STATE OF VERMONT
DEPARTMENT OF LABOR

Mitchell White	Opinion No. 14-19WC
v.	By: Stephen W. Brown Administrative Law Judge
Town of Hartford	
and	For: Lindsay H. Kurrle Commissioner
Town of Hartland	State File No. LL-54328

RULING ON DEFENDANT TOWN OF HARTFORD'S PETITION FOR DECLARATORY RULING REGARDING PRESUMPTION STATUTES APPLICABLE TO MULTIPLE COVERED EMPLOYERS FOR THE SAME CLAIM

ISSUES PRESENTED:

1) Does the Department have authority to issue declaratory rulings?

2) If so, is there a ripe case or controversy regarding the method of allocating liability between two towns that may both be subject to a statutory presumption of liability for the same injury?

3) If so, how, if at all, should any liability resulting from Claimant's colon cancer diagnosis be allocated between two towns for whom Claimant worked as a firefighter during the same time period?

EXHIBITS:

Town of Hartford's ("Hartford's") Exhibit A: Medical Record dated October 2, 2018

Hartford's Exhibit B: Printout of *Employers Preferred Insurance Co. v. Hartford Accident and Indemnity Co.*, Civ. Action No. 17-3355 (8th Cir., January 10, 2019)

Hartford's Exhibit C: Printout of *Wasicki v. Poncho's Wreck, Inc. and Old Yeller*, Opinion No. 11-84WC (August 28, 1984, amended September 28, 1984)

Hartford's Exhibit D: Printout of *Hires v. County of Atlantic and City of Atlantic City*, Claim Petition No. 2001-39136 (N.J. Dept. of Labor and Workforce Development, March 14, 2005)

Town of Hartland's ("Hartland's") Exhibit A: Transcript of Claimant's Recorded Statement dated November 8, 2018

Hartland's Exhibit B: Statement and *Curriculum Vitae* of Jeffrey A. Gordon, M.D. dated March 24, 2019

APPEARANCES:

Mitchell White, Claimant, *pro se*
Wesley Lawrence, Esq., for Defendant Hartford
William Blake, Esq., for Defendant Hartland

FACTUAL[1] AND PROCEDURAL BACKGROUND

Claimant is a 54-year-old firefighter employed separately by two Vermont towns. He has worked for approximately twelve and a half years as a full-time firefighter for the Town of Hartford ("Hartford"), where he currently earns approximately $24 per hour. He has also served as a part-time volunteer firefighter for the Town of Hartland ("Hartland") since approximately 1991.[2] He is a lifelong nonsmoker.[3]

In September 2018, Claimant was diagnosed with colon cancer following a routine colonoscopy.[4] His cancerous polyp was surgically removed the following month.[5] After a post-surgical recovery period, he returned to full employment. His medical records show that he underwent a rectal examination in or around March 2008,[6] but there is no evidence of the results. There is also no evidence as to whether Claimant underwent, or received any recommendation to undergo, any other examination between 2008 and the 2018 colonoscopy that resulted in his diagnosis.

Claimant first brought this claim only against Hartford, which has paid benefits without prejudice. Hartford has not accepted this claim, however, and reserves its right to show that Claimant's cancer was not caused by his firefighting work. Following a preliminary factual investigation, Hartland was joined as an additional Defendant. It has denied liability outright and has not paid any benefits to date.

Section 601 of Vermont's Workers' Compensation Act provides that firefighters who satisfy certain statutory criteria and either die or suffer a disability from certain cancers (including colon cancer) are entitled to a rebuttable presumption that their cancers are causally related to their firefighting duties. Hartford considers there to be a high likelihood that Claimant has satisfied the presumption's requirements, although it reserves the right to rebut the presumption at a formal hearing. Hartland, meanwhile, denies that the presumption applies

[1] There has been no formal hearing on the merits of this case, and there remain factual disputes the resolution of which will require sworn testimony at a formal hearing. The facts recited in this section are based on the parties' assertions in their respective filings and have preliminary evidentiary support. I take these facts as true only for the purpose of resolving this Petition. Nothing herein shall constrain any party's ability to present contrary evidence at trial.

[2] Hartland's Exhibit A at 1-2.

[3] Hartland's Exhibit A at 6; Hartford's Exhibit A at 1.

[4] Hartland's Exhibit A at 1-3.

[5] *Id.* at 3-4.

[6] *See* Hartford's Exhibit A.

at all, contending that Claimant has not proven all necessary statutory criteria. Hartland also contends that the statutory presumption is unconstitutional because the causal origin of colon cancer is unknown; it contends that rebutting the statutory presumption would therefore require proof of something unprovable, thereby depriving it of due process.[7]

Hartford seeks contribution from Hartland for benefits already paid and for benefits it continues to pay without prejudice relating to Claimant's cancer. To that end, it has petitioned for a declaration under the Administrative Procedure Act ("APA") that wherever the statutory presumption of compensability applies to two or more employers for the same injury, each employer should be liable for an equal share of the employee's workers' compensation benefits. Hartland opposes that request, arguing that the Department lacks the authority to issue declaratory rulings, that the declaration sought would be an improper advisory opinion, that Vermont law does not allow for apportionment of liability, that the Department lacks the authority to create new law based on equitable or public policy grounds, and that apportioning liability would improperly bind Hartland to Hartford's strategic decision to pay benefits without prejudice.

DISCUSSION

I. The Presumption Statute

The Workers' Compensation Act provides that covered firefighters[8] who die or develop a "disability" from certain cancers (including colon cancer) are:

> presumed to have had the cancer as a result of exposure to conditions in the line of duty, unless it is shown by a preponderance of the evidence that the cancer was caused by nonservice-connected risk factors or nonservice-connected exposure, provided:
>
> (i) (I) the firefighter completed an initial and any subsequent cancer screening evaluations as recommended by the American Cancer Society based on the age and sex of the firefighter prior to becoming a firefighter or within two years of July 1, 2007, and the evaluation indicated no evidence of cancer;

[7] *See* Correspondence from Defendant's counsel dated June 20, 2019 and Affidavit of Jeffrey A. Gordon, M.D.

[8] This statutory presumption applies to "firefighter[s], as defined in 20 V.S.A. § 3151(3) and (4)." *See* 21 V.S.A. § 601(11)(B). That definition, in turn, defines "firefighter" broadly as including any "member of a state, municipal or county fire department or a privately organized fire department who is responsible for fire suppression, prevention or investigation, or fire-related rescue." 20 V.S.A. § 3151(3). Although volunteers who work without expectation of compensation are ordinarily not considered employees under the Workers' Compensation Act, *see Clark v. Blair Farms Maple Products, Inc.*, Opinion No. 09-18WC (June 12, 2018), the Workers' Compensation Act specifically includes volunteer firefighters as "public employment" covered under the Act, so long as such firefighters work "in any capacity under the direction and control of the fire department or rescue and ambulance squads" *Id.* While Hartland emphasizes Claimant's volunteer status in its filings, his status as such does not preclude liability in this case.

(II) the firefighter was engaged in firefighting duties or other hazardous activities over a period of at least five years in Vermont prior to the diagnosis; and

(III) the firefighter is under 65 years of age.

(ii) The presumption shall not apply to any firefighter who has used tobacco products at any time within 10 years of the date of diagnosis.

(iii) The disabling cancer shall be limited to leukemia, lymphoma, or multiple myeloma, and cancers originating in the bladder, brain, colon, gastrointestinal tract, kidney, liver, pancreas, skin, or testicles.

21 V.S.A. § 601(11)(E).

Nothing in this statute says what happens when the presumption results in liability against more than one employer for the same cancer. That is the question giving rise to Hartford's present request for a declaratory ruling. This is a case of first impression on this issue.

II. The Department's Authority to Issue Declaratory Rulings

A. The Administrative Procedure Act's Mandate

As authority for the Department's jurisdiction to grant declaratory relief, Hartford cites the following provision of Vermont's Administrative Procedure Act ("APA"):

> Each agency shall provide for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency, and may so provide by procedure or rule. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

3 V.S.A. § 808.

Hartland incorrectly asserts that Section 808 does not apply to workers' compensation proceedings, citing the following provision:

> ***Sections 809-813*** of this title shall not apply to: … (3) Acts, decisions, findings, or determinations by the Department of Labor or the Commissioner of Labor or his or her, its, or their duly authorized agents as to any and all procedures or hearings before and by the Department or Commissioner or his or her or their agents, arising out of or with respect to … [the Workers' Compensation Act].

3 V.S.A. § 816(a)(3) (emphasis added).

Section 816's exclusion applies only to Sections 809-813 of the APA, and does not extend to Section 808, which provides for declaratory rulings. Thus, Hartland's reliance on Section 816 for its contention that the APA does not allow for declaratory rulings in workers' compensation cases is misplaced.

Equally misplaced is Hartland's reliance on *Hathaway v. S.T. Griswold & Co.*, Opinion No. 04F-14WC (June 11, 2014) for the same proposition. The Department in *Hathaway* applied the APA's provisions regarding the finality of judgments for the purposes of judicial review. Although it noted that Section 816 of the APA "exempts workers' compensation proceedings from the requirements relating to ***how administrative hearings are conducted***," it noted that nothing in the APA exempted workers' compensation cases from its provisions relating to judicial review. *Id.* at 2 (emphasis added). Judicial review of final judgments, *Hathaway* clarified, is subject to Section 815 of the APA because that section is not within Section 816's exclusion. Thus, *Hathaway's* application of Section 815 directly supports the application of Section 808 here. Like the APA's judicial review provision at issue in *Hathaway*, Section 808 falls outside of the APA's limited workers' compensation exclusion. Moreover, like the principles of judicial review, the availability of declaratory rulings has nothing to do with "how administrative hearings are conducted." *Cf. Hathaway* at 2.

Hartland also incorrectly asserts that the statutory language of Section 808 would not provide for a declaratory ruling here even if that Section applies. Section 808 provides for declaratory rulings regarding the "applicability of any statutory provision or of any rule or order of the agency." *See* 3 V.S.A. § 808. The Vermont Supreme Court has held that declaratory judgments under that section are appropriate in "deciding the applicability of such authorities ***to a particular set of facts***." *Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982) (emphasis added). Hartland argues that here, there is "no workers' compensation rule or statute which covers apportionment or contribution in a concurrent employment situation."[9] Hartland is of course correct that the Workers' Compensation Act does not answer the question of liability apportionment, but that is precisely why a declaratory ruling is appropriate here. If the statute were clear on its face, there would be nothing to declare. *See In re State Aid Highway No. 1, Peru*, 133 Vt. 4, 8 (1974) (holding that the "primary purpose" of a declaratory judgment "is to have a declaration of rights not theretofore determined[.]") (punct. omitted). Hartford's petition presents a dispute concerning the how a statutory division, namely Section 601(11)(E), applies to a particular set of facts, namely multiple concurrent employers potentially subject to a presumption of liability. This falls squarely within the allowable scope of declaratory rulings under *Cavendish, supra*.

For all these reasons, Section 808 of the APA mandates the availability of declaratory rulings in workers' compensation proceedings before the Department, and the present dispute falls within the scope of that mandate.

[9] *See* Hartland's Response at 5.

B. The Workers' Compensation Rules' Satisfaction of the APA Mandate

Although the APA mandates that administrative agencies "provide for" declaratory rulings, it does not independently provide the process for obtaining them; it is up to the administrative agency to provide for declaratory relief "by procedure or rule." 3 V.S.A. § 808. The Department of Labor has satisfied that mandate by adopting the Vermont Rules of Civil Procedure ("V.R.C.P.") for workers' compensation hearings, "insofar as they do not defeat the informal nature of the hearing." *See* Workers' Compensation Rule 17.1100.

V.R.C.P. 57, in turn, provides for declaratory judgments as follows:

> The procedure for obtaining a declaratory judgment pursuant to 12 V.S.A. §§ 4711-4715 in an action in a superior court shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Id.

The relevant statutory provision cited in that rule, in turn, provides that:

> Superior Courts within their jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the grounds that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

12 V.S.A. § 4711.

Although 12 V.S.A. § 4711 applies only to superior courts, I conclude that the APA's mandate, combined with Department's incorporation of V.R.C.P. 57 via Workers' Compensation Rule 17.1100, effectively incorporates the declaratory powers described in 12 V.S.A. § 4711 into the Department's authority. The existence of this declaratory power finds further support in the general statutory provision that "[q]uestions arising under the [Workers' Compensation Act], if not settled by agreement of the parties interested therein with the approval of the Commissioner, shall be determined, except as otherwise provided, by the Commissioner." 21 V.S.A. § 606. The present dispute arises out of the Workers' Compensation Act and has clearly not been settled by agreement of the parties. No applicable authority negates the power to issue declaratory relief here, or provides "otherwise." *See id.*

Thus, I conclude that I have authority to issue declaratory rulings in workers' compensation cases under V.R.C.P 57, as incorporated into Workers' Compensation Rule 17.1100.

C. Informal Nature of the Proceedings

The Department's incorporation of V.R.C.P. 57 remains subject to the requirement that it be consistent with the informal nature of workers' compensation proceedings. *See* Workers' Compensation Rule 17.1100. Here, Hartford seeks a declaration that if a presumption applies to two employers for a single injury, then the liability should be split evenly between them. Although the legal authority to entertain such a request may be complex, the relief sought is simple: Hartford simply asks that if it and Hartland are both going to owe money for the same injury, they should share that liability equally. I find Hartford's request sufficiently intuitive and easy to understand to comport with informal proceedings.

Therefore, Hartford's request for a declaratory ruling satisfies Rule 17.1100.

III. Case or Controversy Limitation

Having determined that I have authority to issue declaratory rulings generally, I must also determine whether the specific declaratory ruling Hartford seeks presents a justiciable case or controversy. "Vermont courts[10] are vested with subject matter jurisdiction only over actual cases or controversies involving litigants with adverse interests." *Turner v. Shumlin*, 2017 VT 2, ¶ 8. This requirement, adopted from the federal courts, "incorporates the doctrines of standing, mootness, ripeness, and political question." *Dernier v. Mortg. Network, Inc.*, 2013 VT 96, ¶ 38 (2013). Thus, "an action for declaratory relief must be based on an actual controversy; the claimed result or consequences must be so set forth that the court can see that they are not based upon fear or anticipation but are reasonably to be expected." *Id.*; *accord Cupola Golf Course, Inc. v. Dooley*, 2006 VT 25, ¶ 14.

Particularly relevant here is the ripeness requirement, *i.e.* that the "question submitted must not be premature, in that it must be a necessary part of the final disposition of the case to which it pertains." *Wood v. Wood*, 135 Vt. 119, 121 (1977). The difference between an "abstract question" and a "controversy" suitable for a declaratory ruling "is necessarily one of degree," and the U.S. Supreme Court has held that it "would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy[.]" *See Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). However, the basic question is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.*

[10] Although this case is pending before the Department, and not a court, the Department's workers' compensation decisions are appealable to either the Vermont Supreme Court or Superior Court. *See* 21 V.S.A. §§ 670-672. Given that those courts are jurisdictionally bound by the "case or controversy" limitation, it follows that the Department must be bound by this same limitation. Otherwise, any rulings by the Department on disputes that did not constitute cases or controversies would effectively evade the possibility of appeal.

A. Assessing Ripeness in a Dispute Between Potentially Liable Parties When Liability Remains Contingent

Applying the principles discussed above, federal courts in the Second Circuit have held that a petition for declaratory relief is ***generally*** not ripe if it depends "upon contingent future events that may or may not occur as anticipated, or indeed may not occur at all." *See Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 511 (2d Cir. 2014). However, the fact that "liability may be contingent does not necessarily defeat jurisdiction[.]" *Employers Ins. of Wausau v. Fox Entm't Grp., Inc.*, 522 F.3d 271, 278 (2d Cir. 2008). Faced with contingent liability disputes, courts should focus on the "practical likelihood that the contingencies will occur[.]" *Id.*; *E.R. Squibb & Sons, Inc. v. Lloyd's & Companies*, 241 F.3d 154 (2d Cir. 2001) (holding that there was a "practical likelihood" that coverage under excess liability insurance policies would be reached due to volume of products liability claims pending against insured; thus, actual case or controversy existed in declaratory judgment action to determine coverage under insured's liability policies); *Wilmington Tr., Nat'l Ass'n v. Estate of McClendon*, 287 F. Supp. 3d 353, 365 (S.D.N.Y. 2018) (holding that "a court must assess as a matter of fact how likely it is that the contingent event upon which the controversy rests will occur."); *cf. Berkshire Hathaway Specialty Ins. Co. v. City of Phoenix*, No. CV-16-01083-PHX-JAT, 2016 WL 6648174, at *3 (D. Ariz. Nov. 10, 2016) (no genuine case or controversy between insurer and insured city where there was no practical likelihood that city's liability in third party claim would come close to its self-insured retention).

Federal courts have often found that questions concerning the allocation of liability among potentially responsible parties, even where the fact of liability has not yet been established, is an appropriate subject for declaratory relief. For instance, in *Am. Guarantee & Liab. Ins. Co. v. Anco Insulation, Inc.*, No. CIV.A. 02-987A1, 2005 WL 1865552, at *5 (M.D. La. July 29, 2005), an insulation company faced numerous asbestos exposure lawsuits in three states, and two insurers were on the risk under multiple policies covering twenty-four years. Federal courts across the country had developed four distinct approaches to allocating insurers' responsibilities in such cases, and the insurers sought a declaration clarifying which approach applied to them. The insulation company opposed the request on the grounds that a declaration on that issue would be an improper advisory opinion based on hypotheticals. The court rejected this argument, noting that "[d]etermining the applicable liability allocation theory is commonly addressed by the courts in declaratory judgment actions." *Id.*, report and recommendation adopted, No. CV 02-987-A, 2005 WL 8155390 (M.D. La. Sept. 8, 2005). *Accord Kidd v. Am. Reliable Ins. Co.*, No. SACV 15-01720-CJC(KESx), 2016 WL 4502459, at *3 (C.D. Cal. Aug. 23, 2016) ("Declaratory judgments are designed for situations like this one in which courts can efficiently determine the scope and apportionment of liability as between multiple parties."); *United States v. Davis*, 31 F. Supp. 2d 45 (D.R.I. 1998) (issuing declaratory judgment as to the allocation of responsibility for future environmental cleanup costs among multiple defendants), *aff'd*, 261 F.3d 1 (1st Cir. 2001).

B. Practical Likelihood of Defendants' Liability

Hartland contends that because there has not yet been a finding that either Defendant is liable for Claimant's cancer, any declaration concerning how liability might be allocated would be purely abstract and hypothetical, and therefore result in an improper advisory

opinion. Based on the authorities discussed above, I find that this argument misses the mark. The proper question is not whether Defendants' liability is contingent, but whether the practical likelihood of that contingency coming to fruition is great enough to generate a substantial controversy affecting the Defendants' adverse interests.

This case involves a statutory presumption of liability provided that certain requirements are met. *See* 21 V.S.A. § 601(11)(E). Some of those requirements appear undisputed, specifically that Claimant was engaged in firefighting activities for more than five years prior to his diagnosis,[11] that his cancer at issue was colon cancer,[12] and that he is less than 65 years old.[13]

Other requirements require more evidence. For instance, there is insufficient evidence of whether Claimant has participated in the cancer screenings required under 21 V.S.A. 601(11)(E)(i)(I). Claimant's medical records include a physical examination report dated May 29, 2009; under the "rectal" portion of that report is a note reading, "deferred to MD Done Last March." *See* Hartford's Exhibit A. However, the evidence does not establish whether the rectal examination done in March 2008 constituted a cancer screening that accorded with the American Cancer Society's ("ACA's") then-applicable recommendations. Nor is there any evidence of that examination's results, or whether any subsequent screenings would have been indicated under the ACA's relevant guidelines, or whether Claimant ever underwent any subsequent screenings prior to his 2018 colonoscopy that yielded his cancer diagnosis.

Additionally, regarding 21 V.S.A. § 601(11)(E)(ii)'s tobacco use provision, Claimant's medical records and recorded statement indicate that has never smoked. *See* Hartford's Exhibit A at 1 ("Never Smoker"); Hartland's Exhibit A at 6 ("SD: Are you a smoker? MW: No"). However, the evidence does not establish whether he used any smokeless tobacco products during the statutory lookback period. Hartland reserves the right to develop the issue of Claimant's tobacco use through additional discovery,[14] as is its right given that discovery remains open.

Hartland also disputes whether Claimant's cancer constitutes a "disability" as contemplated by the statute.[15] I find this contention difficult to understand. Claimant missed work to undergo and recover from colon surgery following a cancer diagnosis. Any parsing of Section 601(11)(E) that would yield the conclusion that this was not a "disability" would not only require an unnaturally strained reading of the statutory text, but also fly in the face of the statute's obvious purpose of expanding benefits coverage for firefighters in cases where direct proof of causation would otherwise be difficult. However, I need not resolve the merits of this contention for the purpose of this petition.

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[11] *See* 21 V.S.A. § 601(11)(E)(i)(II); Hartford's Petition at 5; Hartland's Exhibit A at 1-2.

[12] *See* 21 V.S.A. § 601(11)(E)(iii); Hartford's Exhibit A; Hartland's Exhibit B at 1.

[13] *See* 21 V.S.A. § 601(11)(E)(i)(III); Form 1 (providing Claimant's date of birth).

[14] Hartford's Exhibit A at 1 ("Never smoker"); *accord* Hartland's Exhibit A at 6; Hartford's Petition at 6; Hartland's Response at 12.

[15] Hartland's Response at 10-11.

Due to the open factual questions regarding Claimant's cancer screenings and tobacco history, there is not yet enough evidence to determine whether the statutory presumption applies. However, discovery remains ongoing and this case is on track for a formal hearing where the parties will have ample opportunity to establish or rebut the presumption.

Importantly for the present purposes, nothing in the record specifically negates any of the statutory elements of the presumption. Neither Defendant has moved for summary judgment as to Claimant's claim or otherwise contended that any element of the presumption cannot in principle be satisfied. Given that some of the elements are undisputed, and the remaining elements should be capable of resolution with modest supplemental evidence, I find that the "practical likelihood" of Claimant prevailing against both towns, while contingent, is great enough to create a ripe claim or controversy between the two Defendants as to the allocation of liability between them. *Cf. E.R. Squibb & Sons*, 241 F.3d 154; *Anco Insulation*, 2005 WL 1865552, at *5; *Davis*, 31 F. Supp. 2d at 45.

For all these reasons, Hartford's request for a declaratory ruling presents a ripe and justiciable case or controversy.

IV. Discretion to Allocate Liability Among Multiple Employers

As noted above, Section 601(11)(E) does not address what happens when its presumption of liability applies to more than one employer for the same cancer. Resolving this question requires an analysis of the Department's authority to apportion liability in the absence of an express statutory provision governing such apportionment.

While the Department cannot decide matters of general public policy,[16] it has broad authority to interpret the Workers' Compensation Act and to determine parties' rights thereunder "as a necessary incident to [the Department's] obligation to administer that law." *Letourneau v. A.N. Deringer/Wausau Ins. Co.*, 2008 VT 106, ¶ 2 (citing 21 V.S.A. § 606, *supra*). Accordingly, the Supreme Court traditionally accords substantial deference to its interpretation of that statute. *Bedini v. Frost*, 165 Vt. 167, 169 (1996). Applying these principles, that Court previously affirmed the Department's apportionment of liability in at least two other contexts where the relevant statutes did not expressly provide for it.

First, in *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997), the claimant fell off a roof while working for one employer, rupturing his spleen and fracturing several bones. Fifteen years later, while working for a different employer, he injured the right side of his lower back while attempting to push a clip into a machine. The two employers disputed their respective responsibilities, and the Department apportioned liability between them based on findings that the claimant suffered separate and distinct injuries while working for each employer. On appeal, the first employer argued that the Department should have applied the statutory "last injurious exposure rule,"[17] and that the second employer should therefore have been liable for

[16] *See Clayton v. J.C. Penney Corp.*, 2017 VT 87.

[17] This rule is codified at 21 V.S.A. § 662(d) ("Where more than one employer or insurer may be liable for an employee's occupational disease, the employer in whose service the employee was last injuriously exposed to the

all benefits. The Supreme Court disagreed and held that the last injurious exposure rule was inappropriate in cases where separate accidents produced distinct injuries, as opposed to cases where continuous injuries combine to create a single disability. It affirmed the Department's decision, noting that "the Commissioner's apportionment of liability between employers rationally relate[d] to her findings that claimant's injury to his right lower back was a new and distinct injury from the prior … injury that resulted in recurring pain to his left lower back and left leg." *Id.* at 628. Importantly, nothing in the statutory provisions cited by the Court expressly provided for such apportionment by the Commissioner.[18]

Second, in *Kapusta v. Dep't of Health/Risk Mgmt.*, 2009 VT 81, the claimant was assessed a twenty percent permanent impairment rating, with fifteen percent resulting from a preexisting condition and five percent resulting from her work-related injury. She had not received previous compensation for her non-work-related condition. The central issue was whether the Department was authorized and/or required to reduce the claimant's permanent partial disability ("PPD") benefits because of a preexisting hip condition. Although the statute governing PPD benefits required apportionment where a prior impairment rating had already been compensated, it was silent as to apportionment in cases involving preexisting uncompensated impairments. *See* 21 V.S.A. § 648. The Department determined that it retained discretion to apportion the claimant's impairment according to its causes, but that such apportionment was not mandatory. Based on its factual findings that the claimant was not functionally limited before her work injury and that she would not have been in pain but for her work-related injury's aggravation of her preexisting condition, the Department declined to apportion PPD benefits, and awarded compensation based on the full twenty percent rating. The Vermont Supreme Court affirmed both the existence of the Department's discretion to apportion and the appropriateness of its decision not to apportion it in that case. *See Kapusta* at ¶ 16 (finding "no clear indication of error and defer[ring] to the Commissioner's interpretation of the relevant statutes.").

The apportionments at issue in both *Kapusta* and *Pacher* admittedly involved legal and factual contexts quite distinct from this case. Both involved successive injuries rather than a single diagnosis with multiple causes. Neither involved a claimant performing the same type of work for two independent employers over the same time span. Neither involved a statutory presumption of liability. Additionally, *Kapusta* involved the interpretation of a specific statutory provision that is not implicated here. Both cases show, however, that in cases involving multiple causal origins that do not neatly conform to narrow categories contemplated by the Legislature, the Department retains the power to apportion liability to the appropriate causal sources as long as nothing in the statute prohibits such apportionment. I

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hazard that caused the disease, and the insurance carrier, if any, on the risk when the employee was last exposed, shall be liable if it can be proven that the service for the last employer causally contributed to the disease."). Neither Defendant advocates for the last injurious exposure rule to apply in this case, and I find that it would be entirely unworkable here. Because Claimant works for two fire departments contemporaneously, application of this rule would volley the entire responsibility for this claim back and forth on a near-daily basis in a perpetual game of liability ping-pong. The last injurious exposure rule clearly contemplates successive employments with discrete, non-overlapping periods of exposure to occupational hazards.

[18] It was only after *Pacher* was decided that the legislature amended 21 V.S.A. § 662 to include the present subsection (e), authorizing the Department to refer certain apportionment disputes between successive employers to arbitration. *See* 2000 Vermont Laws P.A. 97 (H. 185) (approved May 2, 2000).

find moreover that this power follows from the Department's broad mandate to administer and resolve unsettled issues arising under the Workers' Compensation Act. *See* 21 V.S.A. § 606.

Here, although 21 V.S.A. § 601(11)(E) is silent regarding the division of liability between multiple employers subject to its presumption, another of the Act's key provisions provides that "[i]f a worker receives a personal injury by accident arising out of and in the course of employment by an employer subject to this chapter, ***the employer or the insurance carrier shall pay compensation***[.]" 21 V.S.A. § 618 (emphasis added). It follows from Section 618 that if two employers are covered by a presumption of compensability and neither rebuts it, then they both "shall pay compensation." *See id.* At the same time, the Supreme Court has recognized that the Workers' Compensation Act reflects a "strong policy against double recovery[.]" *Conant v. Entergy Corp.*, 2016 VT 74, ¶ 16. Requiring both employers to separately pay 100 percent of the benefits owing to an injured worker would clearly violate this principle. Apportioning liability between them resolves this tension by requiring both employers to pay compensation while only compensating the injured worker once. Thus, although the Act does not expressly provide a ***method*** of apportioning liability between multiple employers in such circumstances, I conclude that the ***fact*** of such apportionment necessarily follows from reading Sections 601(11)(E) and 618 together. Contrary to Hartland's contention, such apportionment is not the improper "invention" of public policy but is simply the interpretation of a statute over which the Department has primary jurisdiction.

Hartland nonetheless maintains that Vermont is not an "apportionment state" and that its laws only contemplate limited and discrete categories of multiple-employer situations: aggravations,[19] flare-ups,[20] recurrences,[21] joint employments,[22] and borrowed employees.[23] Hartland is correct that none of those categories fit the situation here. However, the Supreme Court has rejected the notion that the Department's analysis of multi-employer disputes is limited to strict pre-existing conceptual molds that do not fit the facts at hand. *See Cehic v.*

[19] *See* Workers' Compensation Rule 2.1200 (defining "aggravation" as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events").

[20] *See* Workers' Compensation Rule 2.2300 (defining "flare-up" as a "temporary worsening of a pre-existing condition caused by a new injury for which a new employer or insurance carrier is responsible, but only until the condition returns to baseline and not thereafter").

[21] *See* Workers' Compensation Rule 2.3900 (defining "recurrence" as "the return of symptoms following a temporary remission"); *cf.* Rules 2.1210-1211 and 2.3910-2.3915 (providing framework for distinguishing between an "aggravation" and a "recurrence").

[22] *E.g., Wasicki v. Poncho's Wreck, Inc. and Old Yeller*, Opinion No. 11-84WC (August 28, 1984), Conclusion of Law No. 6 ("Joint employment occurs when a single employee, under contract with two employers and under the simultaneous control of each performs services for both employers making the service to each employer the same or close related").

[23] Neither the Workers' Compensation Act nor the Department's Rules specifically refer to borrowed employees. However, the Vermont Supreme Court has held that the scope of statutory employment under the Act is broad enough to include common law borrowed servant relationships. *See Candido v. Polymers, Inc.*, 166 Vt. 15, 21 (1996).

Mack Molding, Inc., 2006 VT 12 (holding that the Department was not limited to the "traditional aggravation-or-recurrence analysis," but could apply "temporary flare up" doctrine, which was not incorporated into the Department's rules at that time,[24] where "flare up" analysis "rationally serve[d] the Commissioner's obligation to determine, if possible, the relative liability of multiple employers for different and distinct injuries to a worker.") (citing *Pacher*, *supra*). I find that Hartland's leap from the premise that this case does not fit within its enumerated list of multi-employer categories to the conclusion that there can be no apportionment is fundamentally inconsistent with the authorities discussed in this section. Hartland also offers no alternative framework that might satisfy both Section 601(11)(E)'s presumption and Section 618's mandatory payment provision.

For all these reasons, I conclude that I have authority to apportion liability between the Defendants in this case provided that there is adequate evidentiary support for factual findings rationally related to such apportionment.

V. Insufficiency of the Factual Record to Support Exercise of Discretion

While both *Pacher* and *Kapusta* support the Department's discretionary power to apportion liability, those cases make it clear that the exercise of that discretion must be rationally related to well-supported factual findings. *See Pacher*, 166 Vt. at 628 (holding that "the Commissioner's apportionment of liability between employers rationally relates to her findings that claimant's injury to his right lower back was a new and distinct injury from the prior Fairdale injury that resulted in recurring pain to his left lower back and left leg."); *Kapusta*, ¶ 17 (holding that the Department did not abuse its discretion in declining to apportion because it "had a sufficient evidentiary basis to find that claimant had no functional impairment at the time she slipped on the ice.").

Here, Hartford asks that one-half of any liability for Claimant's injury be shifted to Hartland. There is currently insufficient evidence upon which to make any factual findings that would support such an apportionment. The only evidence directly relevant to apportionment in the present record is that Claimant has worked full-time for wages for Hartford for about twelve and a half years and has volunteered part time for Hartland since 1991. While this is certainly relevant, there is insufficient evidence concerning his comparative working hours for each town, his daily work activities performed for each town, or the relative frequency of his exposures to known risk factors for colon cancer while working each town. These factors are only illustrative and not exhaustive, but each goes directly to the relative responsibility that each town should bear for any illness that Claimant may have acquired in the line of duty.[25]

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[24] *See generally* Workers' Compensation Rules effective July 1, 2000 (no mention of "flare up" doctrine).

[25] Hartland, for its part, contends that dividing all liability equally would be inappropriate here because it would result in Hartland being responsible for the benefits Hartford voluntarily paid. This, it argues, would unfairly bind it to Hartford's strategic decision to pay benefits without prejudice when Hartland has not waived its defenses. This opinion does not determine either Defendant's share of any liability, and therefore does not bind either town to the other's strategic decisions. However, Hartford's payments to date may be a legitimate factor in apportioning any liability. Thus, Defendants may present evidence at the formal hearing and arguments in their post-hearing briefs concerning what effect, if any, these payments should have on my discretion in apportioning any liability.

Defendants should present evidence concerning these and any other matters they consider relevant to moving my discretion regarding liability apportionment.

VI. Constitutional Challenges

Finally, Hartland contends that the presumption statute itself is unconstitutional. *See* Correspondence from Hartland's counsel dated June 20, 2019. The Vermont Supreme Court has held that administrative agencies have no power to determine the constitutional validity of the statutes they are bound to administer but may consider constitutional challenges to the manner in which their own designees have applied statutes to the circumstances of a particular case. *Williams v. State*, 156 Vt. 42, 53 (1990); *Alexander v. Town of Barton*, 152 Vt. 148, 151 (1989). Because I do not have jurisdiction to determine the constitutionality of the presumption statute, I do not analyze Hartland's constitutional challenge here.

CONCLUSION

For the reasons stated above, Hartford's Petition is **GRANTED IN PART** and **DENIED IN PART**.

I conclude that I have authority to issue declaratory rulings, that there is a ripe case or controversy as to the allocation of Defendants' liabilities in the event that Section 601(11)(E)'s presumption of liability affects the both Defendants, and that I have the authority to apportion liability between the two Defendants in the event that they are both liable for Claimant's colon cancer. However, there is not yet enough evidence to inform the fair exercise of that discretion, and Defendants should present evidence to support factual findings that rationally relate to their respective positions regarding the appropriate allocation of any liability. Therefore, I cannot issue the declaration Hartford seeks, namely that liability should be divided evenly whenever the presumption statute applies to multiple employers for the same claim. To that extent, its Petition is **DENIED**.

Instead, I declare only as follows:

If Claimant is entitled to benefits from both Defendants pursuant to 21 V.S.A. § 601(11)(E), I will exercise my discretion in apportioning such liability to each Defendant as appropriate. I will base my exercise of such discretion upon the totality of evidence relevant to each Defendant's comparative levels of responsibility, taking appropriate account of their respective decisions to pay or not pay interim benefits without prejudice.

DATED at Montpelier, Vermont this 25th day of July 2019.

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Lindsay H. Kurrle
Commissioner