018, the administrative law judge held a final status conference prior to the scheduled formal hearing. Claimant confirmed that he had not retained a medical expert. Defendant indicated its probable intent to file a summary judgment motion and confirmed that intent a few days later. Accordingly, the Department postponed the April 2018 formal hearing to November 7, 2018 to allow time for the motion to be filed and ruled upon.

64. On June 18, 2018, Defendant filed a summary judgment motion, and on July 16, 2018, Claimant filed his opposition to the motion.

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 facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979). Summary judgment is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.

2. Defendant seeks summary judgment on each of Claimantôs claims.

Claim for Injuries Allegedly Sustained During the April 21, 2017 Altercation

Statutory Defense under 21 V.S.A. § 649 as a Bar to Recovery

3. First, Claimant asserts a claim for injuries he allegedly sustained in the April 21, 2017 altercation. Defendant contends that he is barred from recovery for any such injuries pursuant to 21 V.S.A. § 649 because he willfully intended to injure another person. Defendant writes: ñBased on multiple consistent witness statements and the Claimantôs own admissions, the evidence in the record shows Claimant initiated the physical altercation on April 21, 2017 that allegedly resulted in some of the injuries claimed here.ò *Defendant's Summary Judgment Motion at 3,* citing *Statement of Undisputed Material Facts* ¶¶ *16-21.* Defendant hereby equates being the aggressor in an altercation with intending to cause injury for purposes of 21 V.S.A. § 649.

4. Section 649 of the Vermont Workersô Compensation Act provides as follows:

> *Compensation shall not be allowed for an injury caused by an employee's willful intention to injure* himself, herself, or *another* or by or during his or her intoxication or by an employeeôs failure to use a safety appliance provided for his or her use. The burden of proof shall be upon the employer if he or she claims the benefit of the provisions of this section (emphasis added).[5]

5. In interpreting the Vermont Workersô Compensation Act, the Court seeks to implement the Legislatureôs intent as expressed in the words of the act itself. *Butler v. Huttig Building Products*, 2003 VT 48, ¶ 11. The statutory language to be interpreted here is: ñCompensation shall not be allowed for an injury caused by an employeeôs willful intention to injure . . . another.ò 21 V.S.A. § 649. Thus, for the defense to apply, the employee must have ñwillfully intended to injureò someone else.

6. Although the Court has not interpreted ñwillful intentionò in the context of 21 V.S.A. § 649, it has interpreted those words in the criminal context. In that context, the Court has held:

> As we have long recognized, the words ówillfulô and óintentionalô are generally synonyms in the criminal law. [citations omitted]; see also *DeMillard v. State*, 2013 WY 99, ¶ 14, 308 P.3d 825 (ñWillfully means intentionally, knowingly, purposely, voluntarily, consciously, deliberately, and without justifiable excuse, as distinguished from carelessly, inadvertently, accidentally, negligently, heedlessly or thoughtlessly.ò) [citations omitted]. The question is whether defendant's [act] was due to circumstances beyond his control, ñby accident, mistake, or inadvertence,ò or was the result of intentional conduct. [citations omitted].

State v. Anderson, 2016 VT 40, ¶13. Thus, I interpret 21 V.S.A. § 649 as providing the employer with a defense if the employee purposefully, knowingly or deliberately intended to injure another person, but not if the employee acted inadvertently, heedlessly or thoughtlessly. This interpretation of the statutory language includes two elements: first, an *intent to injure*, not merely an intent to make physical contact, and second, a deliberate state of mind, rather than an impulsive one.

[5] Willful intent to injure, intoxication and failure to use a safety device are all affirmative defenses upon which the employer has the burden of proof. Accordingly, a threshold issue is whether the employee has established a work-related injury to which a defense may be asserted. Here, for purposes of this summary judgment motion, Defendant is not challenging Claimantôs alleged April 21, 2017 work-related injuries; it is seeking summary judgment solely as to the availability of the statutory defense.

7. Case law from other jurisdictions supports this interpretation. As in Vermont, most jurisdictions expressly exclude from coverage injuries resulting from a claimantôs willful intent to injure another. 1 Lex K. Larson, *Larson's Workers' Compensation Law* § 8.01[5][d] (Matthew Bender Rev. Ed.) at p. 8-26. Professor Larson notes that willful intent to injure ñobviously contemplate[s] behavior of greater deliberateness, gravity and culpability than the sort of thing that has sometimes qualified as aggression.ò *Id.*, at page 8-27. He continues: ñTwo factors have figured in the cases interpreting this defense: the factor of seriousness of the claimantôs initial assault, and the factor of premeditation as against impulsiveness.ò *Id.*

8. Louisiana has developed a body of relevant case law, including analysis of both premeditation and seriousness. Professor Larson notes that ñ[d]ecisions from other jurisdictions construing the defense of ówillful intent to injureô are generally consistent with this Louisiana pattern.ò 1 Lex K. Larson, *Larson's Workers' Compensation Law* § 8.01[5][d] (Matthew Bender Rev. Ed.) at p. 8-30.

9. In *Velotta v. Liberty Mutual Ins. Co*., 132 So.2d 51 (La. 1961), a coworker called the claimant ñShorty,ò and the claimant responded by throwing a pair of pants in the coworkerôs face. The coworker then punched the claimantôs jaw, causing serious injury. The Louisiana Supreme Court held that the act of throwing the pants was not a bar to compensation under the willful intention to injure another defense because it was impulsive and emotional, rather than premeditated. Further, the Court held that the act was not sufficiently serious that the claimant should have had a reasonable expectation that it would result in real injury to himself or another.

10. Applying the *Velotta* standard, the Louisiana Court of Appeal found a willful intent to injure in *Martinez v. Dixie Brewing Co*., 463 So.2d 628 (La. App. 1984). The claimant in *Martinez* engaged in a friendly slap-fight with a coworker, after which there was a lull in activity and the coworker returned to his forklift. Rather than cooling off, the claimant then grabbed an iron bar, threw it towards the coworker, and chased him. The coworker then armed himself with a metal pipe, the claimant grabbed a baseball bat, and combat ensued, during which the claimant sustained a fatal injury. The *Martinez* court found that the claimant willfully intended to injure the coworker when he grabbed the iron bar after the friendly slap-fight had ended. Coming after the lull in activity, the claimantôs action of grabbing an iron bar and throwing it at his coworker showed a malicious intent to injure. *Id.*at 632.

11. The Louisiana Court of Appeal focused on the second factor ï the seriousness of the claimantôs initial assault ï in *Conley v. Travelers Ins. Co*., 53 So.2d 681 (La. App. 1951). There, the Court held that mere verbal abuse was not serious enough to support the defense of an intent to injure another. The Court expanded on the seriousness factor in *Relish v. Hobbs*, 188 So.2d 479 (La. App. 1966), holding that, even if an act was impulsive, it can still serve as a bar to recovery if it was sufficiently serious. The Court wrote:

> Applying our interpretation of the *Velotta* case to the present matter, we think that when Relish threw the hammer at Daniels and then knocked him down and started choking him, this was conduct which, although impulsive, was sufficiently grave and serious that Relish should have had a reasonable expectation the affray would result in a real injury to himself or Daniels. Thus, willful intent to injure is shown.

Relish v. Hobbs, 188 So.2d at 482.

12. In short, an impulsive act or a light blow are generally not sufficient to support the defense, but the defense has been successfully invoked when there was a grave assault even without premeditation.

13. Claimant here ñwent to grabò Trampas Demers because Trampas repeatedly told him that he had brought the situation upon himself. A reasonable inference from these facts is that Claimant was angered by Trampasô statements and willfully intended to injure him. However, that is not the only inference that can be drawn. Claimant was an ñemotional wreckò at the time of the altercation, raising the possibility that he acted impulsively or heedlessly. Further, the undisputed fact is that he attempted to ñgrabò Trampas Demers, not that he attempted to punch or strike him. Taking the facts in the light most favorable to Claimant, he acted impulsively, and his attempt to grab Trampas was more in the nature of shoving or rough handling, rather than an attempt to cause serious injury. Summary judgment is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.

14. I therefore conclude that Defendant has failed to establish as a matter of law that Claimant willfully intended to injure another. Accordingly, it is not entitled to summary judgment on the statutory defense under 21 V.S.A. § 649.

Termination for Cause or Voluntary Quit as a Bar to Temporary Indemnity

15. Defendant also contends that, if Claimantôs claim is not barred under 21 V.S.A. § 649, he is nevertheless barred from receiving any temporary indemnity benefits for any injuries he might have sustained in the April 21, 2017 altercation because he was fired from his employment for cause or voluntarily quit. Defendant writes that, ñ[a]ccording to Vermont law, an employee who quits or is fired for reasons unrelated to the work injury cannot point to any injury-related work restrictions as the cause of loss of earnings and therefore is not entitled to temporary disability benefits.ò *Defendant's Summary Judgment Motion at 6.*

16. In *Andrew v. Johnson Controls*, Opinion No. 3-93WC (June 13, 1993), the Commissioner determined that a claimant who, during his or her recovery, voluntarily quits a suitable job for reasons unrelated to the work injury is not entitled to temporary indemnity benefits, as he or she can no longer point to the work-related injury as the cause of earnings loss. Further, in *Britton v. Laidlaw Transit*, Opinion No. 47-03WC (December 3, 2003), the Commissioner expanded the application of the *Andrew* holding to situations where the claimant is fired by the employer for reasons unrelated to the work injury.

17. The rule is not absolute, however. In 2008 the Commissioner wrote:

> In order to avoid unnecessarily harsh consequences . . . , the Commissioner [in *Andrew*] recognized an exception to this rule, providing that temporary disability benefits might resume if a claimant can show that the work-related disability is once again the cause of his or her inability to find or hold new employment. Thus, in order to fit within the exception, a claimant has the burden of demonstrating: (a) a work injury; (b) a reasonably diligent attempt to return to the work force; and (c) that the inability to return to the work force, or a return at a reduced wage, is related to the work injury and not to other factors.

D. P., Jr. v. GE Transportation, Opinion No. 03-08WC (January 17, 2008), citing *Andrew v. Johnson Controls*, *supra*, at Conclusion of Law No. 6.

18. Here, Claimantôs employment terminated on April 21, 2017 for reasons unrelated to his alleged work-injury. Finding of Fact No. 24 *supra*. Accordingly, for him to be eligible for temporary indemnity benefits, he must meet the three-pronged exception to the rule set forth in *D.P., Jr. v. GE Transportation, supra.* Defendant contends that the exception does not apply here, but the statement of undisputed facts does not address the relevant factors. Specifically, the undisputed facts do not preclude the possibility that Claimant sustained a work-related injury on April 21, 2017, nor do they address what steps he took to return to the work force or the wage that he ultimately secured when he returned to work.

19. Therefore, genuine issues of material fact preclude summary judgment on the question of whether Defendant is ineligible to receive temporary indemnity benefits in connection with his claim for injuries allegedly arising out of the April 21, 2017 altercation.

Claim for Bilateral Hearing Loss and Tinnitus

20. Second, Claimant asserts a claim for work-related bilateral hearing loss and tinnitus. Defendant contends that this claim is time-barred as a matter of law by the statute of limitations set forth in 21 V.S.A. § 660(a).

21. The Vermont Workersô Compensation Act provides that proceedings to initiate a claim for a work-related injury may not be commenced after three years from the date of injury. 21 V.S.A. § 660(a). The statute further provides: ñThe date of injury . . . shall be the point in time when the injury . . . and its relationship to the employment is reasonably discoverable and apparent.ò 21 V.S.A. § 656(b); *see Longe v. Boise Cascade Corp.*, 171 Vt. 214, 219 (2000); *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 446 (1985).

22. On January 19, 2009, Claimant saw his primary care provider, to whom he reported tinnitus and hearing loss with an onset of two to three years prior. Finding of Fact No. 31 *supra.* At that appointment, these conditions were specifically attributed to the noise level at Defendantôs quarry. *Id.* Accordingly, Claimantôs hearing loss[6] and tinnitus and their relationship to his employment became reasonably discoverable and apparent no later than January 19, 2009.

23. That is not the end of the analysis, however. In order for the statute of limitations to begin to run on his claim, Claimant must have ñsomething to claim.ò In *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443 (1985), the claimant dislocated his left knee at work, but missed only a few days. Six years later, he broke his right ankle at home. As he shifted his weight to his left leg, he began experiencing problems with the knee he had injured at work six years earlier. The Vermont Supreme Court held that a strict application of the statute of limitations to the latent knee injury would be acutely unfair, because in many cases ñthe injury itself does not exist in compensable degree during the claims period.ò *Hartman*, 146 Vt. at 446. Thus, not only must a claimant recognize the existence and work-connection of an injury, but he or she must also have something to claim.

24. Other jurisdictions have engaged in the same analysis. For example, in *American Cyanamid v. Shepherd*, 668 So.2d 26 (Ala. Civ. App. 1995), an employee injured his hand at work and received stitches in 1984. In 1990 the injury required antibiotics. Both times, the employer paid medical expenses, and the employee lost no time from work. In 1993 the employeeôs injury required surgery, and he missed several months of work. The employer denied his claim for indemnity benefits, contending that the statute of limitations barred the claim. On review, the Court of Appeals wrote that the claim period ñcan begin to run only when there is in fact something to claim.ò *Id.* at 27. Because the employeeôs medical bills were paid and he lost no time from work prior to his surgery, he had no basis to file a claim sooner. In reaching this conclusion, the court cited *Gattis v. NTN-Bower Corp.*, 627 So.2d 437, 440 (Ala. Civ. App. 1993), wherein Professor Larson was quoted as follows:

[6] Claimantôs hearing loss (but not his tinnitus), including its relationship to employment, was likely discoverable and apparent even earlier than January 2009. Defendant adopted a federally-mandated hearing loss program in 2006, which documented Claimantôs hearing loss annually and provided those reports to him. *See* Finding of Fact Nos. 28-29 *supra*.

> A rigid claims period may operate unfairly not only because the nature, seriousness, and work-connection of the injury could not reasonably be recognized by the claimant, or perhaps even by his doctor, but in many cases because the injury itself does not exist in compensable degree during the claims period. This latent or delayed injury problem presents in the sharpest relief the senselessness of uncompromising time periods. The classic illustration is that of the apparently trivial accident that matures into a disabling injury after the claim period has expired. A workman is struck in the eye by a metal chip, but both he and the company doctors dismiss the accident as a petty one, and of course no claim is made, since there is no present injury or disability. Eighteen months later a cataract develops as the direct result on the accident. If the statute bars claims filed more than one year after the ñaccident,ò and if the court applies the statutory language with medieval literalism, the workman can never collect for the injury no matter how diligent he is: He cannot claim during the year, because no compensable injury exists; he cannot claim after the year, because the statute runs from the accident. 2B Arthur Larson, *The Law of Workmen's Compensation* § 78.42(a) (1989).

25. The *American Cyanamid* court thus held that the claimantôs latent injury was best governed by a rule like the one for which Professor Larson advocated: ñThe time period does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and compensable character of his injury or disease.ò *American Cyanamid, supra*, at 28, citing 2B Arthur Larson, *The Law of Workmen's Compensation* § 78.41(a), at 15-185, -186. The court further concluded that its holding placed it in the company of the great majority of jurisdictions that have considered this issue. *See e.g., M.M. Sundt Const. Co. v. Industrial Comm. of Arizona*, 602 P.2d 475 (Ariz. 1979) (as claimantôs work-related tinnitus did not cause him to miss work or require medical attention, claims period did not begin to run until he was diagnosed with a permanent condition); *Loud v. Dixie Metal Co., Inc*., 475 So.2d 122 (La. App. 2 Cir. 1985) (as claimant continued working after his injury without full apprehension of its seriousness, limitations period did not begin to run until he started missing work and therefore had something to claim); *Patterson v. Bessemer Coal, Iron & Land Co*., 192 F.Supp. 805 (E.D. Tenn. 1961) (as claimantôs broken neck did not cause him to miss work for three years, claims period did not begin to run until he became disabled from his injury); *Bowerman v. Employment Security Commission*, 673 P.2d 476 (Mont. 1983) (adopting Professor Larsonôs reasonable person standard for latent injuries); *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967) (time for filing begins to run when the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury); *Potter v. Midland Cooperatives, Inc*., 80 N.W.2d 380 (Minn. 1956) (applying the reasonable man standard to a latent or trivial injury).

26. Claimant here became aware of his hearing loss and tinnitus no later than January 19, 2009. He lost no time from work due to either condition, however. Further, no medical treatment was recommended for his condition until August 21, 2017, when an audiologist recommended hearing aids, and no permanent impairment was identified until Dr. Backus performed an independent medical examination on November 1, 2017. Finding of Fact Nos. 41, 43 *supra.* Applying the reasoning set forth by the Supreme Court in *Hartman v.*

Ouellette Plumbing & Heating Corp, supra, and the above-cited cases from other jurisdictions, I conclude that Claimant did not have something to claim until August 21, 2017, when his audiologist recommended hearing aids. To hold otherwise would be to expect him to have filed a workersô compensation claim at a time when he was not entitled to any benefits under the statute. This requirement would be both illogical and inconsistent with the remedial nature of the statute, which should be ñconstrued broadly to further its purpose of making employees injured on the job whole.ò *Hodgeman v. Jard Co.*, 157 Vt. 461, 464 (1991).

27. The statute of limitations for making a claim for workersô compensation benefits on account of a work-related injury is three years from the date of injury. 21 V.S.A. § 660(a). Considering the evidence in the light most favorable to Claimant, he did not have something to claim with regard to his hearing loss and tinnitus until August 21, 2017, when his audiologist recommended hearing aids. Accordingly, the statute of limitations on his claim would not run until August 21, 2020.

28. Claimant initiated his claim for hearing loss and tinnitus on May 4, 2017. I therefore conclude that his claim for these conditions is not time-barred by the statute of limitations and that Defendant is not entitled to summary judgment on this claim.

Hernia Claim

29. Third, Claimant asserts a claim for a work-related hernia.[7] Defendant contends that this claim is time-barred as a matter of law by the statute of limitations. It further contends that Claimant cannot prevail on this claim as a matter of law because he has no expert medical evidence causally relating his hernia to his employment.

Statute of Limitations

30. The statute of limitations for a work-related injury is three years from the date of injury. 21 V.S.A. § 660(a). *See* Conclusion of Law No. 21 *supra*.

31. On May 18, 2015, Claimantôs primary care provider identified a left-sided inguinal hernia and offered to refer him for a surgical consultation. Finding of Fact No. 46 *supra*. Claimant did not undergo the consultation until May 16, 2017. At that time, he told the surgeon that he had injured himself performing heavy lifting two years earlier. Finding of Fact No. 55 *supra*.

[7] Claimant alleges that he sustained a left-sided inguinal hernia in the April 21, 2017 altercation. *Notice of Injury and Claim for Compensation, filed on May 4, 2017*. However, during the surgical consultation on May 16, 2017, he reported that he sustained the hernia two years prior while performing heavy lifting. *Medical records at 108*.

32. Relying on one statement in the May 18, 2015 medical record, Defendant contends that Claimant developed the hernia in 2013, not 2015. The medical record states: ñImpression: health maintenance visit, healthy adult male, with left inguinal hernia and [another condition] for 2 years.ò Finding of Fact No. 47 *supra*. I find that it is ambiguous whether the words ñ2 yearsò refer to *both* the hernia *and* the other condition, or just to the other condition. Further, given the statement in the medical record from the previous year that Claimant did *not* have a hernia in 2014, Finding of Fact No. 45 *supra*, it is unlikely that the May 18, 2015 statement refers to a two-year history of hernia.

33. Defendant further relies upon Claimantôs deposition testimony to establish that he developed a hernia in 2013. However, nowhere in his deposition does Claimant testify that he developed a hernia in 2013. Instead, Defendantôs counsel represented to Claimant that the medical record established a 2013 hernia, and asked Claimant whether he disagreed with the medical record. *See* Finding of Fact No. 48 *supra*. Claimant did not independently testify that he had a hernia in 2013. Taking the facts in the light most favorable to Claimant, I find that he did not become aware of his left-sided inguinal hernia until May 18, 2015.

34. The statute of limitations for making a claim for workersô compensation benefits on account of a work-related injury is three years from the date of injury. 21 V.S.A. § 660(a). Considering the evidence in the light most favorable to Claimant, his hernia and its connection to employment became reasonably discoverable and apparent on May 18, 2015, not two years earlier. Accordingly, the statute of limitations on this claim would not run until May 18, 2018.

35. Claimant initiated his hernia claim on May 4, 2017. I thus conclude that his claim is not time-barred by the statute of limitations as a matter of law and that Defendant is not entitled to summary judgment thereon.

Causal Connection Between Claimant's Hernia and his Employment

36. 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, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), 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*, *supra* at 19; *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

37. To establish a compensable claim under the Vermont workersô compensation statute, a claimant must show both that the accident giving rise to his or her injury occurred ñin the course of employmentò and that it ñarose out of the employment.ò *Miller v. IBM*, 161 Vt. 213, 214 (1993); 21 V.S.A. § 618. The ñin the course ofò component establishes a time and place connection between the injury and the employment, while the ñarising out ofò component establishes a causal connection between the injury and the employment. *Walbridge v. Hunger Mountain Co-op*, Opinion No. 12-10WC (March 24, 2010), citing *Miller*, *supra* at 215 and *Shaw v. Dutton Berry Farm*, 160 Vt. 594, 599 (1993). A claimant must establish both components for the claim to be compensable. *Carlson v. Experian Information Solutions*, Opinion No. 23-08WC (June 5, 2008).

38. Defendant asserts here that because Claimant has no expert medical evidence causally relating his hernia to his employment, as a matter of law he cannot prevail on his claim for workersô compensation benefits for this injury. I agree. In cases such as this one, where the causal connection between the injury and the employment is obscure, and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395-96 (1979); *Lewis v. Town of Stowe*, Opinion No. 12-15WC (June 3, 2015).

39. Even considering the evidence in the light most favorable to Claimant, I conclude that he has failed to establish a genuine issue of material fact, such that Defendant is entitled to judgment on the hernia claim as a matter of law.

ORDER:

Defendantôs Motion for Summary Judgment is hereby **GRANTED IN PART** and **DENIED IN PART**, as follows:

1. Summary judgment in Defendantôs favor is **DENIED** on the question of whether Claimantôs claim for alleged injuries arising out of the April 21, 2017 altercation is barred under 21 V.S.A. § 649;

2. Summary judgment in Defendantôs favor is **DENIED** on the question of whether Claimant is ineligible to receive temporary indemnity benefits due to his separation from employment for reasons unrelated to his work injury;

3. Summary judgment in Defendantôs favor is **DENIED** on the question of whether Claimantôs claim for workersô compensation benefits for hearing loss and tinnitus is barred by the statute of limitations;

4. Summary judgment in Defendantôs favor is **DENIED** on the question of whether Claimantôs claim for workersô compensation benefits for a hernia is barred by the statute of limitations; and

5. Summary judgment in Defendantôs favor is **GRANTED** on the question of whether Claimant suffered a compensable work-related hernia in the course and scope of his employment with Defendant. Claimantôs claim for such benefits is hereby **DENIED**.

DATED at Montpelier, Vermont, this 14th day of September 2018.

_____
Lindsay H. Kurrle
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.