

REOPENING AND MODIFYING AWARDS IN VERMONT WORKERS' COMPENSATION CASES

INTRODUCTION

Workers' compensation laws provide employees with an efficient, expedient remedy for work-related injuries that operates independently of fault.¹ This remedy was created by statute in response to a marked increase in industrial accidents at a time when common-law remedies were declining.² Compensation is provided by placing the costs of employee injuries on the employer, who then passes them on to the consumer by factoring insurance premiums into the overall cost of the product.³ The result is a progressive social insurance system which protects the work force and distributes the cost among the consuming public.

In Vermont, workers' compensation laws have been in operation since 1915.⁴ When there is no dispute as to liability under the Act, the parties may reach a voluntary settlement agreement regarding compensation.⁵ In disputed cases, a hearing is held to determine liability⁶ and an award of benefits is made, if appropriate.⁷ Either party may appeal a commissioner's decision to the superior court on questions of fact,⁸ or to the supreme court on certified questions of law.⁹

A recurring problem in the administration of workers' compensation cases is a change in the physical condition of the injured employee after a settlement agreement has been reached or an award of benefits has been made. To address this problem, provisions for reopening cases and modifying awards have been incorporated into workers' compensation laws in every jurisdiction.¹⁰ The purpose of these provisions is to provide workers' compensation administrators with the flexibility needed to respond to changes in

1. 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 2.10 (1984); Morrisseau v. Legac, 123 Vt. 70, 76, 181 A.2d 53, 57 (1962).

2. 1 A. LARSON, *supra* note 1, § 4.00.

3. 1 A. LARSON, *supra* note 1, § 1.00.

4. 1915 Vt. Acts 164 (current version at VT. STAT. ANN. tit. 21, §§ 601-709 (1978 & Supp. 1984)).

5. VT. STAT. ANN. tit. 21, § 662(a) (Supp. 1984).

6. *Id.* §§ 662(b), 663.

7. *Id.* § 664.

8. *Id.* § 670.

9. *Id.* § 672.

10. 3 A. LARSON, *supra* note 1, § 81.10.

a claimant's condition. Even assuming the most competent professional medical diagnosis was made at the time of injury or hearing, a claimant's condition may change, either improving or deteriorating. To carry out the remedial purpose of workers' compensation laws, the commissioner¹¹ should be able to increase, decrease, revive, or terminate payments to reflect changes in the claimant's condition.¹²

Eight states allow a commissioner to reopen a case and to modify an award at any time,¹³ subject to certain qualifications, such as limiting a claimant to one modification every six months. Other states limit reopening in a variety of ways. Some set fixed periods running from injury¹⁴ or award date.¹⁵ Others base a limitation on the length of the term of the original award.¹⁶ Still others fix periods beginning with the date of final payment.¹⁷

This note examines the law of reopening workers' compensation cases in Vermont. First, the statutory language is analyzed and the legislative history reviewed. Case law is then scrutinized and compared to that of other jurisdictions with similar statutory language. Public policy considerations relating to restriction or expansion of jurisdiction to reopen are also discussed. A related question concerning an administrative agency's power to issue an order in seeming contradiction to existing judicial precedent is also considered. Finally, alternative solutions to the reopening problem, through agency rule-making and legislative amendment, are suggested.

11. The term "commissioner" as used throughout this note refers to the chief administrator of workers' compensation laws in any given jurisdiction. In Vermont, the Commissioner of Labor and Industry fulfills this function. VT. STAT. ANN. tit. 21, § 601(20) (1978).

12. 3 A. LARSON, *supra* note 1, § 81.10.

13. DEL. CODE ANN. tit. 19, § 2347 (1979); KAN. STAT. ANN. § 44-528 (1981); KY. REV. STAT. ANN. § 342.125 (Baldwin 1979); MASS. ANN. LAWS ch. 152, § 12 (Michie/Law. Co-op. 1976); MINN. STAT. ANN. § 176.461 (West Supp. 1983); NEV. REV. STAT. § 616.545 (1979); N.D. CENT. CODE § 65-05-04 (Supp. 1983); UTAH CODE ANN. § 35-1-78 (Supp. 1981).

14. *See, e.g.*, CAL. LAB. CODE § 5410 (West supp. 1983) (continuing jurisdiction within five years of date of injury).

15. *See, e.g.*, ILL. ANN. STAT. ch. 48, § 138.19(h) (Smith-Hurd Supp. 1983) (any time within 18 months of award date).

16. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-315 (West 1972) (limiting jurisdiction to the duration of original award).

17. *See, e.g.*, GA. CODE ANN. § 34-9-104(b) (1982) (jurisdiction within two years of date of final payment of award).

I. STATUTORY LANGUAGE AND LEGISLATIVE HISTORY

Vermont's modification statute provides, in pertinent part: "Upon his own motion or upon the application of any party in interest upon the ground of a change in the conditions . . . the commissioner may at any time review any award . . ." ¹⁸ The statute's language, on its face, places no limitation on the time within which the commissioner may reopen a case for review. The plain meaning of the statute, then, must be interpreted as granting the commissioner unlimited and continuing jurisdiction for review.

This facial interpretation is consistent with the available legislative history. The original Vermont Workmen's Compensation Act ¹⁹ was based on the Uniform Act ²⁰ promulgated by a board of commissioners for uniform legislation among the states. Section 36 of the Uniform Act dealt with modification of awards and provided for review "at any time, but not oftener than once in six months . . ." ²¹ The corresponding section of Vermont's original Act contained identical language. ²² Two years later, the legislature reviewed and amended the Act, deleting the phrase "but not oftener than once in six months." ²³ That deletion strongly indicates that the legislature intended to expand jurisdiction and protection instead of to limit review and liability. ²⁴ Based on the language of the statute and the legislative history, the commissioner has unlimited and continuing jurisdiction to review any award.

II. CASE LAW

The only case that interprets Vermont's statutory modification provision is *Bosquet v. Howe Scale Co.*, ²⁵ which was decided in 1923, eight years after the Act was passed. In *Bosquet*, the

18. VT. STAT. ANN. tit. 21, § 668 (1978).

19. 1915 Vt. Acts 164.

20. See generally 1 A. LARSON, *supra* note 1, § 5.20.

21. Uniform Workmen's Compensation Law, § 36 (1910), cited in *Bosquet v. Howe Scale Co.*, 96 Vt. 364, 368, 120 A. 171, 172 (1923).

22. 1915 Vt. Acts 164, § 34.

23. 1917 Vt. Acts 173, § 6.

24. The 1917 amendment was introduced by Rep. Howland of Barre City and sent to the Committee on Judiciary for review and comment. 1917 Vt. HOUSE J. 392. No notes or minutes of those proceedings remain. Research conducted in the State Papers Division of the Secretary of State's Office indicates that both the 1915 Act and the 1917 amendment were passed and signed without comment. Thus any inferences to be drawn from the change in language must come from the words themselves.

25. 96 Vt. 364, 120 A. 171 (1923).

claimant, after an injury at work, became temporarily totally disabled. A settlement agreement between Mr. Bosquet and the employer's insurer was reached with regard to compensation. Subsequently, the claimant returned to work. He then left work due to a slow down in the business. Three years later, Mr. Bosquet petitioned the Commissioner to reopen the case due to a change in his condition. He alleged that his leg had sustained a permanent loss of function which had not been apparent at the time he had entered into the agreement. The Commissioner granted the petition and, after a hearing, ordered the defendant to pay the claimant a lump sum in additional compensation. On appeal, the Vermont Supreme Court reversed, vacating the award and dismissing the claimant's petition.

The court in *Bosquet* held that under G. L. section 5805,²⁶ "the phrase 'at any time' does not give the commissioner continuing jurisdiction, unlimited as to time, but means at any time before a claim for compensation pending with him is finally disposed of."²⁷ In other words, once final payment from the original award had been made, the Commissioner was without power to reopen the case. The court based its decision on a construction of the English Workmen's Compensation Act by the English courts.²⁸ The English statute stated in pertinent part: "Any weekly payment may be reviewed at the request of either of the employer or of the workman and on such review may be ended, diminished, or increased"²⁹ The English courts held that use of the term "weekly payment" signaled a legislative intent to limit the commissioner's jurisdiction to reopen only those cases in which payments were still being made.³⁰

In adopting this construction, the court in *Bosquet* stated:

It is a settled doctrine of interpretation that, when a statute is adopted in this state from another state or country, if it has received a judicial interpretation there prior to its enactment here, it is to be taken that the language of our statute is used in the sense given to it by such prior adjudication, *unless some other sense is indicated by attendant provisions of the*

26. VT. STAT. ANN. tit. 21, § 668 (1978) (formerly G. L. § 5805).

27. 96 Vt. at 370, 120 A. at 173.

28. *Id.* at 371, 120 A. at 173.

29. Public General Acts, 6 Edw. 7 (1906), cited in 2 A. LARSON, *supra* note 1, § 57.14(b), at 10-33.

30. *Nicholson v. Piper*, 97 L. T. R. 119 (1907).

statute.³¹

Having made this declaration, the court contradicted itself by adopting the English interpretation despite the plain difference between the language of the Vermont statute and that of the English statute. The term "weekly payments" was excluded from the Vermont statute, and the words "at any time," which are absent in the English version, were added. The court noted but ignored this crucial distinction, stating that the English section is "essentially like the corresponding section of our Act."³²

In addition to the English rulings, the court in *Bosquet* also relied on an interpretation of the Massachusetts statute in *Hunnewell's Case*.³³ Like the English statute, the Massachusetts law referred to "weekly payments" and lacked the phrase "at any time."³⁴ Thus, while the Massachusetts statute may have been a good choice for comparison with the English statute, it was a poor selection for comparison with Vermont's. Furthermore, the interpretation relied upon was not the holding of the case, but rather dicta, as the court in *Hunnewell* never reached the question of an award after final payment. Rather, the court in *Hunnewell* found an express reservation of judgment had been made after temporary total benefits had been assessed.³⁵ Indeed, the Supreme Judicial Court of Massachusetts has cited *Hunnewell* as authority for the proposition that a settlement agreement is not a final determination of the extent of the injury or the payment to be made,³⁶ contrary to the interpretation of the Vermont Supreme Court in *Bosquet*. Thus the court's reliance on *Hunnewell* is even more tenuous.

Finally, the court in *Bosquet* noted in passing:

We are not unmindful of the suggestion that this interpretation of the statute may work an injustice to the employee in some instances, as where the effects of an injury are latent and recur after the original claim has been disposed of finally.

31. 96 Vt. at 371, 120 A. at 173 (emphasis added).

32. *Id.* at 371, 120 A. at 174.

33. 220 Mass. 351, 107 N.E. 934 (1915).

34. MASS. ANN. LAWS ch. 152, § 12 (Michie/Law. Co-op. 1976) (original version at ch. 751, pt. III, § 12 (1911)).

35. 220 Mass. at 355, 107 N.E. at 935.

36. *MacKinnon's Case*, 286 Mass. 37, 38, 190 N.E. 117, 117 (1934). Massachusetts remains one of the eight states that place no time limitation on reopening. See *supra* note 13 and accompanying text.

There may be cases, and the instant case may be one, where the full effect of any injury is not at first apparent. But if there is any shortage in the present procedure to take care of such a situation, the argument should be addressed to the Legislature.³⁷

This logic is twisted, since the legislature had already addressed the problem in a clearly worded statute. It is a recognized principle of construction that "when a statute is plain and unambiguous, courts cannot supply supposed omissions nor correct supposed mistakes, but must administer it as the legislature has made it."³⁸ Ignoring this rule, the court in *Bosquet* remedied what it supposed to be an omission by the legislature, effectively adding to the statute the words "before a claim for compensation pending with him is finally disposed of."³⁹ This was done despite the fact that the plain meaning of the statute grants the commissioner unlimited and continuing jurisdiction to review any award.⁴⁰ Further, the deletion of any reference to "weekly payments," found in the English statute, and the addition of the phrase "at any time" to the Vermont Act, reveals the legislative intent to expand rather than limit jurisdiction.⁴¹ This interpretation is further supported by the 1917 amendment,⁴² which dropped the once in six months limitation on reopening. Consequently, in the guise of deference to the legislature, the court in *Bosquet* judicially created its own rule of law. Viewed in this light, the *Bosquet* decision is unsound and improper.

Bosquet has been cited in other jurisdictions with disapproval. In *Jenkins v. Boise Payette Lumber Co.*⁴³ the claimant injured his leg in the course of employment and was awarded permanent partial disability benefits based on the loss of one leg at the knee. After all of the payments had been made, the claimant petitioned to reopen the case based on a change in condition, alleging that he

37. 96 Vt. at 370-71, 120 A. at 173.

38. *Perkins v. Cummings*, 66 Vt. 485, 488, 29 A. 675, 676 (1894). See also *State v. Fox*, 122 Vt. 251, 255, 169 A.2d 356, 359 (1961) ("The courts are not at liberty to supply that which the law makers have advertently omitted.").

39. *Supra* note 27 and accompanying text.

40. *Supra* note 18 and accompanying text.

41. Because "[i]t is to be presumed that the Legislature in enacting this [statute] acted with full knowledge of prior legislation on the same subject," *In re Swanton Market Area*, 112 Vt. 285, 292, 23 A.2d 536, 539 (1942), an inference that the change in statutory language represented a knowing and intentional departure from prior English law, is proper.

42. *Supra* notes 23-24 and accompanying text.

43. 49 Idaho 24, 287 P. 202 (1930).

had suffered from traumatic psychosis as a result of the original injury. The Idaho reopening statute provided in pertinent part: "On the application of any party on the ground of a change in conditions, the board may at any time, but not oftener than once in six months, review any agreement or award . . ."44 The Supreme Court of Idaho, in ruling that the case could be reopened under the statute, stated:

Respondents . . . contend that this statute means any time during which payments under the first award are still being made, but that, if such payments have ceased, the matter is absolutely closed. The only case cited in support of this position is *Bosquet v. Howe Scale Co.*, 96 Vt. 364, 120 A. 171. The reasoning in this case does not appeal to us, nor do we believe it has been followed, but that, on the contrary, it has been criticized and expressly *not* followed. In the first place, the language of the statute is clear and unambiguous; and in the second place . . . there is as much reason to protect the honest and actually injured claimant, although such injury might not appear until after the expiration of the period when the first award is being paid, as there is to guard against the possibility of fraudulent imposition upon the commission.⁴⁵

The Court of Appeals of Kentucky also rejected the *Bosquet* rationale in *Louisville Milling Co. v. Turner*.⁴⁶ In a factually similar situation and under an almost identical statute,⁴⁷ the Kentucky court refused to limit the reopening period to the period of payments, specifically refusing to follow the *Bosquet* decision.⁴⁸

Moreover, the holding in *Bosquet* contravenes the remedial purpose of the Workers' Compensation Act. Case law in this state has long recognized that in order to protect the underlying beneficent purposes of the Act, the statute should be construed liberally.

44. Idaho C.S. § 6269 (1921) (current version at IDAHO CODE § 72-719 (1973)). It is interesting to note that Idaho currently has a five year limitation on reopening. However, this change in Idaho law was brought about by legislation, not judicial rule-making.

45. 49 Idaho at 28, 287 P. at 203-04 (emphasis in the original).

46. 209 Ky. 515, 273 S.W. 83 (1925).

47. "Upon its own motion or upon the application of any party interested and a showing of change of conditions, mistake or fraud, the Board may at any time review any award or order . . ." K.S. § 4902 (1916) (current version at KY. REV. STAT. ANN. § 342.125 (Baldwin 1979)).

48. 209 Ky. at 517-18, 273 S.W. at 83-84.

In *Brown v. Bristol Last Block Co.*,⁴⁹ the Vermont Supreme Court wrote:

The act should have a liberal and reasonable construction. It is framed on broad principles for the protection of the workman. Relief under it is not based on the neglect of the employer nor affected by acts of negligence on the part of the employee. It rests on the economic and humanitarian principle of compensation to the employee, at the expense of the business⁵⁰

Indeed, the Act itself mandates a liberal construction.⁵¹ Section 709 provides:

In construing the provisions of this chapter, the rule of law that statutes in derogation of the common law are to be strictly construed shall not be applied. The provisions of this chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.⁵²

This section was noted and applied by the court in *Giguere v. Whiting Co.*⁵³ In that case the court gave an expansive reading to the word "accident" in defining the scope of coverage under the Act, noting that "[t]he great majority of the courts, including this Court [citing *Bristol Last Block Co.*], have held that the compensation statutes are to be construed liberally to accomplish the humane purpose for which they were passed. Our own act requires such a construction."⁵⁴ The court then quoted the above-mentioned language of the statute and correctly followed its mandate of a liberal construction, which was in line with the majority view.

Similarly, in *Orvis v. Hutchins*,⁵⁵ the court wrote that the "language of [a] section is not to be rigidly applied if the result will defeat the plain purpose and plan of the Workmen's Compensation Act. Rather, it 'is to be construed liberally to accomplish the humane purpose for which it was passed.'"⁵⁶ As recently as 1983, the Vermont Supreme Court reaffirmed this guiding principle in *Mont-*

49. 94 Vt. 123, 108 A. 922 (1920).

50. *Id.* at 128, 108 A. at 924.

51. VT. STAT. ANN. tit. 21, § 709 (1978).

52. *Id.*

53. 107 Vt. 151, 177 A. 313 (1935).

54. *Id.* at 164, 177 A. at 319.

55. 123 Vt. 18, 179 A.2d 470 (1962).

56. *Id.* at 23, 179 A.2d at 473.

gomery v. Brinver Corp.:⁵⁷

In determining and interpreting the applicable statutes, we are guided by certain rules of statutory construction. Foremost is the rule that when the statute's meaning is plain upon its face, we must enforce it in accordance with its express terms Moreover, the Workmen's Compensation Act, having benevolent objectives, is remedial in nature and must be given a liberal construction; no injured employee should be excluded unless the law clearly intends such an exclusion or termination of benefits.⁵⁸

The reasoning in *Bosquet* disregards both of these rules. Not only does it contradict the plain meaning of the statute, but it also represents a narrow, illiberal construction. Given the present view of the Vermont Supreme Court as expressed in *Montgomery*, there should be little hesitancy in overruling *Bosquet*. "When precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it."⁵⁹

III. POLICY CONSIDERATIONS

In defense of the *Bosquet* rule, there may be some need for predictability in the enforcement of awards and the limitation of an employer/insurer's liability. Insurance carriers claim that unlimited jurisdiction to reopen cases would create uncertainty with respect to potential future liabilities, and thus carriers would have difficulty in computing appropriate reserves.⁶⁰ This issue was not addressed by the court in *Bosquet*, although it was argued in the parties' briefs. Arguing against a literal interpretation of the phrase "at any time," Walter S. Fenton, attorney for the defendant-appellant employer, wrote:

Under such a construction no accurate basis could be had for

57. 142 Vt. 461, 457 A.2d 644 (1983).

58. *Id.* at 463, 457 A.2d at 645-46 (citations omitted).

59. *Francis v. Southern Pac. Co.*, 333 U.S. 445, 471 (1948) (Black, J., dissenting), quoted with approval in *Trammel v. United States*, 445 U.S. 40, 48 (1980). See also *Rothberg v. Olenik*, 128 Vt. 295, 305, 262 A.2d 461, 467 (1970) (stating:

The law should be based upon current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast with the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected).

60. See 3 A. LARSON, *supra* note 1, § 81.10.

determining the rates of insurance to be given by the insurer to the employer With the possibility in view that the insurer might be called upon to pay a multitude of old claims upon review it is obvious that the rate of insurance would be extremely high and unjust to the employer. If this contingency were not taken into consideration in fixing the rates then a situation unjust to the insurer would be created or, if such claims were not covered in the policy, the employer would be without protection against them.⁶¹

Essentially, this argument suggests that an injury should go uncompensated simply because the insurance company might have to pay more than it originally anticipated. This view cannot be attributed to the legislature in light of the overall remedial purpose of the Act. Furthermore, the relatively few cases that pose reopening problems⁶² show that adequate reserves would not be difficult to compute. In any event, in allocating any measure of uncertainty as between employer/insurers and employees, the burden should be placed on the employer. The employer is in the best position to pass on any additional expense as part of his general cost of doing business. This argument was made in part by the attorney for plaintiff-appellee Bosquet in his brief:

The defendant urges that the interpretation which the Commissioner gave to this statute leaves the employer or insurance carrier with a great uncertainty as to the amount that he may ultimately be required to pay because of permanent injury. In the words of the Commissioner: "This, of course, is true, but such uncertainty is certainly no greater than that of the injured man himself whom the law seeks to relieve of a portion of his burden of the final outcome of his injuries."

If the legislature desired to have some limitation upon the time for which a review could be made it would have so stated.⁶³

One solution, albeit a legislative one, to the potential problem of ensuring adequate reserves for reopened cases, would be the creation of a special fund for such cases. New York chose this approach and has established a Special Fund for Reopened Cases.⁶⁴

61. Defendant's brief at 4, *Bosquet v. Howe Scale Co.*, 96 Vt. 364, 120 A. 171 (1923) in 96, pt. V VERMONT REPORTS BRIEFS, Brief # 59.

62. *Infra* note 71.

63. Plaintiff's Brief at 8, *supra* note 61.

64. N.Y. WORK. COMP. LAW § 25-a (McKinney 1965 & Supp. 1983).

Generally, the fund is used in cases where the application to reopen is made seven years after the date of the original injury or three years after the last compensation payment was made. Employers and insurance carriers support this fund with payments in certain circumstances.⁶⁵

A second argument for limiting reopening and review is that of administrative convenience.⁶⁶ If cases may be reopened at any time, then case files must be preserved indefinitely. This, arguably, might tax the limited resources of the administrative agency by requiring more time and space for maintaining files. However, this is no longer an insurmountable problem in an age of microfiche and computers. Furthermore, one study⁶⁷ has indicated that most petitions to reopen are filed within a few years of the original injury, so that piecing together facts and documentation from ancient cases is neither a reasonable concern, nor a legitimate argument against reopening.

Another consideration is the desirability of fostering voluntary settlement agreements, thus avoiding the need of costly, time-consuming hearings. Should a settlement agreement impose a different standard, and bar reopening, because the parties have compromised and have not relied on a commissioner's decision? The court in *Bosquet* noted that the "agreements between the parties respecting compensation are favored,"⁶⁸ and this may have been one of the reasons why the court refused to reopen the case. If so, it too seems ill-founded. Consider the case of *Caudill v. Chatham Manufacturing Co.*⁶⁹ in which, a few weeks after the claimant made a compromise settlement, an abscess was discovered at the location of a spinal fusion operation. The court refused to rescind the settlement or to reopen the case, asserting that such risks were inherently part of the settlement process and that both parties voluntarily assumed those risks. Professor Larson, citing this case with disapproval, writes that "[t]his kind of 'chance-taking' approach to legal remedies is out of place in a modern social-insurance system, whose only purpose is to see to it that victims of industrial acci-

65. For a more detailed look at the fund's operation see 3 A. LARSON, *supra* note 1, § 81.60.

66. See W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 203 (1936).

67. *Id.* at 203-06. In 1931, of the 2,661 cases that were reopened in New York, almost half involved injuries within two years of reopening, and 92% were within five years.

68. 96 Vt. at 369, 120 A. at 173.

69. 258 N.C. 99, 128 S.E.2d 128 (1962).

dent receive the protection they need."⁷⁰

There is no reason why claimants who have voluntarily entered into compromise agreements should be penalized by having their cases barred from reopening. No evidence exists to suggest that employer/insurers would have anything to gain by avoiding early settlement and opting for a hearing on the initial injury. Thus, settlement agreements should not be treated any differently than other awards regarding reopening and review.

A final consideration is the inference to be drawn from the legislative silence on the *Bosquet* ruling since 1923. If, indeed, the court misread the legislative intent, why has the legislature not acted to correct the misconception? Does legislative inaction signal at least a tacit agreement with the holding in *Bosquet*? While it is certainly possible to interpret such meaning from silence, a more plausible conclusion is that the matter has not generated much attention in the legislature, because of the few cases in this category.⁷¹ Perhaps, if more cases were affected by the ruling the legislature—which is an elected body subject to popular mandate—might have responded.⁷² Yet, because the number of cases might be small, it does not follow that the injustice done to individuals is not great.⁷³ In such circumstances, it would be wrong

70. 3 A. LARSON, *supra* note 1, § 81.52(b), at 15-554.122.

71. Statistics compiled at the Department of Labor and Industry confirm that the number of cases involving reopening is small. Of the 112 cases heard by the commissioner during the period 1979-82, only three involved reopening (approximately 2.7%). When compared to the total number of claims filed for the same period, the number of cases in which reopening was an issue becomes further dwarfed. The following table sets out the total number of claims for the period, the number of contested cases (defined as those in which a departmental Form 6, Notice and Application for Hearing has been filed), the number of contested cases that were settled prior to hearing, and the number of hearings held:

	1979	1980	1981	1982
Total claims	22,759	21,604	21,608	20,299
Contested cases	107	129	195	155
Contested cases settled	89	105	158	122
Hearings	18	24	37	33

72. At least one former legislator who is now an attorney in private practice and handles workers' compensation claims, agrees with this analysis. Mr. Chester S. Ketcham, who served in the Vermont General Assembly from 1974 until 1980, recently wrote that "the *Bosquet* decision is brutal in its effect and was never intended by the original drafting of the Workmen's Compensation Law." He further stated that "legislative silence on this matter should not indicate approval of that decision." Mr. Ketcham noted that during his tenure with the General Assembly the problem was not discussed, and suggested that "if the Legislature were aware of the problem, it would be rectified." Letter from Chester S. Ketcham to Matthew I. Levine (November 8, 1983) (discussing legislative silence on *Bosquet*).

73. See *infra* notes 80-82 and accompanying text.

for the judiciary to rely on legislative inaction as silent approval.

Indeed, many courts have warned of the dangers of looking for meaning in legislative silence. Justice Frankfurter, writing for the majority in *Scripps-Howard Radio, Inc. v. FCC*,⁷⁴ noted that “[t]he search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions.”⁷⁶ Similarly, in *Turpin v. Mailet*,⁷⁶ the Court of Appeals for the Second Circuit “[took] issue with those who find guidance in congressional inaction Nothing . . . suggests that legislative silence can in any way be viewed as an expression of congressional ‘intent’”⁷⁷ In addition, the Vermont Supreme Court wrote in *Harrington v. Gaye*,⁷⁸ that “[w]e cannot ascribe legislative intent to a mere act of omission”⁷⁹ Legislative inaction in the wake of the *Bosquet* decision must not, therefore, be read as knowing approval.

IV. ADMINISTRATIVE POWER AND JUDICIAL PRECEDENT

One reason that the status quo has remained unchanged for so long, despite the harsh effects in individual cases, is that administrative officials have felt bound by precedent. Several commissioners' opinions have noted with regret the injustice of the *Bosquet* ruling while at the same time feeling compelled to obey it. For example, in *Knights v. Gahagan*,⁸⁰ a woman injured her back in the course of her employment. She entered into an agreement for permanent partial disability benefits based on her doctor's diagnosis that she had sustained a compression fracture of the ninth thoracic vertebra causing a ten percent loss of function to the back. Approximately eight months after the final payment in compensation was made, the claimant was re-examined and found to be permanently and totally disabled due to further compression of the thoracic spine. Despite the severity of the change in condition and the closeness in time to the original injury, the Commissioner ruled that he was compelled to deny the claimant's petition to reopen

74. 316 U.S. 4 (1942).

75. *Id.* at 11.

76. 579 F.2d 152 (2d Cir. 1978).

77. *Id.* at 163.

78. 124 Vt. 164, 200 A.2d 262 (1964).

79. *Id.* at 166, 200 A.2d at 263.

80. No. L10914 (Fox, 1979).

since it fell outside the time period specified in *Bosquet*.

Similarly, in *Vautier v. Engelberth Construction Co.*,⁸¹ the claimant suffered a compensable injury to his right knee and entered into a settlement agreement based on the diagnosis of his doctor that the entire disability was in the range of ten to fifteen percent. Once again, the claimant's condition worsened, and a petition to reopen was filed. This time, the petition to reopen was filed only two months after the final compensation payment was made. Still, the petition was denied under the *Bosquet* rule. Thus the claimant was denied additional compensation for his worsened condition and the necessary surgery which followed.

More recently, in *McCaffrey v. Le Bistro*,⁸² the claimant injured his left elbow at work and entered into an agreement for compensation based on a forty-five percent permanent partial disability to the left arm. After final payment under the agreement was made, the claimant's condition worsened but his petition to reopen was denied. The denial again was based on the *Bosquet* ruling, and also on the agency precedent created by the two previously mentioned commissioners' opinions. The basis for this denial raises an interesting question of administrative law: does a commissioner have the power to issue an order in apparent contradiction to existing precedent? The question can be divided into two categories: agency precedent and judicial precedent.

Administrative agencies exercise broad discretion in carrying out their statutory functions.⁸³ Although it is advisable for agencies to provide a structured framework for the exercise of this discretion through the use of their own precedent, they do not always do so.⁸⁴ In fact, the great majority of administrative decisions are made without reasoned opinions or systems of precedent.⁸⁵ The Internal Revenue Service, for example, often gives different treatment to two taxpayers who have identical problems, without explanation.⁸⁶ While this practice is certainly not to be applauded, the fact remains that it is not uncommon.

A better practice would be for an agency to follow its prece-

81. No. R8121, Op. No. 79-81 WC (1981).

82. No. N5589, Op. No. 2-83 WC (1983).

83. See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8:1 (1979).

84. *Id.* § 8:9.

85. *Id.*

86. *Id.* § 8:12.

dents unless there is a good reason not to do so, in which case an explanation should be provided. This is, in fact, the dominant view.⁸⁷ The United States Supreme Court, in *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*,⁸⁸ stated that an agency has a "duty to explain its departure from prior norms."⁸⁹ Similarly, the United States Court of Appeals for the District of Columbia Circuit stated that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"⁹⁰ Case law supporting this view is found in most circuits.⁹¹ Thus, agency precedent does not bar change as long as a reasonable explanation is provided.

This principle applies to judicial precedent as well. While it is generally true that administrative agencies must respect and follow court rulings,⁹² there are exceptions to this rule. For example, in *SEC v. Chenery Corp.*,⁹³ the United States Supreme Court ruled that under certain circumstances an administrative agency might depart from judicial precedent in the interests of equity. Justice Frankfurter, writing for the majority, noted that the "[d]etermination of what is 'fair and equitable' calls for the application of ethical standards to particular sets of facts. But these standards are not static. In evolving standards of fairness and equity, the Commission is not bound by settled judicial precedents."⁹⁴

The principle set forth in *Chenery* has found application in practice. Professor Davis notes that "judicial decisions are not necessarily precedents, for SSA [the Social Security Administration], like other agencies, often refuses acquiescence in regional decisions

87. *Id.* § 8:9.

88. 412 U.S. 800 (1973).

89. *Id.* at 808.

90. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 923 (1971).

91. See 2 K. DAVIS, *supra* note 83, § 8:9.

92. 73 C.J.S. *Public Administrative Law and Procedure* § 33 (1983).

93. 318 U.S. 80 (1943).

94. *Id.* at 89. *Chenery* involved a determination of what was "fair and equitable" within the meaning of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 7 (current version at 15 U.S.C. § 79g (1976)). While it is possible to limit application of the *Chenery* decision to other cases of statutory construction under the Act, I suggest that such a reading of the case would be overly narrow, and that the rationale of the case need not be so restricted.

of courts."⁹⁵ So, while administrative agencies certainly are not encouraged to rule against judicial precedent, such rulings are not unusual.

This approach is compatible with traditional judicial deference to agency rulings. Courts have long recognized the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong"⁹⁶ This principle, firmly grounded in a constitutional separation of powers, was recently examined by the Vermont Supreme Court in *In re Agency of Administration*.⁹⁷ In that case, the court was called upon to review a ruling of the Environmental Board concerning the applicability of Act 250,⁹⁸ Vermont's land use and development law, to a demolition project in the city of Montpelier. In setting forth the criteria for reviewing agency decisions the court noted:

We approach this review of administrative agency action with a gingerly step. Bathed in a singleness of concern and anointed with an aura of expertise, administrative actions have traditionally kept reviewing courts an arm's length away. This Court has been no exception. Repeatedly we have articulated our willingness to defer to agency determinations, [citations omitted] and we have no wish to repudiate that position here.⁹⁹

The court went on, however, to point out that "under our constitutional system, administrative agencies are subject to the same checks and balances which apply to our three formal branches of government."¹⁰⁰ An agency must operate within the limits of its enabling legislation, or the judiciary will intervene.¹⁰¹ Furthermore, where an agency exercises an adjudicatory function, courts "will be especially vigilant, since proper utilization of the judicial process is unrelated to expertise in any particular subject matter."¹⁰² Thus,

95. 4 K. DAVIS, *supra* note 83, § 20:9, at 32.

96. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) (footnote omitted). Vermont adopted the *Red Lion Broadcasting* "compelling indications" standard in *Comm. to Save the Bishop's House, Inc. v. Medical Center Hosp. of Vt., Inc.*, 137 Vt. 142, 150-51, 400 A.2d 1015, 1019-20 (1979).

97. 141 Vt. 68, 444 A.2d 1349 (1982).

98. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1973 & Supp. 1983).

99. 141 Vt. at 74, 444 A.2d at 1351.

100. *Id.* at 75, 444 A.2d at 1352.

101. *Id.*

102. *Id.*

while agency findings of fact will not be set aside unless clearly erroneous, conclusions of law are subject to greater judicial scrutiny.¹⁰³ This militates against casual departure from judicial precedent and suggests the need for thorough analysis in supplying an explanation that is both well-reasoned and persuasive to withstand the heightened judicial scrutiny. Such scrutiny operates as an effective check to ensure proper exercise of agency discretion.

Admittedly, the principle of *stare decisis* is at the very foundation of our legal system, and is necessary for consistency and predictability in the rule of law. However, "the doctrine of *stare decisis* is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish."¹⁰⁴ An agency blindly following precedent would do damage to the *stare decisis* principle and misconstrue its purpose. As Justice Cardozo wrote:

We tend sometimes, in determining the growth of a principle or a precedent, to treat it as if it represented the outcome of a quest for certainty. That is to mistake its origin. Only in the rarest instances, if ever, was certainty either possible or expected. The principle or the precedent was the outcome of a quest for probabilities. Principles and precedents, thus generated, carry throughout their lives the birthmarks of their origin. They are in truth provisional hypotheses, born in doubt and travail, expressing the adjustment which commended itself at the moment between competing possibilities.¹⁰⁵

There may be situations in which great injustice would be done were an agency merely to follow judicial precedent without question. An agency should not follow precedent "solely for the reason that a previous decision although erroneous, has been rendered on a given question. *This is particularly true where . . . great injustice or injury will result by following the previous erroneous decision.* If it is wrong it should not be continued."¹⁰⁶ In such situations a departure from precedent is appropriate as long as it is

103. *Id.*

104. *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 606, 305 A.2d 877, 888 (1973).

105. B. CARDOZO, *THE GROWTH OF THE LAW* 69-70 (1924).

106. *Olin Mathieson Chemical Corp. v. White Cross Stores, Inc.*, 414 Pa. 95, 100, 199 A.2d 266, 268 (1964) (emphasis added).

supported by careful analysis and reasonable explanation. The appellate review process guards against an abuse of agency discretion.

V. AGENCY RULE-MAKING

An alternative to Department of Labor and Industry refusal to follow the *Bosquet* rule, is to engage in agency rule-making in such a way as to nullify its effect. The Department's rule-making powers are wholly statutory. They are derived from sections 801(b)(1) and 831(a) of Vermont's Administrative Procedure Act,¹⁰⁷ and from section 602 of the Workers' Compensation Act,¹⁰⁸ itself. Both statutes empower the agency to make rules and regulations for its effective administration in carrying out its statutory mandate. Consistent with these provisions the Department has adopted and promulgated *Rules Pertaining to Vermont's Workers' Compensation and Occupational Disease Law*,¹⁰⁹ which cover a wide range of procedural and substantive issues.

While agency conclusions of law reached in exercise of an adjudicatory function are subjected to stringent judicial scrutiny,¹¹⁰ the standard of review of agency rule-making is less rigid. This deferential standard was defined by the United States Supreme Court in *Mourning v. Family Publications Service, Inc.*¹¹¹ and was adopted in Vermont in *Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont, Inc.*¹¹²

It is a fundamental principle in the judicial review of administrative action that, where the empowering provisions of a statute authorize an agency to make such rules and regulations as may be necessary to carry out the provisions of the Act, the validity of such rules or regulations will be sustained so long as they are *reasonably related to the purposes of the enabling legislation*.¹¹³

Since "[a]n administrative agency may not use its rule-making authority to enlarge a restrictive grant of jurisdiction from the legis-

107. VT. STAT. ANN. tit. 3, §§ 801(b)(1), 831(a) (1972 & Supp. 1984).

108. VT. STAT. ANN. tit. 21, § 602 (1978).

109. DEPT. OF LAB. & INDUS., *Rules Pertaining to Vermont's Workers' Compensation and Occupational Disease Law* (1983).

110. *Supra* notes 102-03 and accompanying text.

111. 411 U.S. 356, 369 (1973).

112. 137 Vt. 142, 150, 400 A.2d 1015, 1019 (1979).

113. *Id.* (emphasis added).

lature,"¹¹⁴ it is doubtful that a rule could be fashioned based on the modification provision, section 668, that would be immune from attack as an enlargement of jurisdiction. Historically, the *legislative* grant of jurisdiction was *not* restrictive; it was the *court* that limited jurisdiction to reopen, and so, perhaps the above-mentioned principle would not apply in this case. The result is far from certain. A better approach is to draft a rule reasonably related to carrying out the purpose of another section of the Act, which has not been the subject of prior adjudication, but could somehow mitigate the harsh effect of the *Bosquet* rule.

A solution may be found in section 673 of the Act¹¹⁵ which provides for an appeal to the supreme or superior court in cases "where the petitioner has been prevented by fraud, accident or mistake from taking or entering an appeal within the time allowed by law."¹¹⁶ Since the *Bosquet* decision redefined the reopening period permitted under section 668, an attempt to reopen after final payments have been made could conceivably come within the purview of section 673. For example, under a broad definition of the word "mistake," many of the same appeals based on a change in condition could be characterized as a mistake in diagnosis. An appeal could then be made directly to the supreme or superior court even after final payments of the original award had been made.

It is well within the Department's power to issue a rule further defining the general term of "mistake." "Certainly it is not fatal for a rule or order to *fill in details*, regularize procedures and spell out performance in areas *where the statute is indefinite* or uncertain so long as the substantive requirements are not compromised. This is the usual and frequent function of agency rules."¹¹⁷

In the absence of any prior adjudication under this section in Vermont, the Department might look to other jurisdictions that allow reopening for mistake in formulating the new rule. Generally, "when a key medical witness, whose testimony was relied on, later testifies that his earlier diagnosis . . . was mistaken, reopening may be in order."¹¹⁸ For example, in *Sager v. Royce Kershaw*

114. *In re Agency of Admin.*, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982).

115. VT. STAT. ANN. tit. 21, § 673 (1978).

116. *Id.*

117. *In re Petition of Allied Power and Light Co.*, 132 Vt. 354, 360, 321 A.2d 7, 11 (1974) (emphasis added).

118. 3 A. LARSON, *supra* note 1, § 81.52(b), at 15-554.117-18.

Co.,¹¹⁹ the Alabama Court of Civil Appeals allowed the trial court to consider rescission of a settlement agreement on grounds of mutual mistake, where the initial diagnosis of a back injury was erroneous, and the plaintiff subsequently needed surgery for injured discs. Similarly, in *Meyers v. Holiday Inn*,¹²⁰ the Iowa Court of Appeals permitted the reopening of a case four years after the initial injury, based on a mistaken diagnosis given at the initial hearing. The court characterized the incorrect diagnosis as a "substantive omission due to mistake."¹²¹ Finally, in *Mattson v. Abate*,¹²² a worker fell from a scaffold and suffered a severe skull fracture. Disability was diagnosed at thirty percent, and a settlement agreement was reached based on that figure. Six years later, the doctor testified that his former diagnosis had been erroneous and that the plaintiff was permanently and totally disabled. The Minnesota Supreme Court ruled that the Commissioner's decision to vacate the previous award and reopen the case based on mistake, was not an abuse of discretion, even though the petition to reopen was filed many years after the initial injury.

Following the pattern established by these cases, the Department could develop a rule that broadly defines "mistake" and thereby create grounds to reopen many of the kinds of cases previously denied modification under section 668 and the *Bosquet* rule.¹²³ Such a rule, if challenged, could easily be shown to be "reasonably related to the purposes of the enabling legislation,"¹²⁴ and would therefore survive judicial review. In this manner, much of the injustice of the *Bosquet* rule could be alleviated, with fewer attendant risks of an outright refusal to follow the case.

VI. LEGISLATIVE AMENDMENT

Another solution to the reopening problem in Vermont is to call upon the legislature to amend the statute and clarify its intent. While it is difficult to fathom a more clearly worded statute than the existing one, a sentence could be added that would leave no doubt as to the purpose of section 668. The following example is one suggestion: This section grants to the commissioner continuing

119. 359 So. 2d 398 (Ala. Civ. App. 1978).

120. 272 N.W.2d 24 (Iowa Ct. App. 1978).

121. *Id.* at 26.

122. 279 Minn. 287, 156 N.W.2d 738 (1968).

123. See *supra* notes 80-82 and accompanying text.

124. *Supra* note 113 and accompanying text.

and unlimited jurisdiction to review any award for purposes of modification. Such language would directly and completely counter the holding in *Bosquet*.¹²⁵

Two potential problems arise from this approach. The first is bringing the issue to the forefront of legislative concerns so that action could be taken. Given the small number of cases involved,¹²⁶ this could prove to be a difficult task; it is doubtful that the legislature would appreciate the urgent need for change.

The second potential problem is closely related to the first. While the number of claimants is small and their organizational force almost nil, insurance companies represent a large, well organized and powerful lobby. Their potential for influencing the outcome of any legislation is great. Thus, there is the distinct possibility that even if the issue were brought before the legislature, it would be defeated by insurance company lobbyists.

Still, in the absence of an agency or judicial resolution, every available avenue should be explored. One former legislator has already suggested amending the statute,¹²⁷ and has called on the legislature to respond. It will be interesting to note any progress that may develop from this effort.

CONCLUSION

The Vermont reopening provision, on its face, grants unlimited and continuing jurisdiction to the commissioner to review an award at any time. *Bosquet* has been the only case to interpret the statute. It held that the phrase "at any time" does not give continuing jurisdiction to the commissioner, and limited the time for reopening to the period during which payments are being made to the injured worker. Its rationale, however, is not persuasive, it contradicts the plain meaning of the statute, and it is inconsistent with the legislative intent as reflected by the legislative history. Other jurisdictions have specifically refused to follow the case, and have expressly criticized its reasoning. Finally, the decision works

125. *Supra* note 27 and accompanying text.

126. *Supra* note 71 and accompanying text.

127. Chester S. Ketcham, *supra* note 72, suggests adding the following sentence to the present reopening provision: "The Commissioner shall have continuing jurisdiction relative to the modification of awards." Letter from Chester S. Ketcham to the Honorable John F. Murphy, Chairman, General and Military Affairs Committee (November 8, 1983) (urging legislative amendment).

against the overall remedial purpose and beneficial nature of workers' compensation law. *Bosquet* should be overruled.

The legislative silence on *Bosquet* since 1923 should not be taken as a sign of approval. Rather it should be attributed to the small number of cases attempting to invoke jurisdiction to reopen, thus falling outside the mainstream of legislative concerns.

In seeking to mollify any future uncertainties, as between the employer/insurer and the injured employee, the law should protect the employee. Not only is this approach consistent with the underlying remedial purposes of workers' compensation laws, it also represents a sound public policy. The employer is in a much better position to pass on his costs, spreading them over a large consuming public, than is the injured employee. In this manner, harshness to individuals can be avoided at an almost imperceptible cost to the consumer.

The Department of Labor and Industry should take an active role in this drama if the opportunity presents itself. Rather than waiting for the unlikely possibility that a claimant, with limited resources, will appeal a denial of a petition to reopen, the commissioner should grant the petition, providing a reasoned explanation for the departure from precedent. The employer/insurer will certainly appeal, and the Vermont Supreme Court will then have the opportunity to overrule *Bosquet*. Alternatively, the rule-making power of the agency should be used to broadly define "mistake" under the Act, allowing cases of mistaken diagnosis to be reopened, thereby partially alleviating the injustice of the *Bosquet* rule. As a final alternative, the legislature should act to counter the *Bosquet* rule by amending the statute, thus rectifying this small but important corner of workers' compensation law.

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