STATE OF VERMONT
DEPARTMENT OF LABOR

John West

v.

North Branch Fire District #1

Opinion No. 14-20WC

By: Beth A. DeBernardi
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. EE-61277

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

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

ISSUE PRESENTED:

Is Defendant[1] entitled to judgment in its favor as a matter of law on Claimant's claim for permanent total disability benefits under the pre-amendment version of 21 V.S.A. § 644(a)(6)?

EXHIBITS:

Claimant's Statement of Undisputed Facts filed July 30, 2020
Claimant's Exhibit 1: Claimant's Affidavit dated July 28, 2020

Defendant's Response to Claimant's Statement of Undisputed Facts filed August 4, 2020
Defendant's Exhibit A: Neuropsychological evaluation conducted by Nancy Hebben, Ph.D.

FACTUAL AND PROCEDURAL BACKGROUND:

1. On March 14, 2013, Claimant sustained a compensable work-related head injury and other injuries while working as Defendant's employee. *West v. North Branch Fire District #1*, Opinion No. 10-19WC (June 11, 2019) ("*West I*"), at Finding of Fact Nos. 1-2.

2. Claimant has filed a Notice and Application for Hearing (Form 6) alleging that he is permanently and totally disabled as a consequence of his March 14, 2013 work injury pursuant to 21 V.S.A. § 644(a)(6). That statute was amended effective July 1, 2014. Claimant contends that the current version of the statute applies to his claim. The current version deems a disability caused by the following injury to be permanent and total: "an injury to the skull resulting in severe traumatic brain injury causing

[1] Claimant has moved for summary judgment in *Defendant's* favor.

permanent and severe cognitive, physical, or psychiatric disabilities." 21 V.S.A. § 644(a)(6), effective July 1, 2014. *Claimant's Statement of Undisputed Facts ("Claimant's Statement") ¶ 3; see generally West I.*

3. Defendant contends that the pre-amendment version of 21 V.S.A. § 644(a)(6) applies to this claim. The pre-amendment version of the statute provides that a claimant shall be deemed permanently and totally disabled if he or she sustained "an injury to the skull resulting in incurable imbecility or insanity." 21 V.S.A. § 644(a)(6), effective prior to July 1, 2014. *Claimant's Statement ¶ 4; see generally West I.*

4. In January 2019, Defendant filed a *Motion for Declaratory Judgment and/or Summary Judgment* seeking a determination as to which version of 21 V.S.A. § 644(a)(6) applies to this claim and judgment in its favor under the applicable version of the statute. *Claimant's Statement ¶ 5; see generally West I.*

5. On June 11, 2019, the Department ruled that the pre-amendment version of 21 V.S.A. § 644(a)(6) applies to this case. *See West I.* However, the Department did not grant summary judgment in Defendant's favor because there were material facts in dispute. *Id.*; *Claimant's Statement ¶ 6.*

6. On June 20, 2019, Claimant filed a notice of appeal to the Vermont Supreme Court and sought permission for an interlocutory appeal on the issue of which version of the statute applies to his claim. The Department granted his motion for interlocutory appeal. *West v. North Branch Fire District #1*, Opinion No. 10A-19WC (July 3, 2019) ("*West II*"). On July 23, 2019, the Vermont Supreme Court found that Claimant did not have the right to bring a direct appeal because there was no final judgment on his request for benefits. Further, the Court dismissed his interlocutory appeal as "improvidently granted." *West v. North Branch Fire District #1*, Supreme Court Docket No. 2019-232, Entry Order dated July 23, 2019. Claimant's motion for reconsideration was denied. *Id.*, Entry Order dated August 19, 2019.

7. Following the dismissal of Claimant's interlocutory appeal, the Department scheduled his permanent total disability claim for formal hearing in September 2020. However, Claimant does not wish to proceed with a formal hearing where his burden of proof is to establish himself as suffering from either "incurable imbecility or insanity." *Claimant's Affidavit,* at 5. He states that he finds these terms "vague and ambiguous," as well as "highly offensive and demeaning." *Id.*

8. Accordingly, Claimant has requested that summary judgment issue in *Defendant's* favor that he is not permanently and totally disabled under the pre-amendment version of the statute. By making this request, Claimant seeks to avoid a formal hearing before the Department and expedite an appeal to the Vermont Supreme Court. On appeal, he plans to argue that the current version of the statute applies. If his appeal is successful, he envisions a formal hearing on remand where the Department will apply the current version of 21 V.S.A. § 644(a)(6). If his appeal is not successful, he recognizes that the judgment in Defendant's favor will remain in full force and effect. *See Claimant's Affidavit*, at 6-7.

9. Defendant does not oppose Claimant's summary judgment motion. However, it contends that judgment cannot be based simply on Claimant's unwillingness to go to hearing under a standard that he finds offensive; it must be based on a finding that no material facts are in dispute and that Defendant is entitled to judgment as a matter of law. Accordingly, Defendant has submitted Dr. Hebben's neuropsychological evaluation of Claimant to support its position that he is not permanently and totally disabled under the pre-amendment version of § 644(a)(6). *Defendant's Exhibit A.*

10. In response to Defendant's filing, Claimant concedes that he does not have sufficient evidence to establish a prima facie case of entitlement to permanent total disability benefits under the pre-amendment standard. *See Claimant's Reply to Defendant's Response to Claimant's Motion for Summary Judgment*, at 2.

11. On August 25, 2020, the Department held a status conference with counsel for the parties to address the pending motion. Claimant's counsel confirmed that his client accepts the risks involved in this appeal, including the risk that the judgment in Defendant's favor may be upheld. The parties also confirmed that they had notice and a reasonable time to respond to the prospect that the Department might grant judgment for the non-moving party.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton*, *supra* at 19; *Morse v. John E. Russell Corp*., Opinion No. 40-92WC (May 7, 1993).

2. Claimant concedes that he has insufficient evidence to make a prima facie case of entitlement to benefits under the pre-amendment version of 21 V.S.A. § 644(a)(6). Finding of Fact No. 10 *supra*.

3. Defendant has submitted Dr. Hebben's neuropsychological evaluation as evidence that Claimant is not permanently and totally disabled under the pre-amendment version of § 644(a)(6). *Defendant's Exhibit A*. In the absence of any evidence from Claimant to establish prima facie case, however, I find that Dr. Hebben's evaluation is immaterial to my determination here. *See, e.g., Miller v. Cersosimo Lumber Co.,* Opinion No. 55-96WC (October 5, 1996) (burden shifts to defendant only after claimant makes a prima facie case); *Dunroe v. Monro Muffler Brake, Inc*., Opinion No. 17-15WC (July 28, 2015) (even in the summary judgment context, claimant must supply sufficient evidence to establish a prima facie case).

4. V.R.Civ.P. 56 provides that a court shall grant summary judgment if the moving party shows that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. Here Claimant has conceded that he has insufficient evidence to establish a prima facie case of permanent total disability under the pre-amendment version of the statute. Accordingly, I conclude that there are no genuine issues of material fact and that Claimant cannot meet his burden of proof as a matter of law.

5. This case has an unusual posture in that Claimant is seeking summary judgment in Defendant's favor. V.R.Civ.P. 56(f) permits granting summary judgment to the non-moving party after notice and a reasonable time to respond. During the August 25, 2020 status conference, the parties confirmed that they had notice and a reasonable time to respond for purposes of the rule. Further, as Claimant's motion itself seeks judgment in the opposing party's favor, such a ruling will not be a surprise to either party.

6. Accordingly, I conclude that Defendant is entitled to summary judgment in its favor that Claimant is not permanently and totally disabled under the pre-amendment version of 21 V.S.A. § 644(a)(6). *See, e.g., Estate of George v. Vermont League of Cities and Towns*, 2010 VT 1, ¶ 13 (when a party fails, after adequate discovery, to make a sufficient showing to establish an element essential to its case and on which it has the burden of proof, summary judgment is required).

ORDER:

Summary judgment in Defendant's favor is hereby **GRANTED.** Claimant's claim for permanent total disability benefits under the pre-amendment version of 21 V.S.A. § 644(a)(6) is hereby **DENIED.**

DATED at Montpelier, Vermont this 3rd day of September 2020.

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Michael A. Harrington
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.*