

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Jodi McGee

Opinion No. 04-20WC

v.

By: Stephen W. Brown  
Administrative Law Judge

Fair Haven Volunteer Rescue

For: Michael A. Harrington  
Interim Commissioner

State File No. LL-61381

**RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**APPEARANCES:**

Kevin E. Brown, Esq., for Claimant  
Jennifer K. Moore, Esq., for Defendant

**ISSUE PRESENTED:**

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

**EXHIBITS:**

Defendant's Statement of Undisputed Facts (DSUF)

Defendant's Exhibit A: Transcript of March 12, 2019 Recorded Conversation between Claimant and Insurance Adjuster Drew LaPointe  
Defendant's Exhibit B: May 2, 2019 Correspondence from Claimant  
Defendant's Exhibit C: Medical Records from Megan Greenleaf, MD of Castleton Family Health Center

Claimant's Exhibit 1:<sup>1</sup> Medical Records from Megan Greenleaf, MD of Castleton Family Health Center (same as pages 2-14 of Defendant's Exhibit C)  
Claimant's Exhibit 2: June 26, 2019 Correspondence from Clinical Psychologist Lori P. Gurney, M.S.  
Claimant's Exhibit 3: Medical Records from Megan Greenleaf, MD of Castleton Family Health Center (same as page 1 of Defendant's Exhibit C)

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<sup>1</sup> Claimant submitted her exhibits unmarked and unnumbered, but they appear in this order.

## BACKGROUND:

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 her employment with Defendant on or about July 1, 2000. *See* DSUF 1. As of March 7, 2019, she was working for Defendant as an Advanced Emergency Medical Technician. DSUF 1; Defendant's Exhibit A. On that date, she experienced a panic attack that prompted her to file this workers' compensation claim. *See generally id.* At issue in the present motion is whether Claimant's psychological injury occurred before or after July 1, 2017, the effective date of certain statutory amendments discussed *infra* at Conclusions of Law Nos. 2-8.
2. In August 2015, Claimant presented to her physician Megan Greenleaf, MD, with complaints of psychological stress from multiple sources, some work-related and some not. At that time, Claimant had recently lost five pets, was estranged from her then-incarcerated daughter, was caring for her elderly mother who had Alzheimer's disease, and was experiencing financial difficulties. She also told Dr. Greenleaf that she thought she had "PTSD from a bad squad call" in May 2015. *See* Defendant's Exhibit C. Dr. Greenleaf did not diagnose Claimant with PTSD at that time but assessed her with anxiety related to situational stress. She recommended online therapy sessions because Claimant did not want to take medications and did not have time for in-person therapy. *Id.*
3. In June 2016, Claimant saw Dr. Greenleaf again. Although Claimant reported that she felt well overall and had good energy levels, she was sleeping poorly and experiencing significant stress related to her mother's health, caregiving, and finances. She also told Dr. Greenleaf that her "PTSD [was] bothering her a lot." *See* Defendant's Exhibit C. At that time, Claimant was taking Lorazepam, which she said helped "with her PTSD symptoms." *Id.* Dr. Greenleaf again assessed her with anxiety related to situational stress but did not diagnose her with PTSD. *Id.*
4. In December 2017, Claimant saw Dr. Greenleaf again for a routine follow-up. *See* Defendant's Exhibit C. She again stated that she felt well but had sleep difficulties, and she complained of attention problems and anxiety, which she said she managed with marijuana brownies. *Id.* Dr. Greenleaf assessed her with multiple conditions during that visit, including "Post-traumatic stress disorder, chronic," explaining that "[s]he qualifie[d] for this diagnosis given her traumatic paramedic calls and its [sic] impact on her life and health." *Id.* Defendant's Exhibit C.
5. In late February 2019, Claimant contacted clinical psychologist Lori Gurney, MS, and scheduled an appointment for the following month. Claimant had responded to seven calls during the previous six months involving deaths, including six individuals she had known personally. She also pronounced her own mother's death in September 2018; although she was not at work when she did so, she alleges that that incident contributed to her present mental health status. *See* Defendant's Exhibit A.

6. In her letter appealing Defendant’s denial of her claim, Claimant stated that she scheduled the appointment with Ms. Gurney “[b]ecause of PTSD symptoms from numerous years of working rescue[.]” See DSUF 2; Defendant’s Exhibit B. Additionally, in a recorded statement with Defendant’s insurer’s adjuster, Claimant explained her reasons for setting that appointment by stating, “it’s taken a toll on me ... 30 years of this.” Defendant’s Exhibit A.
7. The March 7, 2019 panic attack that prompted Claimant to file this workers’ compensation claim occurred while she was responding to a call involving an elderly man who had fallen and injured his shoulder. Claimant stated that this incident was not among the worst calls she had experienced, but it caused her anxiety and PTSD to “kick in.” See Defendant’s Exhibit A.
8. Between March and June 2019, Claimant met with Ms. Gurney eleven times, during which she reported “ongoing work traumas that [had] occurred over the past several years,” but noted that the preceding seven months had been particularly difficult. See Claimant’s Exhibit 2. In Ms. Gurney’s opinion, Claimant presently meets the criteria for PTSD. However, based on her description of her symptoms over the past several years, Ms. Gurney “would debate” whether she met the full criteria for a diagnosis of PTSD prior to February 2019.” *Id.*

## 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 or 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 “the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material.” *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 14.

### Statutory Amendments Affecting the Analysis of Some Claims for Psychological Injuries

2. Vermont law recognizes two types of potentially compensable psychological injuries: those that stem from a physical injury (“physical-mental”) and those that are solely

psychological (“mental-mental”). *B.H. v. State of Vermont*, Opinion No. 17-17WC (December 22, 2017). Because Claimant does not allege any physical injuries giving rise to her psychological condition, this case presents a mental-mental claim.

3. Due to a substantive amendment to Section 601 of the Workers’ Compensation Act that took effect July 1, 2017, the standard applicable to mental-mental claims depends on whether Claimant’s psychological injury occurred before or after that date. *See* 21 V.S.A. §§ 601(11)(I)-(J) (amended statute); 1 V.S.A. § 214(b)(2) (providing that the amendment or repeal of a statute may not “affect any right, privilege, obligation, or liability acquired, accrued, or incurred prior to the effective date of the amendment or repeal”); 2017 Vermont Laws No. 80 (S. 56), § 23 (providing effective date of amendment to 21 V.S.A. § 601, *supra*); *Bergeron v. City of Burlington*, Opinion No. 14-18WC (October 15, 2018) (holding that the amendment to Section 601, *supra*, is substantive and therefore not retroactive).
4. In the context of substantive amendments to workers’ compensation laws that affect a claimant’s right to compensation, the choice between pre- and post-amendment law is governed “by the law in force at the time of occurrence of such injury.” *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 “time the injury occurs” control 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).
5. Therefore, if Claimant’s psychological injury occurred before July 1, 2017, her right to compensation for that injury is governed by the pre-amendment standard; otherwise, it is governed by the post-amendment standard. *Bergeron, supra*, Conclusion of Law No. 9.
6. For psychological injuries occurring before July 1, 2017, a claimant seeking compensation for a mental-mental injury must satisfy a two-part test: “First, 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.” *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 is evaluated against a “control group” of “similarly situated employees” performing the “same or similar work.” *Crosby v. City of Burlington*, 2003 VT 107, ¶¶ 17-24.
7. For psychological injuries occurring on or after July 1, 2017, diagnoses of PTSD in certain first responders, including rescue and ambulance workers, are “presumed to have been incurred during service in the line of duty and shall be compensable[.]” 21 V.S.A. § 601(11)(I)(i).<sup>2</sup>

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<sup>2</sup> This presumption also applies 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). However, this three-year grace period applies

8. The amendment also changed the control group for evaluating the extraordinariness of the stressors giving rise to a claimant's mental injuries. Instead of comparing a claimant's stressors to those encountered by similarly situated employees performing similar work, the amendment provides that for psychological injuries occurring on or after July 1, 2017, a claimant's work-related stress or event must be "extraordinary and unusual in comparison to pressures and tensions experienced by the average employee across all occupations[]" in order for the claim to be compensable. 21 V.S.A. § 601(11)(J)(i)(I); *Bergeron, supra*, Conclusion of Law No. 6; *contra Crosby, supra*.

#### Date of Claimant's Psychological Injury

9. In determining the date of Claimant's psychological injury, neither the date of her traumatic experiences nor the date of diagnosis (or even the date on which she would have qualified for a specific diagnosis) is controlling. *See Bergeron, supra*, Conclusions of Law Nos. 11-16 (citing *Holmes v. James Gold, DDS*, Opinion No. 31-00WC (October 2, 2000)).
10. In *Holmes*, one of the issues was whether a claim for carpal tunnel syndrome was time-barred under 21 V.S.A. 656(a)'s six-month reporting requirement. That issue depended in part on the date by which the claimant's hand and wrist condition and its relationship to work had become reasonably discoverable and apparent. The claimant in *Holmes* sought treatment for a hand and wrist condition related to her work in September 1994, but her physician had no basis to diagnose carpal tunnel syndrome at that time; instead, he diagnosed an overuse syndrome that he expected would improve. Fourteen months later, in November 1995, her physician diagnosed her with carpal tunnel syndrome. The claimant did not report her injury to her employer until that time. On those facts, the Department held that, "[r]egardless of the precise diagnosis, ... 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." *Id.*, Conclusion of Law No. 4. Accordingly, the limitations period began to run in 1994, even though the claimant's physician lacked a basis to diagnose carpal tunnel syndrome at that time.<sup>3</sup>
11. Of course, a claimant's date of injury, which determines whether statutory amendments apply, is not always the same as the date on which the injury and its relationship to work becomes reasonably discoverable and apparent, which determines when the limitations period begins to run. *See Bergeron, supra*, Conclusions of Law Nos. 14-16. This follows from the potential for some injuries to persist for some time before an injured worker can reasonably recognize the injury or attribute it to work.

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only to first responders with dates of injury on after July 1, 2017. *See Bergeron, supra*, Conclusions of Law Nos. 17-19.

<sup>3</sup> The claimant's claim in *Holmes* was not time barred, however, because she established that the defendant had not suffered any prejudice from the reporting delay. *Id.*, Conclusion of Law No. 8.

However, it is clearly not possible for the date of injury to occur *after* the date on which the injury and its relation to work becomes reasonably discoverable and apparent. Thus, if a claim for an injury would be ripe for limitations purposes by a specific date, it follows that the injury must have occurred no later than that date.

12. In this case, Claimant told her physician that bad calls from her work as a first responder were adversely affecting her mental health as early as 2015, and her physician diagnosed her with anxiety due to situational stress at that time. *See* Finding of Fact No. 2, *supra*. Her physician diagnosed her with chronic PTSD two years later in December 2017 because of her history of traumatic calls. *See* Finding of Fact No. 4, *supra*. In 2019, in both her appeal letter and in a recorded conversation, Claimant attributed her current mental health condition to the cumulative toll of many years of first responding. *See* Findings of Fact Nos. 6-7, *supra*. Additionally, Ms. Gurney specifically acknowledged the cumulative effect of Claimant's trauma over multiple years on her current mental health. *See* Finding of Fact No. 8, *supra*. Taken together, I conclude that the undisputed facts of this case would make Claimant's psychological injury and its relationship to work reasonably discoverable and apparent by 2015 under *Holmes*, *supra*. Therefore, her injury giving rise to this claim occurred by that time as a matter of law.
13. Neither the fact that Claimant's physician did not diagnose her with PTSD until December 2017 nor the fact that Ms. Gurney questions whether that diagnosis was appropriate until 2019 changes the result. Even if, as Ms. Gurney appears to suggest, Claimant only had anxiety from work-related experiences in 2015 and 2016 and subsequent traumatic experiences at work caused that anxiety to progress into PTSD in 2019, Claimant's injury would be precisely analogous to the overuse syndrome in *Holmes* that developed into carpal tunnel syndrome over fourteen months. *Cf. Holmes*, *supra*, Conclusion of Law No. 4.
14. Nor does Claimant's allegation that her work-related experiences during the roughly six-month period preceding March 7, 2019 were more severe than her prior experiences change the result. Although Claimant may have been highly functional for years despite her traumatic experiences and psychological symptoms, the record is clear that she experienced a psychological injury from her experiences at work before July 1, 2017, and she has expressly acknowledged the cumulative toll that decades of work-related traumas have taken on her mental state. *See* Finding of Fact No. 6, *supra*. While she appears to have been able to work despite her psychological injury until March 2019, the record shows that her recent series of traumatic calls contributed to the progress of an existing injury that had been present and lingering for several years and did not constitute a new injury.
15. Nor does it matter that Claimant's stressors in 2015 appeared to have involved a mixture of work-related and non-work-related factors, while her more recent stressors have been more uniformly occupational. Dr. Greenleaf's 2015 notes make it clear that at least one bad call at work in May 2015 contributed to Claimant's psychological condition at that time. Therefore, Claimant's work was at the very least a contributing

cause of her psychological injury at that time. That was enough to make her injury work-related and subject it to the workers' compensation laws. *See McNall v. Town of Westford*, Opinion No. 08-19WC (May 10, 2019), Conclusion of Law No. 12 ("To be clear, if Claimant's 2015 fall was one of several contributing factors, this claim would be compensable.").

16. For all of these reasons, Claimant's work-related psychological injury occurred before July 1, 2017, and her claim for benefits based on her work-related psychological injury is governed by the law that was in effect before that date, and not by the amendments discussed *supra* at Conclusions of Law Nos. 2-8, *supra*.

*A Formal Hearing Will Be Necessary to Assess the Compensability of Claimant's Injuries Under the Pre-Amendment Standard*

17. Although Defendant has moved for summary judgment rather than partial summary judgment, it does not present evidence or argument concerning the analysis of Claimant's injury under the pre-amendment law. A formal hearing will therefore be necessary to assess the merits of this claim under the law that applies to psychological injuries sustained before July 1, 2017.

**ORDER:**

Based on the foregoing findings of fact and conclusions of law, Defendant's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. Claimant's claim for psychological injuries is governed by the law in effect before July 1, 2017, but a formal hearing will be necessary to assess her claim under that law. To the extent that Defendant seeks any broader holding, its Motion is **DENIED**.

**DATED** at Montpelier, Vermont this 21st day of February 2020.

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Michael A. Harrington  
Interim Commissioner