STATE OF VERMONT
DEPARTMENT OF LABOR

Arthur Bergeron	Opinion No. 14-18WC
v.	By: Stephen W. Brown Administrative Law Judge
City of Burlington	For: Lindsay H. Kurrle Commissioner
	State File No. KK-58711

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Alison McCarthy, Esq., for Claimant
David Berman, Esq., for Defendant

ISSUES PRESENTED:

1) Do the amendments to 21 V.S.A. § 601(11) governing psychological injuries that took effect on July 1, 2017 govern Claimantôs claim for psychological injuries?

2) If not, is Claimant unable to establish his entitlement to benefits for psychological injuries under the pre-amendment statute as a matter of law?

EXHIBITS:

Claimantôs Statement of Undisputed Facts filed August 13, 2018

Claimantôs Exhibit 1:	Elizabeth Jacobs, MA, LCMHCôs[1] Intake Report dated May 18, 2016
Claimantôs Exhibit 2:	Elizabeth Jacobs, MA, LCMHCôs Clinical Summary dated January 29, 2018 (same as Defendantôs Exhibit 2)[2]
Claimantôs Exhibit 3:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated March 7, 2017 (same as Defendantôs Exhibit 4)
Claimantôs Exhibit 4:	Vermont EMS 2018 Protocol Regarding Resuscitation Initiation and Termination
Claimantôs Exhibit 5:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated March 20, 2017
Claimantôs Exhibit 6:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated May 19, 2017 (same as Defendantôs Exhibit 9)

[1] The parties refer to this provider as ñDr. Jacobs.ò However, her treatment records do not indicate any doctoral credential; I refer to her as she refers to herself in her Clinical Summary dated January 29, 2018.

[2] There are several exhibits that Claimant and Defendant have both submitted separately. Because this decision resolves Defendantôs motion, I refer to such exhibits using Defendantôs designations.

Claimantôs Exhibit 7:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated June 27, 2017
Claimantôs Exhibit 8:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated December 21, 2017
Claimantôs Exhibit 9:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated December 29, 2017
Claimantôs Exhibit 10:	Travelersô Receipt of Notice of Injury dated January 18, 2018 (same as Defendantôs Exhibit 1)
Claimantôs Exhibit 11:	UVM Medical Record dated January 22, 2018
Claimantôs Exhibit 12:	City of Burlington Record regarding Claimantôs EMS Certification dated November 3, 2015

Defendantôs Statement of Undisputed Facts filed July 2, 2018

Defendantôs Exhibit 1:	Travelersô Receipt of Notice of Injury dated January 18, 2018 (same as Claimantôs Exhibit 10)
Defendantôs Exhibit 2:	Elizabeth Jacobs, MA, LCMHCôs Clinical Summary dated January 29, 2018 (same as Claimantôs Exhibit 2)
Defendantôs Exhibit 3:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated May 26, 2016
Defendantôs Exhibit 4:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated March 7, 2017 (same as Claimantôs Exhibit 3)
Defendantôs Exhibit 5:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated March 13, 2017
Defendantôs Exhibit 6:	Dr. Clara M. Keeganôs Progress Notes dated March 23, 2017
Defendantôs Exhibit 7:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated March 29, 2017
Defendantôs Exhibit 8:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated May 3, 2017
Defendantôs Exhibit 9:	Elizabeth Jacobs, MA, LCMHCôs Progress Report dated May 19, 2017 (same as Claimantôs Exhibit 6)
Defendantôs Exhibit 10:	Burlington Fire Department Alarm Report, July 1, 2017 to November 25, 2017
Defendantôs Exhibit 11:	Wage Statement (Form 25) signed January 24, 2018

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), I find the following facts:

1. Claimant began working as a firefighter for Defendant on October 20, 2003 and worked there until November 26, 2017. *See* Defendantôs Exhibits 1 and 11. His responsibilities included saving lives and property by responding to emergency calls, providing immediate care to critically injured patients, and transporting patients to medical facilities. *See* Defendantôs Exhibit 2 at 1. He claims that he suffers from post-traumatic stress disorder (PTSD) due to multiple traumatic experiences during his employment over fourteen years. Defendantôs Exhibit 1.

2. Claimant first received psychological counseling from Elizabeth Jacobs, MA, a licensed clinical mental health counselor, on May 18, 2016. Defendantôs Exhibit 2 and Claimantôs Exhibit 1. During his initial session, he expressed concerns about work, finances, and his marriage. Claimantôs Exhibit 1. At that time, Ms. Jacobs provisionally diagnosed him with adjustment disorder with mixed anxiety and depression. *See id*.

3. On May 26, 2016, Ms. Jacobs administered a depression screening instrument known as the PHQ-9 battery, on which Claimant scored an 11, consistent with moderate depression. *See* Defendantôs Exhibit 3. He underwent cognitive behavioral therapy with Ms. Jacobs until June 23, 2016, when he expressed improvement and suspended treatment. *See* Defendantôs Exhibit 2 at 1.

4. Following a nine-month hiatus, Claimant resumed counseling with Ms. Jacobs on March 7, 2017. Defendantôs Exhibit 2 at 1; Defendantôs Exhibit 4. During his March 7, 2017 appointment, he said, ñI think Iôm pretty depressed.ò Defendantôs Exhibit 4. Ms. Jacobsôs notes also indicate that Claimant endorsed symptoms of depression and post-traumatic stress. She again administered the PHQ-9 battery, on which Claimant scored a 21, indicating moderate to severe depression. She also administered the PCL-5 with Criterion A, a battery that screens for PTSD. Claimant scored a 46 out of 80. *See* Defendantôs Exhibits 2 and 4. Generally, a score of 33 or higher on that battery indicates that a patient ñlikelyò suffers from PTSD. *See* Defendantôs Exhibit 2 at 2. Claimant expressed a ñdiscomfort with PTSD being listed as a diagnosis, for fear of backlash at work.ò Defendantôs Exhibit 4. Ms. Jacobs honored his desire and did not diagnose him with PTSD at that time. *Id.* (ñClient reticent about a PTSD diagnosis. Clientôs wishes to be respected.ò). However, she provided education about both PTSD and depression. *Id.*

5. During his March 7 session, Claimant described his most disturbing job call to date as a fatal heroin overdose where he and his team were unable to revive the victim. He said that he continued to ñrecall[] the sounds of anguish from family/observers as they learned of the death[.]ò *Id.* Defendantôs Exhibit 4. Ms. Jacobs noted that Claimant remained upset that he and his coworkers lacked training in the area of working on patients ñón place,ô in view of witnesses, with death notification being an aspect of this kind of scene.ò *See id.*, *cf. also* Claimantôs Exhibit 4 (setting forth certain policies regarding resuscitation). Since that March 7 visit, Claimant has continued to see Ms. Jacobs approximately once per week. *See* Defendantôs Exhibit 2 at 1.

6. During a March 13, 2017 therapy session, Claimant said that he had a growing sense of ñuneasiness with regard to remaining in his profession,ò pointing to a history of ñhorrific calls.ò *See* Defendantôs Exhibit 5. During his March 20, 2017 session, Ms. Jacobs noted that Claimant struggled to understand the source of his depression and that coping strategies had become ineffective. *See* Claimantôs Exhibit 5. She also encouraged him to address his sleep difficulties, medications, and depression with his primary care physician. *Id.*

7. On March 23, 2017, Claimant visited his primary care physician, Clara Keegan, MD, with a chief complaint of depression. He told Dr. Keegan that he had been seeing Ms. Jacobs weekly, and that Ms. Jacobs thought he had depression and PTSD. *See*

Defendantôs Exhibit 6. Dr. Keegan administered a behavioral health screen and a physical examination. She diagnosed Claimant with depression and prescribed antidepressants Zoloft and Desyrel. *Id.*

8. During a May 3, 2017 therapy session with Ms. Jacobs, Claimant discussed a lack of education and support at his workplace for a rise in PTSD and other forms of distress among his coworkers. Defendantôs Exhibit 8. Ms. Jacobs noted that Claimant was ñbeginning to show greater interest and comfort in the usage of PTSD and PTSD-related language to describe his own experience.ò *Id.*

9. During his May 19, 2017 session with Ms. Jacobs, Claimant summarized many experiences during his career that he found traumatic. *See* Defendantôs Exhibit 9. Among other incidents, he described assisting a young female sexual assault victim. She did not want Claimant near her, but he had to tell her father what had happened. He also described a dangerous water rescue of a swimmer who had fallen off an 80-foot cliff into five-foot waves; Claimant thought he might die during that rescue. *See id.* He also described complex deliveries and removal of burn victims.

10. In addition to the incidents listed in Defendantôs Exhibit 9, Ms. Jacobsôs Clinical Summary recounts additional traumatic incidents, including responding to major motor vehicle accidents with multiple fatalities including one instance where he knew one of the victims; fatal shootings including one where he unsuccessfully attempted to resuscitate the victim in front of family and neighbors; and a young male suicide victim, whose images and smells continued to haunt Claimant. Her summary also indicates that Claimant remained disturbed by his first emergency child delivery, which involved a non-English speaking mother whose child nearly died from umbilical cord strangulation; the mother could not understand Claimantôs commands, but she intervened, and the child survived. *See* Defendantôs Exhibit 2 at 2-3.

11. During Claimantôs June 27, 2017 counseling session, Ms. Jacobs noted his ñgrowing awareness that stressors and traumatic events from his professionò were ñdisturbing him more intensely[,]ò including two recent drownings of young boys to which he responded. Claimantôs Exhibit 7. Ms. Jacobs continued to provide education regarding PTSD but her records do not reflect any diagnosis of PTSD at that time. *See id.*

12. During his December 21, 2017 counseling session, Claimant said he was ñbroken,ò and reported physical, mental, and emotional depletion. He said the amount of trauma he witnessed and experienced over his fourteen-plus years had become ñtoo much.ò Ms. Jacobs advised him that his symptoms reflected PTSD. Her notes indicate that ñ[a]lthough formerly reluctant to accept this diagnosis, [Claimant] is now aware that he is contending with more than depression.ò Claimantôs Exhibit 8.

13. On December 29, 2017, Ms. Jacobs again administered the PCL-5 with Criterion A, the same PTSD screening battery that Claimant took on March 7, 2017. This time, he scored a 67 out of 80 possible points, a 21-point increase from his earlier score. *See* Claimantôs Exhibit 9. Ms. Jacobs formally diagnosed him with ñPTSD NOS [not otherwise specified],ò and communicated that diagnosis to Claimant. *Id.*; *see also* Defendantôs Exhibit 2 at 2.

14. In her report dated January 29, 2018, Ms. Jacobs noted that the events that disturbed Claimant the most ñoccurred prior to July 1, 2017.ò Defendantôs Exhibit 2 at 2.

15. Due to a work-related back injury that occurred on October 23, 2017, Claimant has been out of work since November 26, 2017. Defendantôs Exhibit 11. The following is the list of calls that Claimant responded to between July 1, 2017 and his last day of work:

- Smoke detector activation
- Removal from stalled elevator
- Building fire
- Gas leak
- Watercraft rescue
- MVA without injuries
- Cooking fire
- Outside rubbish fire
- Defective elevator
- MVA with injuries
- Malicious fire alarm
- Toxic chemical condition
- Vehicle accident, general cleanup
- Assist invalid
- MVA vs. pedestrian
- EMS call
- Smoke detector activation

Defendantôs Exhibit 10; Defendantôs Statement of Undisputed Fact No. 25.

16. Claimant filed this workersô compensation claim on January 17, 2018, listing that same date as the date of injury and describing his injury as PTSD. *See* Defendantôs Exhibit 1 at 1.

CONCLUSIONS OF LAW:

Summary Judgment Standard

1. To prevail on a summary judgment motion, 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). It 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 of the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15. In determining whether there is a genuine issue as to any material fact, the Department must accept as true ñthe allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material.ò *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 45.

Legislative Amendments to the Standards for Compensability of Mental-Mental Claims

2. Vermont law recognizes two types of potentially compensable psychological injuries: those that stem from a physical injury (ñphysical-mentalò) and those that are solely psychological (ñmental-mentalò). *B.H. v. State of Vermont*, Opinion No. 17-17WC (December 22, 2017). Because Claimant does not allege any physical injuries giving rise to his psychological condition, this case presents a mental-mental claim.

3. Until July 1, 2017, a claimant seeking compensation for a mental-mental injury had to satisfy a two-part test: ñFirst, he must prove that the stresses endured at work were significant and objectively real. Second, the claimant must show that his illness is actually a product of unusual or extraordinary stresses.ò *Gallipo v. City of Rutland*, Opinion No. 22-00WC (July 12, 2000) (cits. & punct. omitted). Under this standard, the question of whether an employee had experienced unusual or extraordinary stresses was evaluated against a ñcontrol groupò of ñsimilarly situated employeesò performing the ñsame or similar work.ò *Crosby v. City of Burlington*, 2003 VT 107, ¶¶ 17-24.

Amendment Pertaining to First Responders

4. Effective July 1, 2017, the Vermont Legislature amended the Workersô Compensation Act to change the standard of proof required for mental-mental claims. *See* 2017 Vermont Laws No. 80 (S. 56), § 23. This amendment, among other things, provides that diagnoses of PTSD in certain first responders, including firefighters, shall be ñpresumed to have been incurred during service in the line of duty and shall be compensable[.]ò 21 V.S.A. § 601(11)(I)(i).

5. This amendment further provides that its protections apply to covered first responders diagnosed with PTSD within three years of the last active date of employment in such role. 21 V.S.A. § 601(11)(I)(ii).

Amendment Pertaining to All Employees

6. The statutory amendments also changed the control group for evaluating the extraordinariness of the stressors giving rise to a claimantôs mental injuries. Instead of comparing a claimantôs stressors to those encountered by similarly situated employees performing similar work, the amendment provides that a claimantôs work-related stress or event must be ñextraordinary and unusual in comparison to pressures and tensions experienced by the average employee across all occupations[.]ò 21 V.S.A. § 601(11)(J)(i)(I); *contra Crosby*, *supra*.

Retroactivity of Statutory Amendments

7. The amendment or repeal of a statute may not ñaffect any right, privilege, obligation, or liability acquired, accrued, or incurred prior to the effective date of the amendment or repeal[.]ò 1 V.S.A. § 214(b)(2). In other words, Vermont law prohibits retrospective application of new and amended statutes that ñtake away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past.ò *Agency of Nat. Res. v. Towns*, 173 Vt. 552, 555 (2001); *accord State v. Willis*, 145 Vt. 459, 467 (1985). By contrast, ñ[s]tatutory changes that are procedural in nature, as opposed to those that affect preexisting rights and obligations, may be applied retrospectively.ò *Agency of Nat. Res. v. Godnick*, 162 Vt. 588, 595-96 (1994). Generally, provisions are ñmerely procedural in natureò if they ñcontrol only the method of obtaining redress or enforcement of rights and do not involve the creation of duties, rights, and obligations.ò *Smiley v. State of Vermont*, 2015 VT 42, ¶ 18.

8. The Commissioner has previously held that the amendments described in Conclusion of Law Nos. 4-6 *supra* affect the partiesô substantive rights and thus do not apply retroactively prior to their effective date. *See B.H., supra*, Opinion No. 17-17WC at fn. 26. In the context of substantive amendments to workersô compensation laws that affect a claimantôs right to compensation, the choice between pre- and post-amendment law is governed ñby the law in force at the time of occurrence of such injury.ò *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983); *see also Sanz v. Douglas Collins Const.*, 2006 VT 102 (holding that the laws governing the right to compensation in effect at the ñtime the injury occursò control with respect to all benefits to which a claimant may be entitled, even if the right to certain benefits would not accrue for limitations purposes until sometime after the injury).

9. Therefore, if Claimantôs psychological injury occurred prior to July 1, 2017, his right to compensation for that injury is governed by the pre-amendment standard. Otherwise, it is governed by the post-amendment standard.

Determination of the Standard that Applies to Claimant's Claim

10. Defendantôs primary contention is that Claimantôs claim must be evaluated under the pre-amendment law because the stressful experiences that led to his PTSD occurred over the course of his fourteen-year career as a firefighter, and those experiences all predate July 1, 2017. While Defendantôs factual statements about the dates of Claimantôs stressful experiences have evidentiary support, *see* Findings of Fact Nos. 14-15, its legal conclusion does not necessarily follow. The key date for choosing between pre- and post-amendment law is the date of injury. *Montgomery*, 142 Vt. at 463; *Sanz*, 2006 VT 102, ¶ 9. Defendantôs argument presumes that the date of a stressful experience is necessarily the same as the date on which any resulting psychological injury occurs. However, this does not account for the possibility of a person developing a psychological injury sometime after the actual experience of stressful events.

11. In further support of applying the pre-amendment standard, Defendant also asserts that Ms. Jacobs diagnosed Claimant with PTSD on March 7, 2017. It is true that on March 7, 2017, Ms. Jacobs administered the PCL-5 assessment and Claimant scored a 46, which is above the threshold score that would indicate that he ñlikelyò had PTSD. *See* Finding of Fact No. 4 *supra*. However, a screening batteryôs indication that a patient likely has a disorder is not necessarily the same as a diagnosis of that disorder. Although she clearly discussed the possibility of that diagnosis with Claimant in March 2017, she did not render that diagnosis at that time. *See* Findings of Fact Nos. 4, 10-11 *supra*. She did not formally diagnose him with PTSD until December 29, 2017, when Claimant scored significantly higher on the same screening battery, and after Ms. Jacobs had gathered significantly more information over the course of approximately nine months of counseling sessions.

12. By contrast, Claimant contends that his claim should be evaluated under the post-amendment standard because his claim did not accrue until Ms. Jacobs formally diagnosed him with PTSD in December 2017. Specifically, he asserts that he ñdid not become aware of his psychological injury until he was formally diagnosed with PTSD on December 29, 2017ò and thus ñdid not have the basis to file his claimò until that time. He relies on the accrual standard applicable to reporting obligations and the statute of limitations, namely the point in time when the injury and its relationship to work is ñreasonably discoverable and apparent.ò *See* 21 V.S.A. § 656(b) (setting forth the ñreasonably discoverable and apparentò standard for the purposes of the six-month reporting period); *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 447 (1985) (expanding that same definition to the statute of limitations context). Applying that standard, he argues that there is a genuine dispute of material fact as to when his injury became reasonably discoverable and apparent. There are several significant problems with this analysis, as discussed below.

13. First, Claimantôs assertion that he ñdid not know of his psychological injuryò until December 2017 contradicts the entire evidentiary record. While Ms. Jacobs may not have rendered a formal diagnosis of PTSD until December, the evidence is overwhelming that Claimant had actual knowledge of both of his psychological injury and its relationship to work well before July 1. In March, he complained of feeling ñpretty depressedò and specifically discussed work stressors with Ms. Jacobs. His screening results at that time indicated that he ñlikelyò had PTSD, and Ms. Jacobs discussed the possibility of a diagnosis with Claimant then. Claimant obviously understood that conversation well enough to express ñreticenceò about receiving that diagnosis. *See* Finding of Fact No. 4 *supra*. He told his primary care physician that same month that his therapist thought he had PTSD and depression, and his physician prescribed him antidepressants. *See* Finding of Fact No. 7 *supra*. He discussed work stressors with Ms. Jacobs repeatedly between March and May, and by May, he showed ñinterest and comfortò in describing his own experience with ñPTSD-related language[.]ò *See* Finding of Fact No. 8 *supra*. By June, he demonstrated a ñgrowing awarenessò that stressors and ñtraumatic events from his professionò were disturbing him. Finding of Fact No. 11 *supra*. Claimant has filed no affidavit or other evidence refuting the timeline in his treatment records. There is simply no evidence to support any reasonable doubt or inference in Claimantôs favor on this issue.

14. Second, Claimant frames his analysis entirely in terms of *Hartman's* ñreasonably discoverable and apparentò standard. However, the Vermont Supreme Court has held that that standard is ñexpressly limited to the applicability of statutory limitations periods[,]ò and has rejected that standardôs application to statutory amendments. *Sanz*, 2006 VT 102, ¶ 11. The *Sanz* Court distinguished between a claimant's right to compensation, which is ñacquired at the time of the injury,ò and a defendant's right to bar an action on limitations grounds, which only accrues ñonce the time limit has lapsed.ò *Id.*, ¶¶ 9-12. Because of 1 V.S.A. § 214(b)ôs prohibition against retrospective application of substantive statutory amendments, *Sanz* held that the ñtime the injury occurs,ò and not the time it becomes reasonably discoverable and apparent, controls the choice between pre- and post-amendment law as it affects the entitlement to compensation. *Id.*, ¶ 11. The dispute here does not involve a statute of limitations but rather the applicability of a statutory amendment that affects the compensability of Claimantôs claim. Thus, the proper inquiry is when Claimant developed the psychological injury giving rise to his claim, not when he might reasonably have discovered it. *See generally id*.

15. Third, even under the limitations accrual standard on which Claimant relies, the date of diagnosis does not control. Under the ñreasonably discoverable and apparentò standard, a litigant ñneed not have an airtight caseò for an injury and its relationship to work to be discoverable and apparent. *Smiley v. State of Vermont*, Opinion No. 15-13WC (June 3, 2013), *aff'd in relevant part*, 2015 VT 42 (2015). All that is required under that standard is ñinformation sufficient to put a reasonable person on notice that a particular defendant may have been liableò for his or her injuries. *Id*. (quoting *Rodrigue v. VALCO Enterprises, Inc.*, 169 Vt. 539, 540-41 (1999)). For instance, in *Holmes v. James Gold, D.D.S.*, Opinion No. 31-00WC (Oct. 2, 2000), the claimant sought treatment in 1994 for a hand and wrist condition related to work, but her physician testified that he had no basis to diagnose her with carpal tunnel syndrome at that time. The Commissioner held that ñ[r]egardless of the precise diagnosis, however, the claimant had knowledge in 1994 that she had a hand and wrist condition that was related to work. At that time, her injury was reasonably discoverable and apparent.ò *Id.*

16. Because Claimant had actually discovered his psychological injury and its relationship to work before July 1, 2017, *see* Conclusion of Law No. 13, his claim would have accrued before the amendmentôs effective date even under the ñreasonably discoverable and apparentò standard that Claimant advances. *See Smiley*, Opinion No. 15-13WC; *Holmes*, Opinion No. 31-00WC. It follows *a fortiori* that the ñtime of the injuryò which determined Claimantôs right to compensation occurred prior to that date. Therefore, under *Sanz*, the law in effect before July 1, 2017 must govern. *See* Conclusion of Law No. 14.

17. In addition to the accrual analysis discussed in Conclusion of Law Nos. 12-16 *supra*, Claimant also argues that the text of amended 21 V.S.A. § 601(11)(I)(ii) requires that the post-amendment standard apply to injuries sustained *before* its effective date, so long as the injuryôs diagnosis occurs within three years after termination of employment. The statutory text Claimant cites for this argument provides as follows:

> A police officer, rescue or ambulance worker, or firefighter who is diagnosed with post-traumatic stress disorder within three years of the last active date of employment as a police officer, rescue or ambulance worker, or firefighter shall be eligible for benefits under this subdivision (11).

21 V.S.A. § 601(11)(I)(ii).

18. The legislation that effectuated the amendment could not be clearer with respect to its effective date: ñThis act shall take effect on July 1, 2017.ò 2017 Vermont Laws No. 80 (S. 56), § 25(a). Claimantôs argument effectively reads the effective date out of the amendment. The fact that three years have not *yet* elapsed since July 1, 2017 does not mean that Section 601(11)(I)(ii) would be rendered ineffective by complying with its clearly-stated effective date. It simply means that no claimants will be in a position to take advantage of the full three-year waiting period until at least July 1, 2020.

19. Moreover, Claimantôs proposed reading of Section 601(11)(I)(ii) would impair Defendantôs vested rights to have Claimantôs workplace injury evaluated under the standard in effect at the time of its occurrence. Because the amendment is substantive in nature, *see B.H.*, *supra*, such a construction would render the amendment an unlawful retrospective statute. *See Towns, supra*, 173 Vt. at 555; Conclusion of Law Nos. 7-9 *supra*. In construing the amendment, I presume that the Legislature did not overlook the requirements of 1 V.S.A. § 214(b). *See Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 10 (1941) (ñTo give the statute the meaning claimed by the petitioners would be to render it unconstitutional, and this result we must avoid if it is fairly and reasonably possible to do so. We must indulge every presumption and resolve every doubt in favor of its validity.ò) (punt. & cits. omitted).

20. Finally, Claimant argues that applying the pre-amendment standard to his mental-mental claim would contravene the Legislatureôs intent by implying that *all* firefighters hired before July 1, 2017 would be forever held to the pre-amendment standard. This argument rests on the incorrect legal premise that a firefighterôs date of hire determines whether the pre- or post-amendment law applies. As discussed *supra* at Conclusion of Law Nos. 8-10 and 14, the date of injury controls. There is no reason to suppose that firefighters, as a general matter, are psychologically injured immediately upon hire.

21. I conclude that Claimantôs injury occurred before July 1, 2017 as a matter of law. Therefore, the pre-amendment standard for mental-mental claims applies to his claim. *See Sanz*, 2006 VT 102.

Analysis of Claimant's Claim Under the Pre-Amendment Standard for Mental-Mental Claims

22. Under the pre-amendment law, a claimant in a mental-mental case must satisfy a two-part test: ñFirst, he must prove that the stresses endured at work were significant and objectively real. Second, the claimant must show that his illness is actually a product of unusual or extraordinary stresses.ò *Gallipo v. City of Rutland*, Opinion No. 22-00WC (July 12, 2000) (cits. & punct. omitted). A claimant may satisfy the first prong of this test by showing that his job is ñinherently stressful.ò *See Cardimino v. The Bennington School*, Opinion No. 81-95WC (November 6, 1995) (holding that where the claimant served as a ñnight-awake supervisorò at a school for troubled students, the nature of her job was inherently stressful and she thus satisfied the first prong of the test).[3] The second prong requires that the stress giving rise to the injury be ñof significantly greater dimension than the daily stress encountered by similarly situated employees performing the same or similar work.ò *Crosby v. City of Burlington*, 176 Vt. 239, 246 (2003).

Whether Claimant's Stressors Were Significant and Objectively Real

23. The parties here do not directly address the first prong of a pre-amendment mental-mental claim, *i.e.,* whether the stress giving rise to the injury was significant and objectively real. However, two of the three Departmental decisions Defendant cites for the proposition that mental-mental claims are often non-compensable under pre-amendment law reached that result in part because the claimantsô perceived stressors were not significant or objectively real. *See Gallipo*, *supra*, Opinion No. 22-00WC; *Little v. IBM*, Opinion No. 13-97WC (June 30, 1997). Because Defendant relies on those cases to support its contention that Claimant cannot satisfy his burden under the pre-amendment law, each is discussed in turn below.

24. While the claimant in *Gallipo* was a firefighter, the similarities to this case end there. The claimant in that case claimed that his coworkers ñshunnedò him and used profane language in his presence. He construed their coarse language as harassment for his religious views, but he was unable to show that any of the language was directed at him. He also complained that his computer password was invalid, although no adverse consequences resulted from his lack of computer access. He complained of being denied a bereavement leave request (although he was allowed sick leave), and he felt insulted when he had to take a certification test since he had been firefighting for many years. The Department held that none of these events were ñsignificantò or ñobjectively realò stressors and concluded that the claimantôs mental injury was ña result of forces independent of the work place.ò *Id.*

[3] However, there must be a relation between the stresses inherent to the claimantôs job and the stressors giving rise to the claimantôs psychological injuries for the inherently stressful nature of the job to be sufficient for the first prong of this test. For instance, in *Gallipo*, *supra*, Opinion No. 22-00WC, the claimant was a firefighter (an inherently stressful job), but he failed to satisfy the first prong of this test where all of his allegedly stressful experiences giving rise to his claim stemmed from interpersonal friction with his coworkers and supervisors; such frictions could have occurred in any workplace and did not arise out of any of the risks inherent in firefighting.

25. In *Little*, Opinion No. 13-97WC, the claimant had a paranoid personality and depression, and had work restrictions resulting from poor eyesight and a knee injury. He claimed that his coworkers made derogatory comments about his medical restrictions and that his manager called him at home and threatened to have him terminated. The Department generally did not find the claimantôs testimony credible because he ñdemonstrated an inability to distinguish between objective reality and his own perceptions.ò *Id.* Accordingly, the Department held that the claimant failed to prove either that his stressors were objectively real and significant or that any of his stressors were unusual and extraordinary. *Id.*

26. Unlike this case, the stressors in both *Gallipo* and *Little* primarily involved interpersonal friction and feelings of being shunned or harassed. Neither involved any exposure to actual or imminent death or violence, which are the primary stressors at issue here. As such, I find *Gallipo* and *Little* unpersuasive in evaluating this case.

27. Here, Defendant does not argue that Claimantôs stressors were trivial or lacking objective reality, and there is no evidence or suggestion that these stressors were imagined or exaggerated. The stressors that Claimant claims gave rise to his eventual PTSD include witnessing death, engaging in complex child delivery, responding to sexual violence, and engaging in potentially life-threatening water rescues. *See* Findings of Fact Nos. 5, 9-10 *supra*. These stressors made his job at least as inherently stressful as a night awake supervisorôs job at a boarding school for troubled students. *Cf. Cardimino*, *supra.* At the very least, there is a genuine issue of material fact as to whether Claimantôs stressors were significant and objectively real that precludes summary judgment in Defendantôs favor on the first prong of the pre-amendment standard.

Whether Claimant's Stressors Were Unusual and Extraordinary

28. As to the second prong of that standard, *i.e.*, that the stressors be unusual or extraordinary, Defendant argues that Claimantôs stressors are typical of those encountered in the firefighting field generally. Defendant claims that in the line of duty, firefighters are likely to encounter death, sexual violence, murder, suicide, trauma, and difficult infant calls. However, the record contains no affidavits, testimony, statistics, or other evidence as to what any other firefighters experience or how Claimantôs specific experiences compare to those of his peers.

29. The only evidence potentially relevant to other firefightersô experience is a set of protocols relating to resuscitation efforts. *See* Claimantôs Exhibit 4. Without any evidence of how these protocols affected other employees or groups of employees, however, they do not shed significant light on the comparison of Claimantôs job stressors to the stressors endured by his peers. Even accepting as true for the purposes of this motion that other firefighters can reasonably expect encounters with each of the classes of stressors that Claimant alleges here, there is no evidence of the average frequency with which other firefighters encounter them.

30. The lack of evidence concerning other employeesô experiences distinguishes this case from *Cardimino*, *supra*, Opinion No. 81-95WC, on which Defendant relies. In

Cardimino, the ñnight awake counselorò claimant was required to sit outside the rooms of students posing a flight risk or who might ñact out.ò *Id.* She was assigned to a residence hall with a lower population and less difficult students compared to other halls because it was less stressful than other positions. She testified as to some instances of threatened violence from students, but the school disputed her accounts. The Department found that the claimantôs experiences at the school contributed to her psychiatric difficulties but held that ñthe stresses she experienced at the school were a function of her own make-up and not a result of any undue stress on the job or mistreatment by her supervisors.ò *Id.* While she proved that her stressors were significant and objectively real, she failed to prove any ñunusual or extraordinary stresses.ò *Id.* The Departmentôs conclusion was based in part upon evidence that her specific job was ñthe least stressful position in her class of employment at the school.ò *Id.* There is no comparable evidence in this case as to how Claimantôs stressors compared to those of his peers.

31. Moreover, Claimant describes numerous traumatic incidents over the course of many years. *See* Findings of Fact Nos. 5, 9-10 *supra*. This is not a case where the psychological injuries arise out of an isolated incident. This distinguishes his claim from both of the Pennsylvania decisions Defendant cites, which involved police officers claiming that single encounters caused their psychological injuries. *See Rydzewski v. Workers' Compensation Appeal Board (City of Philadelphia)*, 767 A.2d 13 (Pa. Commw. Ct. 2001) (holding that police officer who responded to call and found two officers shot upon his arrival had failed to prove abnormally stressful working condition for a police officer, as required to prevail on mental-mental claim under Pennsylvania law); *Young v. Workers' Compensation Appeal Board (New Sewickley Police Dep't)*, 737 A.2d 317 (Pa. Commw. Ct. 1999) (holding that police officer whose claim arose out of a single arrest where suspect pointed a gun at officer and pointed a separate gun at suspectôs own head while threatening suicide had failed to prove abnormal working condition for a police officer).

32. I decline to take judicial notice in the summary judgment context as to the nature, frequency, and severity of other firefightersô stressful experiences. Without any evidence concerning other similarly-situated employees performing the same or similar work, I cannot determine as a matter of law whether Claimantôs stressors were of a significantly greater dimension. *Cf. Crosby*, 176 Vt. at 246; *Cardimino*, Opinion No. 81-95WC.

33. Thus, there is a genuine issue of material fact as to whether Claimantôs stressors were of a significantly greater dimension than those experienced by similarly situated employees performing the same or similar work that precludes summary judgment in Defendantôs favor on the second prong of the test as well.

34. Because of the existence of genuine fact questions as to both prongs of the pre-amendment standard, Defendant has failed to establish that Claimantôs claim fails as a matter of law under that standard.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendantôs Motion for Summary Judgment is hereby **GRANTED** in part and **DENIED** in part. Claimantôs mental-mental claim must be evaluated according to the law in effect prior to July 1, 2017. However, a

formal hearing will be necessary to determine the merits of his claim under the law as it existed at that time.

DATED at Montpelier, Vermont this 15th day of October 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.