

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Estate of Derek Goldsmith

Opinion No. 15-19WC

v.

By: Stephen W. Brown  
Administrative Law Judge

Home Improvement Company of  
Vermont, Inc. d/b/a Jancewicz & Son

For: Lindsay H. Kurrel  
Commissioner

State File No. LL-53761

**RULING ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

**APPEARANCES:**

John C. Mabie, Esq., for Claimants  
William J. Blake, Esq., for Defendant

**ISSUE PRESENTED:**

May an employer assert the affirmative defenses of voluntary intoxication and failure to use a safety appliance in a dependent's claim for workers' compensation death benefits?

**EXHIBITS:**

Claimants'<sup>1</sup> Statement of Undisputed Material Facts ("CSUMF")

Defendant's Statement of Undisputed Material Facts ("DSUMF")

Defendant's Response to CSUMF ("DRCS")

Affidavit of Misty Coles

Claimants' Exhibit A: October 5, 2018 correspondence from Nathan Barnett of Acadia Insurance to Claimants' attorney John Mabie

Claimants' Exhibit B: December 19, 2018 correspondence from Defendant's attorney William Blake to Vermont Department of Labor ("VDOL") Workers' Compensation Specialist Anne Coutermarsh

Claimants' Exhibit C: December 20, 2018 email communication from Anne Coutermarsh to attorneys John Mabie and William Blake

Defendant's Exhibit A: September 26, 2018 Death Certificate for Derek Goldsmith

---

<sup>1</sup> Though Claimants' Motion is captioned as being brought by Mr. Goldsmith's estate, it states that it is Mr. Goldsmith's dependent minor children, through their mother as next friend, who are seeking the relief asserted therein.

## **BACKGROUND:**

The following material facts are undisputed:

1. As of September 22, 2018, Derek Goldsmith was Defendant's employee. On that date, he was working for Defendant at a construction worksite in Hanover, New Hampshire when he fell from scaffolding and sustained serious injuries. *See* CSUMF 1, 5, 10-11; DRCS 1, 5, 10-11; DSUMF 1. Emergency personnel transported him from the worksite to Dartmouth-Hitchcock Medical Center, where he was pronounced dead. *See* CSUMF 12; DRCS 12. It is undisputed that he died during the course of his employment. *See* CSUMF 3, 4, 7; DRCS 3, 4, 7; DSUMF 4.<sup>2</sup>
2. Mr. Goldsmith is survived by his domestic partner, Misty Coles, and their two children, ages three and eight. *See* CSUMF 2; DRCS 2. Though Mr. Goldsmith and Ms. Coles were not married, they lived together with their children in Mr. Goldsmith's home. Their children were financially dependent on him. *See* CSUMF 8-10; DRCS 8-10; DSUMF 2.
3. Mr. Goldsmith's children, through Ms. Cole as their next friend, seek workers' compensation death benefits from Defendant. *See generally* Claimants' Motion; DSUMF 3.
4. Defendant initially paid death benefits without prejudice pending a factual investigation. *See* CSUMF 13; DRCS 13; DSUMF 5. However, it later filed a denial and sought to discontinue benefits based on Mr. Goldsmith's alleged intoxication and failure to use a safety appliance at the time of his fall, pursuant to 21 V.S.A. § 649. *See* CSUMF 14; DRCS 14; DSUMF 6. Specifically, Defendant alleges that Mr. Goldsmith was under the influence of marijuana and that his intoxication caused or contributed to his fall. It also asserts that there were no safety guardrails erected on the scaffolding and that Mr. Goldsmith was not wearing a personal fall arrest system or safety harness. DSUMF 7.
5. In response to Defendant's denial of this claim, Anne Coutermarsh, a workers' compensation specialist with the Department, sent an email to the parties' attorneys stating that Mr. Goldsmith's dependents' claims were "not derivative, but an independent right. Since dependents' claims are not derivative, it is not clear whether the affirmative defenses in 21 V.S.A. § 649 may be used to bar the dependents' claims." *See* CSUMF 15; DRCS 15; Claimants' Exhibit C.
6. The Department rejected Defendant's request to terminate benefits and ordered it to continue paying them on an interim basis. Defendant then requested a formal hearing. Following a pretrial conference, the parties filed cross motions for partial summary judgment on the limited issue of whether Defendant may assert affirmative defenses under Section 649 in response to Mr. Goldsmith's children's claims for death benefits. *See* CSUMF 20; DRCS 20.

---

<sup>2</sup> The parties agree that Mr. Goldsmith's death occurred "during the course of" his employment, but Defendant denies that his death "arose out of" his employment. *See* DRCS 7. Because of the present motions' limited scope, I need not resolve this issue here.

## DISCUSSION:

1. Summary judgment is proper when “there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, after giving the benefit of all reasonable doubts and inferences to the opposing party.” *State v. Delaney*, 157 Vt. 247, 252 (1991). To prevail on a motion for summary judgment, the facts must be “clear, undisputed or unrefuted.” *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979); *A.M. v. Laraway Youth and Family Services*, Opinion No. 43-08WC (October 30, 2008).
2. Section 632 of the Workers’ Compensation Act (the “Act”) provides that where an employee dies because of a work-related injury, the employer must pay death benefits in specified amounts “to the persons entitled to compensation,” including dependent children. *See* 21 V.S.A. § 632.
3. Section 649 of the Act, however, provides certain affirmative defenses to employers as follows:

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

21 V.S.A. § 649 (emphasis added).

4. At issue here is whether the defenses in Section 649 are limited in application to a claim by the injured worker during his or her life, or whether they also apply to a claim by a deceased worker’s dependents or personal representative for death benefits under Section 632.

### Textual Analysis of the Statute

5. The primary goal of statutory interpretation is to effectuate the legislature’s intent. The first step in doing so is to look to the legislation’s “plain meaning,” and avoid reading “terms into the statute unless necessary to make the statute effective.” *Morin v. Essex Optical/The Hartford*, 2005 VT 15, ¶ 7. The Vermont Supreme Court has held that because of the Act’s remedial purpose, it must be construed liberally in favor of coverage. *St. Paul Fire & Marine Ins. Co. v. Surdam*, 156 Vt. 585, 590 (1991). However, that principle must be balanced with the Act’s other purpose of providing employers with a limited and determinate liability. *See In re Chatham Woods Holdings, LLC*, 2008 VT 70, ¶ 9.
6. Section 649’s opening phrase is instructive as to the scope of its application. It begins with the broad phrase, “***Compensation shall not be allowed*** for an injury caused by ...” *See* 21 V.S.A. § 649 (emphasis added). It does not, for instance, begin with a more limited phrase such as, “***No injured worker shall receive compensation*** for an injury caused by ...” *Cf. id.*

7. Section 632, in turn, makes clear that death benefits are compensation for an injury: “If death results from the injury, the employer shall pay to the persons entitled to compensation...” See 21 V.S.A. § 632. Therefore, under Section 649, death benefits “shall not be allowed” if the injury resulting in death resulted from a willful intent to injure, intoxication, or failure to use a safety appliance. See 21 V.S.A. § 649.
8. Nothing in the text of Section 632 suggests a different result. It is true that Section 632 begins with a broad mandatory payment provision: “If death results from the injury, **the employer shall pay** to the persons entitled to compensation” specified amounts for funeral and burial expenses as well as weekly compensation based on the decedent’s average weekly wages. 21 V.S.A. § 632. However, Section 618, governing injured workers’ entitlement to benefits generally, begins with analogous language: “If 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** in the amounts and to the person hereinafter specified.” 21 V.S.A. § 618.
9. It is uncontroversial that the defenses enumerated in Section 649 may apply to living injured workers’ claims under Section 618. If that were not the case, there would truly be no work for Section 649 to do, and that entire Section would be surplusage. Cf. *In re Beliveau NOV*, 2013 VT 41, ¶ 13 (“Generally, we do not construe a statute in a way that renders a significant part of it pure surplusage.”).
10. The linguistic mirroring between the mandatory payment provisions of Sections 618 and 632 supports the application of Section 649 with equal force to living injured workers seeking compensation under Section 618 and dependents claiming death benefits under Section 632. Inserting an exception to Section 649 based on the identity of the person seeking benefits would require reading terms into the statute that are not there and that are not required to make the statute effective, contravening *Morin, supra*, 2005 VT 15, ¶ 7. Moreover, applying Section 649 equally to all claimants accords with the legislative purpose of making liability limited and determinate. Cf. *Chatham Woods, supra*, 2008 VT 70, ¶ 9.

*The Laird Case and the Independent Status of Dependents’ Claims for Death Benefits*

11. Claimants argue that the Vermont Supreme Court’s decision in *Laird v. State of Vermont Highway Dep’t*, 112 Vt. 67 (1941) requires a different result.
12. In *Laird*, the injured worker suffered a cerebral hemorrhage while working as a watchman at the state’s garage. He was found lying in the snow in a comatose state and was totally disabled from the time he was found until his death several months later. While he was alive, he sought workers’ compensation benefits and prevailed at a hearing before the Commissioner. The employer appealed, and the worker died while the appeal was pending. After his death, the Vermont Supreme Court overturned the Commissioner’s award of benefits based on a lack of evidence causally connecting the worker’s injury to his employment. The worker’s widow then sought death benefits, which the Commissioner denied on *res judicata* grounds, holding that her claim was derivative of her husband’s and stood on no higher ground than his. *Id.*, 112 Vt. at 70-72.

13. The Vermont Supreme Court again reversed, holding that the widow was not a party to her husband's action and was not in privity with the rights he claimed during his life. It reasoned that the widow's rights did not come into existence until her husband's death, while her husband's rights accrued the moment of his injury. *Id.*, 112 Vt. at 80-82. It also noted that the widow's rights to benefits did not derive from her husband's rights, but "came to her directly from the statute[.]" *Id.* As such, "the adjudication in his case d[id] not bar [her] right to recover by reason of estoppel, *res judicata*, or for any other discernible reason." *Id.* (italics added).
14. While it is undisputed that *Laird* stands for the proposition that a dependent's claim for death benefits is independent of the injured worker's rights for *res judicata* purposes, the parties dispute *Laird*'s implications for affirmative defenses *other than res judicata*.
15. Claimants advocate for an expansive interpretation of *Laird*, under which an employer may not assert any defense to a dependent's claim for death benefits that it might have been able to assert in response to a living worker's claim. In support of this argument, they cite Larson's Workers' Compensation Law<sup>3</sup> and persuasive cases from other jurisdictions holding that a worker's failure to assert a claim within a statutory limitations period,<sup>4</sup> election of remedies,<sup>5</sup> or execution of a contractual release<sup>6</sup> does not bar a dependent's subsequent claim for death benefits. Claimants argue that nothing in the Act distinguishes the defenses of *res judicata*, statute of limitations, election of remedies, or release from the defenses in Section 649 of the Act, and that therefore none of those defenses may apply in a dependent's claim for death benefits.
16. Defendant disagrees with this analysis and argues that because *Laird* was only concerned with *res judicata*, the only conclusion that follows from that case is that an injured worker's failure to prevail on a claim during his or her life does not preclude that worker's dependents from later bringing an action for death benefits. Even in a death claim, Defendant argues, there must be a compensable claim, and if a claim is barred by a

---

<sup>3</sup> See Larson's Workers' Compensation Law §§ 98.01(1)-(4) (Rev. December 2014) (providing that death benefits are generally not affected by compromises or releases executed by a decedent, by an adverse holding on a decedent's claim, or by a decedent's failure to claim within a statutory period).

<sup>4</sup> E.g., *Fossum v. State Accident Ins. Fund*, 289 Or. 787 (Or. 1980) (holding that as long as widow of injured worker filed claim for death benefits within the applicable limitations period following her husband's death, her right to recovery was not contingent on her husband's filing of a claim for benefits during his lifetime, even if the statutory limitations period applicable to his claim expired prior to his death).

<sup>5</sup> E.g., *Mikolich v. State Indus. Acc. Comm'n*, 212 Or. 36 (Or. 1957) (widow of injured worker permitted to argue that her husband was permanently and totally disabled prior to his death, even though he had been receiving temporary total disability benefits during his life).

<sup>6</sup> E.g., *Rosander v. Copco Steel & Eng'g Co.*, 429 N.E.2d 990 (Ind. Ct. App. 1982) (widow's tort claim for loss of consortium not barred by her late husband's settlement and release because she was not a party to that contract); *Kibble v. Weeks Dredging & Const. Co.*, 161 N.J. 178 (N.J. 1999) (injured worker's settlement and release of workers' compensation claim not binding on spouse in her subsequent claim for dependency benefits unless spouse or other adult dependent knowingly, intelligently, and voluntarily waived future dependency benefits).

statutory defense, there can be no compensation, whether in the form of death benefits or otherwise.<sup>7</sup>

17. In analyzing *Laird's* effect on affirmative defenses other than *res judicata*, it is useful to distinguish between two categories of affirmative defenses: (1) procedural defenses that relate to the handling, prosecution, or disposition of an injured worker's claim during his or her life, and (2) substantive defenses that relate to the nature of the accident giving rise to a claim for benefits.
18. Defenses such as *res judicata*,<sup>8</sup> limitations,<sup>9</sup> election of remedies,<sup>10</sup> and contractual release<sup>11</sup> are squarely in the first category. These defenses exist to ensure the structural integrity of the adjudicative process and the finality of the resolution of claims that an injured worker actually asserted or could have asserted during his or her life. *Laird's* holding implies that defenses in this first category should be analyzed separately for an injured worker's claim and a dependent's claim. For instance, while an injured worker's failure to file within a statutory limitations period should bar his or her claim, that bar should not apply to a person who did not have a legally cognizable ownership interest in that claim and had no right to assert any claim until after the worker's death. However, if a deceased worker's dependent waits too long after the worker's death to assert a claim for death benefits, that separate and independent claim may still be subject to its own limitations defense. The same analysis applies to the other defenses in this first category, as these defenses all relate to the finality of an actual or potential claim with respect to the owner of that claim.
19. The substantive defenses in the second category, by contrast, go to the question of whether there was a compensable accident in the first instance. The Section 649 defenses of willful intent to injure, intoxication, and failure to use a safety appliance are all in this category. Section 649's disallowance of compensation for accidents caused by these types of employee misconduct stems from a legislative judgment that certain accidents

---

<sup>7</sup> Defendant also cites *Veach v. SG Realty d/b/a Gateway Hotel*, Opinion No. 47-98WC (August 31, 1998), in which the Department denied a claim for death benefits because of the decedent's intoxication at the time of his death. As Claimants accurately note here, however, the employer's right to assert the intoxication defense was not specifically challenged in *Veach*. Thus, although *Veach* serves as precedent for the Department's application of that defense in a claim for death benefits, it does not stand for the affirmative proposition that an employer has the right to assert it over a claimant's objection because that issue was not presented for separate consideration. While *Veach* is certainly relevant, it does not resolve the narrow issue disputed here.

<sup>8</sup> *Res judicata* bars relitigation of the *same claim or defense* if there is a prior final judgment in which the *parties*, subject matter, and causes of action are substantially identical. See *Daiello v. Town of Vernon*, 2018 VT 17, ¶ 12, as amended (Mar. 19, 2018).

<sup>9</sup> A limitations defense arises when an injured worker does not assert a claim in a timely fashion. See generally *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 219 (2000).

<sup>10</sup> A defense based on an election of remedies arises when a party has two alternative and inconsistent remedies, and is determined by a manifestation of choice. *Sabourin v. Woish*, 117 Vt. 94, 98 (1952).

<sup>11</sup> A release arises when an employee has released a claim in a settlement agreement approved by the Department. See generally 21 V.S.A. § 662(a).

stray so far from a worker's duties that allowing compensation for them would be unfair to employers and effectively reward employee misconduct. *See, e.g., Cyr v. McDermott's, Inc.*, 2010 VT 19, ¶ 18 (noting that the Legislature's intent in enacting Section 649 was "to void compensation resulting from certain types of malfeasance.").

20. Where the Legislature has deemed certain classes of accidents so far removed from an employee's work duties that "[c]ompensation shall not be allowed" for them, *see* 21 V.S.A. § 649, nothing about the legal separateness of the injured worker's claim and his or her dependents' claims requires that compensation for a non-compensable injury should be allowed for one class of claimant but not the other.
21. Instead, the legal independence of dependents' claims under *Laird* simply means that a judicial finding on the merits of a Section 649 defense in a living injured worker's claim would not preclude a contrary resolution on that issue in a subsequent claim by his or her dependents. However, nothing in *Laird* precludes the *assertion* of the Section 649 defenses in response to a claim by either the worker or his or her dependents.
22. For all these reasons, I conclude that Defendant may lawfully assert defenses under Section 649 in response to Mr. Goldsmith's children's claim for death benefits.

**ORDER:**

Claimants' Motion for Partial Summary Judgment is **DENIED**, and Defendant's Motion for Partial Summary Judgment is **GRANTED**. Defendant may lawfully assert the affirmative defenses of intoxication and failure to use a safety appliance under 21 V.S.A. § 649 in this case.

**DATED** at Montpelier, Vermont this 28th day of August 2019.

---

Lindsay H. Kurrle  
Commissioner