

Deborah Lydy v. Trustaff Inc (February 8, 2012)

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STATE OF VERMONT

DEPARTMENT OF LABOR

Deborah Lydy Opinion No. 05-12WC

v. By: Jane Woodruff, Esq.

Hearing Officer

Trustaff, Inc.

For: Anne M. Noonan

Commissioner

State File No. Z-63780

OPINION AND ORDER

Hearing held in Montpelier, Vermont on November 8 and 14, 2011

Record closed on December 22, 2011

APPEARANCES:

Christopher McVeigh, Esq., for Claimant

Jeffrey Dickson, Esq., for Defendant

ISSUES PRESENTED:

1. Did Claimant suffer a psychological injury as a result of her May 20, 2008 work-related accident?
2. Did Claimant suffer a left ankle injury as a result of her May 20, 2008 work-related accident?
3. Did Claimant suffer a left knee injury as a result of her May 20, 2008 work-related accident?
4. Should Defendant's contribution to Claimant's group health insurance premium be included in her average weekly wage and compensation rate calculation?

EXHIBITS:

Joint Exhibit I: Medical records

Claimant's Exhibit 1: Dr. Youngjohn's MMPI-2-RF Interpretive Report
(under seal)

Claimant's Exhibit 2: July 22, 2010 letter detailing health insurance premium contributions

Claimant's Exhibit 3: Dr. Selz's MMPI-2 Extended Score Report (under seal)

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CLAIM:

Temporary total disability benefits to include the value of Defendant's contributions to Claimant's group health insurance premiums pursuant to 21 V.S.A. §642

Medical benefits pursuant to 21 V.S.A. §640

Costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.
2. Judicial notice is taken of all relevant forms contained in the Department's file relating to this claim.

Claimant's May 2008 Work-Related Accident

3. Claimant is a licensed practical nurse who worked for Defendant as a “traveler.” That is, even though she lived in New Jersey with her son she agreed to a 13-week placement in a Rutland, Vermont nursing home. As part of her remuneration, Defendant provided her with local housing.

4. On May 20, 2008 Claimant reported to work for her third shift duty. As she was being briefed on the prior shift’s activities, she noticed a patient’s call light activate. Claimant responded to the call light and entered the patient’s room. The room was dark except for a night light.

5. The patient appeared to be sleeping as Claimant approached her bed, which was low to the floor and did not have side rails. As Claimant bent down to ask the patient how she could assist her, the patient reared up, grabbed Claimant by the hair, jerked her down and started shaking her violently. For two or three minutes she shook Claimant by the hair, digging her nails into Claimant’s scalp and drawing blood. The incident ended when another nurse came to Claimant’s aid and disentangled her from the patient’s grasp.

6. Claimant testified credibly that during the attack she felt afraid and helpless. As a medical professional, she did not consider it an option to defend herself against her patient’s aggression.

7. After she collected herself, Claimant realized that both her left knee and her left foot hurt, and also that she had a burning sensation in her neck. She ended her shift early and went to the emergency room. There she was diagnosed with an acute cervical strain and a fracture of her left great toe. For her neck injury she was advised to apply ice and to wear a sling to immobilize her left arm. For her toe fracture she was instructed to wear orthotic shoes. The emergency room records do not reference any complaints of, or treatment for, left foot or knee pain.

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8. Defendant accepted Claimant’s neck and left toe injuries as compensable and began paying workers’ compensation benefits accordingly.

9. Claimant was released to return to desk work only in three days’ time. Unfortunately, Defendant had no desk duty available, and instead advised her that unless she was 100 percent recovered it would not allow her to return to work. In that event, furthermore, it would no longer pay for her housing in Vermont. Claimant could not afford this. Having no personal ties to Vermont outside of her job, she decided to move with her son to Arizona.

10. Claimant, her son and his fiancé moved to Arizona almost immediately. In July 2008 she obtained employment at Desert Life Rehabilitation and Care Center, a long term care facility. Claimant worked in different capacities for Desert Life’s parent company until November 2009. At that point, her treating physician disabled her from working on account of her cervical injury and Defendant commenced paying temporary total disability benefits. As of the formal hearing, Claimant had not yet returned to work.

Claimant’s Psychosocial History

11. Claimant suffered through a physically and emotionally abusive childhood and adolescence. She ran away when she was 14 years old and hitchhiked to the Woodstock music festival when she was 15. When she was 17, she gave birth to a child, but her mother told her it was stillborn and then secretly put it up for adoption.

12. When Claimant was 18 years old she was the victim of a brutal sexual assault. Her assailant pulled her by her hair from her car one night, dragged her to the edge of the woods and repeatedly assaulted her sexually at gunpoint. When Claimant struggled against her

attacker, he subdued her by grabbing her hair and pulling her to the ground.

13. Claimant never received any type of therapeutic intervention for this horrific crime, though she did attempt to overdose shortly afterwards. Ultimately she compartmentalized the psychological effects of the assault and in her own credible words, “just moved on.”

14. When Claimant was in her twenties she obtained her GED, and then became certified as a respiratory therapist. After nine years in this profession she returned to school and obtained her licensed practical nurse certificate. Claimant had three failed marriages, and was the sole bread winner for her four sons. In order to provide for her children, she consistently worked throughout her adult life, sometimes moonlighting at a second job or working overtime to make ends meet.

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Claimant’s Psychological Symptoms after Moving to Arizona

15. Within a few months after settling in Arizona, Claimant’s sons began to notice that she was behaving strangely. She constantly cried, and refused to leave the house for any reason other than to go to work. She feared for her safety, and became hyper-vigilant about checking and rechecking her doors and windows to make sure they were locked. She experienced anxiety attacks while driving, and therefore refused to do so. At work she compulsively counted and recounted patient medications for fear of making a mistake. She was afraid of the dark. Previously Claimant had been a social person, but now she no longer found pleasure in activities she used to enjoy, and was becoming estranged from her sons as well.

16. Claimant ultimately developed night terrors. Several times a week she dreamed about the sexual assault that had occurred when she was 18 years old, something she had never done before. These and her other psychological symptoms still persist. At the formal hearing Claimant credibly described her existence as, “I don’t have a life.”

Claimant’s Medical Treatment in Arizona

17. Claimant had difficulty treating for her accident-related health issues when she first arrived in Arizona, because the medical providers there were reluctant to accept out-of-state workers’ compensation coverage. Defendant finally arranged for her to see Dr. Ransom, an orthopedic surgeon, nine months after she arrived there for treatment of her cervical spine injuries.¹

(a) Claimant’s Left Ankle Injury

18. In June 2009 Claimant began treating with Dr. Ransom for complaints of left ankle pain, which she attributed to her May 2008 work accident. In follow-up appointments, Dr. Ransom observed lateral swelling on the left side of Claimant’s left foot and mild tenderness in the area as well.

19. Dr. Ransom diagnosed Claimant with a left ankle sprain, but never stated an opinion as to whether this injury was causally related to her May 2008 work accident or not.

20. In December 2009 and September 2010, Claimant underwent independent medical examinations as to her cervical spine injury with Dr. Eskay-Auerbach, an orthopedic surgeon. During the course of her examinations, Dr. Eskay-Auerbach noted that the lateral aspect of Claimant’s left foot was swollen and tender to palpation. She did not offer any diagnosis for this condition.

¹ Defendant had accepted as compensable Claimant’s neck strain and left upper extremity radiculopathy. As treatment for these injuries she ultimately underwent cervical fusion surgery.

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21. Dr. Eskay-Auerbach concluded that Claimant's left ankle injury most likely was not causally related to her May 2008 work accident. As grounds for her conclusion, she noted first, that there was no report of ankle pain in the contemporaneous emergency room record immediately following that incident, and second, that if the pain had been present for a long time, it likely would have been evaluated some time ago. Given the circumstances surrounding Claimant's relocation to Arizona, and particularly the difficulty she encountered in arranging medical care, I find Dr. Eskay-Auerbach's reasoning in this regard somewhat unpersuasive.

(b) Claimant's Left Knee Injury

22. In October and November 2010 Claimant treated with Dr. Arnold, an orthopedic surgeon, for left knee and hip pain. Claimant reported to Dr. Arnold that she had been suffering from left knee pain since her work-related accident in May 2008. Dr. Arnold diagnosed Claimant with tendonitis in her knee and bursitis in her hip. He did not state an opinion as to whether these injuries were causally related to Claimant's work accident or not.

(c) Claimant's Psychological Injury

23. As both Dr. Ransom's and Dr. Arnold's medical records reflect, Claimant consistently denied during her office visits with them that she suffered from depression, anxiety, substance abuse or suicidal ideation. Claimant did acknowledge, in a second independent medical examination with Dr. Eskay-Auerbach in August 2010, that she was depressed. Even then, though, she attributed her depression to difficulty sleeping due to chronic pain, not to any psychological trauma per se.

24. It was not until December 2010 that Claimant first admitted the extent of her psychological distress to a medical provider. Specifically, she reported to Dr. Christiano, the neurosurgeon who was treating her cervical spine injury, that she was experiencing night terrors, had become reclusive and withdrawn and was compulsive about the safety of her home. Upon learning of these psychological symptoms, Dr. Christiano referred Claimant to Dr. Selz, a clinical psychologist, for treatment.

(i) Dr. Selz' Causation Opinion

25. In addition to her credentials as a clinical psychologist, Dr. Selz also is certified as a Diplomate in neuropsychology by the American Board of Professional Neuropsychologists. Dr. Selz' practice includes both evaluation and treatment. While most neuropsychologists do not engage in psychotherapy, Dr. Selz does.

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26. Dr. Selz evaluated Claimant on one occasion, in March 2011. In the course of that evaluation, which lasted for approximately one hour, she administered the MMPI-2, which is the gold standard of personality tests. In Dr. Selz' assessment, Claimant responded truthfully and credibly to the questions put to her. According to the computer-generated interpretation of Claimant's MMPI-2 results, she did not omit any answers and endorsed items consistently and accurately.²

27. Dr. Selz concluded that Claimant's May 2008 work accident triggered repressed emotions dating back to the sexual assault she had suffered when she was 18. While Dr. Selz could not say conclusively why the work injury prompted such a psychological response, she was certain it was the causal link for the following reasons:

- Subsequent to the sexual assault, Claimant was able to carry on with her life without

external evidence of serious problems. She was consistently employed, raised her four sons successfully with little if any support and functioned well both within her family and in her community.

- There was no evidence of any existent psychiatric distress prior to the May 20, 2008 work injury.

- The May 2008 assault at work was similar in many respects to the sexual assault Claimant had endured years earlier. It happened at night and in the dark, the assailant subdued Claimant by dragging her down violently by her hair and it occurred under circumstances in which Claimant felt helpless to defend herself.

I find Dr. Selz's rationale very persuasive.

28. Dr. Selz admitted at the formal hearing that she was not able to fit Claimant's symptoms neatly into the diagnostic criteria for either post-traumatic stress disorder (PTSD) or a major depressive disorder. She prefers a more holistic approach to evaluating and treating patients and does not feel rigidly bound by the specific diagnostic criteria described in the most recent edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. In Dr. Selz' opinion, Claimant clearly suffers from depression and anxiety causally related to the May 2008 work accident, and clearly requires psychological treatment as a result. Whether her condition meets the specific diagnostic requirements for either PTSD or a major depressive disorder does not alter these conclusions in any respect. I find Dr. Selz' reasoning in this regard persuasive.

2 In addition to reviewing the raw data from her own administration of the MMPI-2 to Claimant, Dr. Selz also reviewed the raw data generated by Defendant's expert, Dr. Youngjohn.

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(ii) Dr. Youngjohn's Causation Opinion

29. Defendant's medical expert, Dr. Youngjohn, disagreed with Dr. Selz' analysis. Dr. Youngjohn is board certified in clinical psychology and a Fellow of the National Academy of Neuropsychology. His practice focuses on assessment of psychological and neuropsychological issues for other doctors, nurses, attorneys and employers. Most of his current referrals come from the court system, and involve evaluating criminal defendants' competence to stand trial as well as mitigation of guilt issues.

30. Dr. Youngjohn conducted a day-long neuropsychological evaluation of Claimant in June 2011.³ He also reviewed her medical records.

31. Dr. Youngjohn concluded that Claimant did not suffer any psychological injury as a consequence of her May 2008 work accident. In his estimation, that accident involved a "demented little old lady" who could not have posed a significant physical threat to Claimant. Nor did he perceive that it produced the necessary level of fear, helplessness or horror sufficient to support a diagnosis of PTSD. I find Dr. Youngjohn's attempt to minimize the physical threat posed by the May 2008 attack unpersuasive, particularly given that it involved force sufficient to cause both a serious cervical injury and a fractured toe.

32. Dr. Youngjohn also rejected the possibility that Claimant suffered from any depressive disorder causally related to the May 2008 patient assault. She consistently had denied experiencing depression, anxiety, substance abuse or suicidal ideation when asked by Drs. Ransom and Arnold on several occasions in 2009 and 2010. In Dr. Youngjohn's opinion, her failure to report any such symptoms earlier casts substantial doubt on her assertion now, some two years later, that her psychological issues relate back to her work accident.

33. Dr. Youngjohn interpreted the results of Claimant's MMPI-2 testing⁴ as indicative of her tendency to over-report and exaggerate her psychological symptoms. In fact, he doubted the veracity of both her complaints and her history. He did not believe that Claimant would have had the wherewithal at age 14 to run away from home, or to hitchhike around the country and attend the Woodstock music festival at age 15. Nor did he believe that her mother would have been able to circumvent "hospital policies" so as to give Claimant's newborn baby up for adoption without her knowledge. Very simply put, Dr. Youngjohn did not buy Claimant's story in any respect.

³ A neuropsychological examination differs from a psychological one in that it entails six to eight hours of rigorous testing, the primary purpose of which is to determine if the examinee suffers from cognitive deficits. Dr. Youngjohn acknowledged that neuropsychological testing was not a necessary component of his evaluation in this case, but he performed it anyways because that was what Defendant had requested.

⁴ As Dr. Selz had, Dr. Youngjohn analyzed the raw data from both his own administration of the MMPI-2 to Claimant and from Dr. Selz' testing.

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34. Based both on Claimant's psychological test results and on what Dr. Youngjohn characterized as her lifelong history of maladaptive behavior, he concluded that Claimant suffers from antisocial personality and avoidant personality disorders. He acknowledged the possibility that Claimant had compartmentalized the psychological effects of the sexual assault she suffered when she was 18. He also agreed that Claimant clearly is in psychological distress currently and would benefit from treatment. In Dr. Youngjohn's opinion, however, Claimant's psychological issues were neither caused nor triggered in any way by her May 2008 work accident.

35. Having accepted Claimant's account of the various circumstances underlying her claim as credible, I find Dr. Youngjohn's testimony to be largely unpersuasive. I do not share his incredulity, for example, at the possibility that Claimant could have made her way to Woodstock at age 15. To the extent that Dr. Youngjohn's opinion was based on his strongly held belief to the contrary, I find that it is severely compromised.

Claimant's Employer's Group Health Insurance Premium Contribution

36. In 2009, the last year that Claimant worked, Claimant's then employer, Desert Life Rehabilitation and Care Center, contributed \$3,120.00 to her annual group health insurance premium. It is unclear from the evidence presented whether these contributions covered the period of time after November 2009 when Claimant became disabled from working on account of her cervical spine injury. As a consequence, it is impossible to determine how her average weekly wage and compensation rate calculation would differ were the contributions to be included.

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 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 v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell*

Corp., Opinion No. 40-92WC (May 7, 1993).

Compensability of Claimant's Psychological Injury

2. Claimant alleges that the mechanism of her May 2008 work accident was such that it triggered long-repressed emotions stemming from the sexual assault she endured when she was 18. As a result, she claims, she now suffers from depression and anxiety. Claimant in essence is asserting a "physical-mental" claim, one in which a work-related physical insult causes a psychological injury.

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3. The key component of any workers' compensation claim is the causal nexus between a work-related accident and a resulting injury. 21 V.S.A. 618. Most compensable claims originate with a physical stimulus, a slip and fall, for example, and result in a physical injury, such as a disc herniation or a ligament tear. The same causal nexus is required in a physical-mental claim, the only difference being that the work-related physical stimulus gives rise to a psychological injury rather than a physical one. See, e.g., *Blais v. Church of Christ of Latter Day Saints*, Opinion No. 30-99WC (July 30, 1999); see 3 Lex K. Larson, *Larson's Workers' Compensation* §56.03 (Matthew Bender, Rev. Ed.) and cases cited therein.

4. It is true, as Defendant asserts, that many physical-mental claims involve situations where the limitations induced by a specific physical injury cause psychological consequences. A claimant whose disc herniation precludes him from returning to physically strenuous work becomes depressed and anxious at the prospect of becoming unemployable, for example; the necessary treatment required to restore his psychological well-being is clearly compensable. See, e.g., *Jackson v. True Temper Corp.*, 151 Vt. 592 (1989); *Larson's Workers' Compensation*, supra. Even in this fact situation, however, the critical inquiry is not whether the claimed psychological injury derives directly from a work-related physical injury. It is simply whether it derives from a work-related physical stimulus. *Merrill v. Town of Ludlow*, 147 Vt. 186 (1986).

5. In *Merrill*, the Vermont Supreme Court considered the viability of just such a "physical-mental" claim. The claimant in that case was involved in a work-related accident when the truck he was driving skidded off the road and overturned. He initially claimed to have suffered a thoracic spine injury. Later, a defense expert hypothesized instead that the accident had unmasked a pre-existing hysterical condition, such that the claimant's physical symptoms were actually psychological in origin. The court sustained the claimant's right to recover workers' compensation benefits under this theory of the case. It thus acknowledged that a physical stimulus (the truck accident) could give rise to a compensable psychological injury. *Id.*; see also *Blais*, supra at Conclusion of Law No. 10 (noting evidence that substantiated causal link between claimant's psychological injury and his work-related fall from a ladder).

6. In accepting the viability of the claimant's physical-mental claim in *Merrill*, the Supreme Court also acknowledged the compensability of a claim in which the physical stimulus (there, the truck accident) did not cause a new psychological injury but rather triggered a previously dormant one (hysteria) to become active. In doing so, the court signaled that when a work injury aggravates or exacerbates a pre-existing condition, be it physical or psychological, the result is compensable. *Marsigli's Estate v. Granite City Auto Sales, Inc.*, 124 Vt. 95 (1964). This is simply an extension of the well-settled rule that an employer takes its employees as it finds them. *Brace v. Jeffrey Wallace, DDS*, Opinion No. 28-09WC (July 22, 2009); *Petit v. North Country High School*, Opinion No. 20-98WC (April 28, 1998).

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7. According to Claimant's expert, Dr. Selz, this is exactly what occurred here. The physical

stimulus of the May 2008 assault at work triggered long-repressed emotions from her sexual assault decades earlier, causing the depression and anxiety from which she now suffers. Defendant's expert, Dr. Youngjohn, sees no such causal connection.

8. Where expert opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

9. Neither of the experts here was a treating provider. Both reviewed the pertinent records and conducted a comprehensive evaluation. Both were well qualified to render an opinion as to the causal relationship, if any, between Claimant's current psychological distress and the May 2008 work accident. The only factor that differentiates them, therefore, is the third one, that is, the extent to which their respective opinions were clear, thorough and objectively supported.

10. I conclude that Dr. Selz' opinion is better supported, and therefore more persuasive, than Dr. Youngjohn's. The starting point for her analysis was uncontroverted evidence establishing that for the many years between Claimant's sexual assault and her work accident she functioned well and was psychologically stable. Against that backdrop, Dr. Selz considered the many important similarities between the two assaults. With those similarities in mind, she credibly concluded that although the root cause of Claimant's emotional pain may have extended back to her sexual assault, it was the work accident that triggered the psychological response from which she now suffers.

11. In contrast, Dr. Youngjohn's opinion was based almost entirely on his determination that Claimant was exaggerating both her prior history and her current symptoms. As I do not accept as credible his analysis, nor can I accept as credible his ultimate conclusion.

12. I conclude that Claimant has sustained her burden of proving that her current psychological condition is causally related to the May 2008 work accident, and is therefore compensable. She therefore is entitled to workers' compensation coverage for whatever treatment is determined to be reasonable, necessary and causally related to that condition.

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Compensability of Claimant's Left Ankle and Knee Injuries

13. Claimant contends that she injured both her left ankle and her left knee as a consequence of the May 2008 patient assault. Neither Dr. Ransom nor Dr. Arnold stated an opinion as to the causal relationship, if any, between her ankle and knee complaints and her work injury, however. Absent expert medical evidence, I cannot presume that such a relationship exists.

Laird v. State Highway Department, 110 Vt. 195 (1939). This is true even though I have found the reasoning underlying Dr. Eskay-Auerbach's opinion on this issue to be unpersuasive. Claimant bears the burden of proof, and she has failed to sustain it. *Egbert*, supra.

14. I conclude that Claimant's left ankle and knee injuries are not compensable.

Employer-Paid Contributions to Group Health Insurance Premium as Includable in Average Weekly Wage and Compensation Rate Calculation

15. Claimant argues that the value of her employer's contributions to her group health insurance premium should be included in her average weekly wage and compensation rate calculation. This argument was addressed – and rejected – most recently in *Pelissier v.*

Hannaford Brothers, Opinion No. 26-11WC (September 9, 2011). For exactly the same reasons as enunciated there, I reject the claim here as well.

16. I conclude that Claimant's average weekly wage and compensation rate should be calculated without including the value of any employer-paid contributions to her group health insurance premium.

Costs and Attorney Fees

17. As Claimant has prevailed on her claim for workers' compensation benefits causally related to her psychological injury, she is entitled to an award of those costs that relate directly thereto. *Hatin v. Our Lady of Providence*, Opinion No. 21S-03 (October 22, 2003), citing *Brown v. Whiting*, Opinion No. 7-97WC (June 13, 1997). As for attorney fees, in cases where a claimant has only partially prevailed, the commissioner typically exercises her discretion to award fees commensurate with the extent of the claimant's success. Subject to these limitations, Claimant shall have 30 days from the date of this opinion to submit evidence of her allowable costs and attorney fees

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ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby ORDERED to pay:

1. Medical benefits covering all reasonable medical services and supplies necessitated by Claimant's psychological injuries and causally related to her May 20, 2008 work accident, in accordance with 21 V.S.A. §640; and

2. Costs and attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 8th day of February 2012.

Anne M. Noonan
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.