STATE OF VERMONT
DEPARTMENT OF LABOR

John West

v.

North Branch Fire District #1

Opinion No. 10-19WC

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. EE-61277

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Robert D. Mabey, Esq., for Claimant
William J. Blake, Esq., for Defendant

ISSUES PRESENTED:

1. Which version of 21 V.S.A. § 644(a)(6) applies to Claimant's claim for permanent total disability benefits?

2. Is Defendant entitled to judgment in its favor as a matter of law on the question of whether Claimant is permanently and totally disabled under the applicable version of 21 V.S.A. § 644(a)(6)?

EXHIBITS:

Claimant's Statement of Undisputed Facts filed March 4, 2019

Claimant's Exhibit 1: September 5, 2018 deposition of Joseph Kandel, MD (unsigned)
Claimant's Exhibit A: 2014 Vermont Laws No. 96 (S. 27) (excerpt)

Defendant's Statement of Undisputed Facts filed January 23, 2019

Defendant's Exhibit A: Medical records
Defendant's Exhibit B: Surveillance reports and videos
Defendant's Exhibit C: 2014 Vermont Laws No. 96 (S. 27) (full text)

FINDINGS OF FACT:

The following facts are undisputed:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in the Vermont Workers' Compensation Act. *Claimant's Statement of Undisputed Facts* ¶ *1*.

2. Claimant sustained a compensable work-related head injury and other physical injuries on March 14, 2013.[1] *Defendant's Statement of Undisputed Facts ¶ 1; Defendant's Exhibit A.*

3. Claimant underwent treatment for his injuries and has been placed at end medical result. *Defendant's Statement of Undisputed Facts ¶ 2; Defendant's Exhibit A.*

4. Claimant has been rated for permanent partial impairment by several different physicians, who have offered conflicting opinions as to his permanent impairment. *Defendant's Statement of Undisputed Facts ¶ 3; Defendant's Exhibit A.*

5. Claimant was rated by his treating neurologist for neurological permanent impairment attributable to the accepted work injury. *Claimant's Statement of Undisputed Facts ¶ 2; Defendant's Exhibit A.*

6. Claimant was rated by his treating neuropsychologist for mental and behavioral permanent impairment attributable to the accepted work injury. *Claimant's Statement of Undisputed Facts ¶ 3; Defendant's Exhibit A.*

7. Claimant was rated by Leon Ensalada, MD, for physical injury permanent impairment attributable to the accepted work injury. *Claimant's Statement of Undisputed Facts ¶ 4; Defendant's Exhibit A.*

8. At Defendant's request, Claimant was seen by Joseph Kandel, MD, for an independent medical examination on February 18, 2016. *Claimant's Statement of Undisputed Facts ¶ 5; Defendant's Exhibit A.*

9. On September 5, 2018, Dr. Kandel testified at a deposition, during which the following exchange took place between Claimant's counsel and Dr. Kandel:

> Q. Would you agree that a TBI caused permanent, severe cognitive physical and psychiatric disabilities for [Claimant]?
>
> A. I would agree to that.

Claimant's Exhibit 1, Dr. Kandel's deposition at p. 21, line 25 – p. 22, line 2; Claimant's Statement of Undisputed Facts ¶ 6.

10. Claimant is currently and actively working at the Freedom Boat Club in Florida. *Defendant's Statement of Undisputed Facts ¶ 4; Defendant's Exhibit B.*

11. Claimant has filed a Notice and Request for Hearing alleging that he is permanently and totally disabled under 21 V.S.A. § 644(a)(6). *Defendant's Statement of*

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[1] Although the parties did not identify Claimant's other injuries, the medical records document various bone fractures and other physical injuries. *See Defendant's Exhibit A.*

Undisputed Facts ¶ 5; Notice and Request for Hearing (Form 6) filed with the Department of Labor on October 29, 2018.

CONCLUSIONS OF LAW:

Defendant's Motion for Declaratory Judgment and/or Summary Judgment

1. Defendant seeks a determination as to which version[2] of the permanent total disability statute applies to this claim; it also seeks summary judgment in its favor under the applicable version of the statute. Defendant has captioned its filing as a motion for declaratory judgment "and/or" summary judgment, although in the body of the motion it simply moves for summary judgment. Claimant contends that the motion for declaratory judgment should be "summarily denied" because the Department lacks jurisdiction to offer declaratory relief.

2. The determination Defendant seeks will necessarily be made in the course of interpreting and applying the law relevant to its summary judgment motion. Therefore, to the extent that it has moved for declaratory judgment, I decline to rule on that motion. *See, e.g., Price v. Leland*, 148 Vt. 518, 520 (1988) (careful reading of defendant's motion for declaratory relief reveals that it satisfies the requirements of a summary judgment motion and may be determined as such); *Hill v. Brown*, Opinion No. 10-02WC (March 7, 2002) (claimant's motion for "declaratory/summary judgment" treated as a summary judgment motion).

Legislative Amendment to the Standard for Permanent Total Disability

3. The Vermont workers' compensation statute includes two separate provisions under which an injured worker may qualify for permanent total disability benefits. First, 21 V.S.A. § 644(a) enumerates six specific injuries that qualify an injured worker for permanent total disability benefits, such as the total and permanent loss of sight in both eyes. *See* 21 V.S.A. § 644(a)(1)-(6).

4. In the alternative, an injured worker who does not have any of the injuries enumerated in section 644(a) may nevertheless be found permanently and totally disabled under the odd lot doctrine set forth in 21 V.S.A. § 644(b). Odd lot permanent total disability relies on a finding that the injured worker has a work-related physical or mental impairment that renders him or her unable to perform regular, gainful work. *See* Workers' Compensation Rule 10.1700.

5. Claimant here contends that he is permanently and totally disabled under section 644(a)(6) as a result of a compensable skull fracture injury that he sustained on March 14, 2013. He has not filed a claim for permanent total disability benefits under the odd lot doctrine set forth in section 644(b).

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[2] The statute was amended effective July 1, 2014. *See* Conclusion of Law No. 7 *infra*.

6. Prior to July 1, 2014, the permanent total disability provision relevant to skull injuries provided as follows:

> (a) In case of the following injuries, the disability caused thereby shall be deemed total and permanent:
>
> *(6) an injury to the skull resulting in incurable imbecility or insanity.*

21 V.S.A. § 644(a)(6) (emphasis added).

7. The permanent total disability statute was amended effective July 1, 2014.[3] The provision relevant to skull injuries now provides as follows:

> (a) In case of the following injuries, the disability caused thereby shall be deemed total and permanent:
>
> *(6) an injury to the skull resulting in severe traumatic brain injury causing permanent and severe cognitive, physical, or psychiatric disabilities.*

21 V.S.A. § 644(a)(6) (emphasis added).

8. The 2014 amendment to section 644(a)(6) was part of a broader legislative action to remove outdated and offensive terminology from all the Vermont statutes. *See* 2014 Vermont Laws No. 96 (S. 27), entitled "An Act Relating to Respectful Language in the Vermont Statutes Annotated." Section 1 of the Act set forth its purpose and intent as follows:

> (a) For the purpose of reversing demeaning stereotypes, changing negative attitudes, and cultivating a culture of respect toward persons with disabilities, the General Assembly seeks to replace offensive statutory terms with language that recognizes persons as opposed to their disabilities.
>
> (b) Notwithstanding Secs. 7, 7a, and 222, nothing in this act shall be construed to alter the substance or effect of existing law or judicial precedent. Changes in terminology made in this act are merely meant to reflect evolving attitudes toward persons with disabilities.

Thus, the Legislature's stated intent was not to make any substantive change to existing law, but rather just to update the language to remove offensive terminology.[4]

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[3] 2014 Vermont Laws No. 96 (S.27).

[4] Examples of changes in terminology pursuant to the Act include the change from "deaf person" to "person who is deaf," *see* Act 96, § 3; the change from "handicapped" to "persons with disabilities," *see* Act 96, § 6; and the change from "mentally retarded persons" to "persons with intellectual disabilities." *See* Act 96, § 114.

Retroactive Application of Statutory Amendments

9. Defendant contends that Claimant's injury falls under the pre-amendment statutory provision in effect at the time his injury occurred. Claimant, however, contends that the current version of section 644(a)(6) applies retroactively to his injury.

10. Vermont law provides that the amendment of a statutory provision "shall not affect any right, privilege, obligation, or liability acquired, accrued, or incurred" prior to the amendment's effective date. 1 V.S.A. § 214(b)(2); *Myott v. Myott*, 149 Vt. 573, 575-76 (1988). This general rule of statutory construction prohibits legislative amendments that affect substantive rights and responsibilities from being applied retroactively.

11. In contrast, amendments that are solely procedural can be given retroactive effect, and therefore can be applied to claims that are pending when the new statute becomes effective. *See, e.g., Agency of Natural Resources v. Towns*, 173 Vt. 552, 555 (2001); *Myott v. Myott*, 149 Vt. 573, 575-76 (1988). Generally, provisions are merely procedural in nature if they "control only the method of obtaining redress or enforcement of rights and do not involve the creation of duties, rights, and obligations." *Smiley v. State of Vermont*, 2015 VT 42, ¶ 18; *see also Bergeron v. City of Burlington,* Opinion No. 14-18WC (October 15, 2018) (legislative amendments that affect substantive rights and responsibilities not to be applied retroactively).

12. The Supreme Court has applied this well-established rule of statutory construction specifically to workers' compensation claims. For example, in *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983), the Court, citing 1 V.S.A. § 214, ruled that "[t]he right to compensation for an injury under the Workmen's Compensation Act is governed by the law in force at the time of occurrence of such injury." Later, in *Sanz v. Douglas Collins Construction*, 2006 VT 102, the Court clarified what constitutes the "right to compensation" in the *Montgomery* context. A post-injury amendment that "fundamentally changes the right to benefits or the obligation to pay those benefits," it declared, is substantive, and cannot be applied retroactively. An amendment that does not fundamentally change pre-existing rights and responsibilities is procedural, and can be applied retroactively in a pending action. *Id.* at ¶ 12; *Jalbert v. Springfield School Dist.*, Opinion No. 04-17WC (February 16, 2017).

Determination of the Standard that Applies to Claimant's Claim

13. The pre-amendment version of 21 V.S.A. § 644(a)(6) specified an injury to the skull resulting in "incurable imbecility or insanity." The amended version specifies an injury to the skull resulting in "severe traumatic brain injury causing permanent and severe cognitive, physical, or psychiatric disabilities." *See* Conclusion of Law Nos. 6-7 *supra*. To determine which version of the statute applies to Claimant's permanent total disability claim requires an analysis of whether the amendment fundamentally changed the right to receive compensation or the obligation to pay it.

14. The starting point for construing the statutory language of the Workers' Compensation Act is to "seek to implement the Legislature's intent as expressed in the words of the Act itself." *Butler v. Huttig Building Products*, 2003 VT 48, ¶ 11, citing *Colwell v. Allstate Ins. Co.*, 2003 VT 5, ¶ 7. Where the legislative intent can be ascertained on its face, the statute must be enforced according to its terms without resort to statutory construction. *In re Hinsdale Farm*, 2004 VT 72, ¶ 5, citing *Derosia v. The Book Press, Inc.*, 148 Vt. 217, 222 (1987) (when meaning is plain on its face, it must be enforced according to its terms).

15. In comparing the pre-amendment and current versions of section 644(a)(6), I find that the language of the two versions is significantly different. The pre-amendment statute uses the terms "imbecility" and "insanity" where the amended statute refers to "severe traumatic brain injury causing permanent and severe cognitive, physical or psychiatric disabilities." In particular, the term "physical disabilities" in the amended statute has no antecedent in the pre-amendment statute. Based on all of these differences, I find that the language adopted by the Legislature in 2014 is a significant change. Whether the significant change in language constitutes a substantive change in existing law requires a review of the meaning of "imbecility," as well as a review of Vermont law interpreting 21 V.S.A. § 644(a)(6).

16. The term "imbecility" appears in Vermont case law from the nineteenth and early twentieth centuries, usually in the context of a testator's capacity to make a will or a party's capacity to enter into a contract. *See, e.g., Conant v. Jackson*, 16 Vt. 335 (1844) (contracting party reduced to a "state of bodily and mental imbecility" due to chronic alcohol abuse such that he was incapable of knowing the nature, effect and consequences of a contract); *Mann v. Betterly*, 21 Vt. 326 (1849) ("imbecility of intellect" coupled with inadequate consideration would constitute grounds for voiding a contract); *Ward v. Lyman*, 108 Vt. 464, 471-72 (1937) (equity will not void a contract made through a unilateral mistake "except under very strong and extraordinary circumstances showing imbecility or something that would make it a great wrong to enforce the agreement.")

17. The term also arises in the criminal context. For example, in *State v. Kelsie*, 93 Vt. 450 (1919), the defendant was tried for murder. A doctor with expertise in "mental diseases" testified that the defendant, who was then thirty-four years old, had the "mentality of a child eight years old." The doctor further testified that, "from a medical standpoint, an adult of that mentality is classed" as "an imbecile." 93 Vt. at 451. The defendant's mental age was relevant because, at common law, a child between the ages of seven and fourteen was presumed to be incapable of committing a crime. *Id.* at 452. It is noteworthy that the Court decided this case within a few years of the adoption of Vermont's workers' compensation statute in 1915.

18. Black's Law Dictionary also provides guidance as to the meaning of the term "imbecile" in 1915. The second edition, published five years before Vermont adopted its statute, defines "imbecility" as follows:

> A more or less advanced decay and feebleness of the intellectual faculties; that weakness of mind which, without depriving the person entirely of the use of his reason, leaves only the faculty of conceiving the most common and ordinary ideas and such as relate almost always to physical wants and habits. It varies in shades and degrees from merely excessive folly and eccentricity to an almost total vacuity of mind or amentia . . . .

Black's Law Dictionary 632 (2nd ed. 1910).

19. The Department has had occasion to apply the pre-amendment version of 21 V.S.A. § 644(a)(6) at least once. In *Fleury v. Kessel/Duff Construction Co.*, Opinion No. 28-84WC (July 25, 1985), the claimant was hit in the head with a board and fell fifteen feet off a scaffolding. He sustained the following physical and mental injuries:

> [A] fractured skull with a brain contusion which affects the left temporal lobe causing slowing of motor function in the right upper extremity, a deficit in verbal and short-term memory and inability to remember sequential steps. . . . The claimant also suffered a brain stem injury, causing diplopia (double vision), which prevents him from performing close work, tinnitus that erodes his concentration, a moderately severe hearing loss, and vertigo accompanied by nausea. Because any movement of his head increases the vertigo, the claimant constantly tries to hold his head absolutely still, an effort which has resulted in disabling pain and tightness in his neck and upper body. The claimant also suffered a separated clavicle requiring resection, which prevents him from lifting more than 10 pounds. Finally, he suffers from an extreme anxiety reaction to his extensive physical limitations and to his inability to return to any type of work. This has resulted in a permanent psychoneurosis.

20. The *Fleury* claimant sought permanent total disability benefits under the pre-amendment version of 21 V.S.A. § 644(a)(6). In applying that provision, the Commissioner found that, "[a]lthough the claimant has not suffered insanity or imbecility, the massive effects of his head and brain injuries, which have rendered him unable to perform most activities, including movement of his head and upper body, are permanent and untreatable and therefore functionally equivalent to incurable imbecility or insanity." *Id.* The Commissioner therefore concluded that the claimant was permanently and totally disabled under 21 V.S.A. § 644(a)(6).

21. On appeal, the Supreme Court declined to adopt the Commissioner's functional equivalency analysis. Instead, the Court concluded that the claimant was permanently and totally disabled "under any definition" based on the "more than ample" evidence of his physical and cognitive impairments. *Fleury v. Kessel/Duff Construction Co.*, 148 Vt. 415, 419 (1987). In so doing, the Court moved away from section 644(a)(6) and essentially made its finding under 21 V.S.A. § 644(b), which at that time simply provided that the enumeration of qualifying conditions for permanent total disability

under section 644(a) was not exclusive. Accordingly, the Court did not provide any specific guidance on the interpretation of "incurable imbecility or insanity" under 21 V.S.A. § 644(a)(6).

22. Finally, a Kansas case provides some guidance on the issue of whether the Vermont statutory amendment is substantive or procedural. In *Wimp v. American Highway Technology*, 360 P.3d 1100 (Kan. Ct. App. 2015), the Kansas Court of Appeals was faced with interpreting that state's "incurable imbecility or insanity" standard for permanent total disability. Noting that "imbecility" had a defined meaning when the statute was adopted in 1917, and further noting that the meaning did not come close to including an injured worker with an IQ score of 86, the court held that the injured worker did not meet that standard. Then, noting that the Kansas legislature had amended the statute in 2011 to eliminate the pejorative term "imbecility," the court wrote:

> We hope, therefore, that this will be the case of last impression on the subject. We have published this opinion, though, because the statute in place on the date of injury controls under the Kansas Workers Compensation Act, so other cases under the old statute may still be moving through the adjudicative process.

Id. at 1107. The Kansas court's analysis thus hinged on its understanding that the 2011 statutory amendment eliminating the pejorative term "imbecility" did not apply retroactively to injuries that occurred when the pre-amendment statute was in force.

23. Although the Vermont Legislature's stated intent was not to change the substance of existing law, Conclusion of Law No. 8 *supra*, words by their very nature have meaning and effect. Changing statutory language from a "deaf person" to a "person who is deaf" is not a substantive change on its face. However, by deleting the "imbecility" language and replacing it with new language, the Legislature has unintentionally changed the substance of 21 V.S.A. § 644(a)(6). When a post-injury amendment is substantive, it cannot be applied retroactively. *See* Conclusion of Law No. 12 *supra*.

24. Accordingly, I conclude that Claimant's claim for permanent total disability benefits is governed by the statute in effect at the time of his March 14, 2013 injury.

Analysis of Claimant's Claim Under the Applicable Standard for Permanent Total Disability

25. Defendant moves for summary judgment on the grounds that Claimant does not meet the standard for permanent total disability under 21 V.S.A. § 644(a)(6) as a matter of law "because he is actually employed and working." *Defendant's Motion*, at 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.

26. This claim is governed by the version of 21 V.S.A. § 644(a)(6) that was in effect at the time of Claimant's March 2013 injury. Conclusion of Law No. 24 *supra*. To determine whether he is permanently and totally disabled under that provision requires evidence relevant to the incurable imbecility or insanity standard. Conclusion of Law No. 6 *supra.*

27. The undisputed facts here contain no medical evidence concerning the nature, extent and effect of Claimant's skull fracture injury, other than a statement that Dr. Kandel made during his deposition. Dr. Kandel agreed, when Claimant's counsel read him the current statutory provision, that a traumatic brain injury caused Claimant permanent, severe cognitive, physical and psychiatric disabilities. *See* Finding of Fact No. 9 *supra.* However, Dr. Kandel had not seen Claimant since his February 2016 independent medical examination, and it is unknown whether he had access to medical records or other information concerning Claimant's current capabilities and disabilities. Further, Dr. Kandel did not provide any basis for his opinion that would allow evaluation of its persuasiveness. Thus, I find that Dr. Kandel's statement is conclusory and insufficient to form the basis for a finding that Claimant is, or is not, permanently and totally disabled under 21 V.S.A. § 644(a)(6). *See Meau v. The Howard Center, Inc.*, Opinion No. 01-14WC (January 24, 2014) (merely stating a conclusion to a reasonable degree of medical certainty does not necessarily make it so, even if no more credible opinion is offered).

28. In moving for summary judgment, Defendant also relies on surveillance videos showing Claimant engaged in various activities, including driving to work at a Florida marina, preparing boats for rental, operating boats on the water, handling paperwork and interacting with co-workers. *Defendant's Exhibit B.* Defendant contends that Claimant is not permanently and totally disabled as a matter of law because he is currently and actively working. There are two problems with this argument, however.

29. First, Claimant has not made a claim for permanent total disability under the odd lot doctrine set forth in 21 V.S.A. § 644(b), to which his ability to engage in regular, gainful employment would be relevant. He is seeking permanent total disability benefits under 21 V.S.A. § 644(a). Under section 644(a), an injured worker is deemed permanently and totally disabled if he or she has one of the enumerated injuries regardless of employment. Indeed, some people who are blind or who have lost limbs nevertheless work at a variety of occupations; such work would not change their entitlement to permanent total disability, as they are *deemed* entitled to such benefits based on their physical impairment alone. *See Bishop v. Town of Barre*, 140 Vt. 564 (1982). In the context of a claim under 21 V.S.A. §644(a), the activities depicted in the videos may be helpful to a medical expert in determining the nature, extent and

effect of Claimant's skull fracture injury, but whether the activities are evidence of employment is not strictly relevant.

30. Second, even if Claimant's employment were relevant to a disability claim under section 644(a), the record contains very little information about it. Although the surveillance video shows him engaged in various work-like activities, the record contains no information about how many hours he works or the wages he earns, if any. Nor do they establish whether he is performing such activities for a family member or charitable benefactor, rather than on the competitive labor market. In short, the surveillance videos raise a question about whether Claimant can engage in regular, gainful employment, but they do not answer that question.

31. Having considered the undisputed facts here, I conclude that Defendant has failed to establish, as a matter of law, that Claimant is not permanently and totally disabled under 21 V.S.A. § 644(a)(6).

Summary

32. Defendant moved for summary judgment on the grounds that Claimant's current work at a Florida marina is incompatible with his claim for permanent total disability under the pre-amendment version of 21 V.S.A. § 644(a)(6). Although I agree that the pre-amendment version of the statute governs, there are insufficient undisputed facts to establish that Claimant is not permanently and totally disabled as a matter of law. Accordingly, Defendant is not entitled to summary judgment in its favor.

ORDER:

Defendant's Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 11 day of June 2019.

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.*