STATE OF VERMONT
DEPARTMENT OF LABOR

Catherine Lyons	Opinion No. 29-15WC
v.	By: Phyllis Phillips, Esq. Administrative Law Judge
Chittenden Central Supervisory Union	For: Anne M. Noonan Commissioner
	State File No. FF-53165

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Michele Patton, Esq., for Claimant
Jason Ferreira, Esq., for Defendant

ISSUE PRESENTED:

Was Claimant an employee of Defendant, as defined in 21 V.S.A. §601(14), at the time of her September 12, 2013 injury?

EXHIBITS:

Claimant's Exhibit 1:	Deposition of Catherine Lyons (excerpted), October 22, 2014
Claimant's Exhibit 2:	Affidavit of Deb Robbins, December 1, 2014
Claimant's Exhibit 3:	Procedure: Pre-Service Teacher Screening and Supervision
Claimant's Exhibit 4:	Deposition of Deborah [Robbins] Anderson[1] (excerpted), January 16, 2015
Claimant's Exhibit 5:	Student Teacher Application Process
Claimant's Exhibit 6:	Application for Student Teaching
Claimant's Exhibit 7:	UVEI Placement Contract
Claimant's Exhibit 8:	UVEI Teacher Internship Program Handbook (excerpted), 2013-2014
Defendant's Exhibit A:	UVEI Application for Admission
Defendant's Exhibit B:	Letter to Claimant, February 12, 2013
Defendant's Exhibit C:	Deposition of Catherine Lyons (excerpted), October 22, 2014

[1] Between the time of her affidavit and her deposition, Ms. Robbins married, and assumed the name "Anderson."

Defendant's Exhibit D:	UVEI Teacher Internship Program Handbook (excerpted), 2013-2014
Defendant's Exhibit E:	Affidavit of Deb Robbins, December 1, 2014
Defendant's Exhibit F:	UVEI Placement Contract
Defendant's Exhibit G:	Deposition of Deborah [Robbins] Anderson (excerpted), January 16, 2015
Defendant's Exhibit H:	Substitute Acknowledgement, 8/23/12
Defendant's Exhibit I:	Letter from Page Tompkins, February 6, 2015
Defendant's Exhibit J:	Letter from Claimant, October 1, 2013

FINDINGS OF FACT:

The following facts are undisputed:

1. Judicial notice is taken of all relevant forms contained in the Department's file relative to this claim.

2. Claimant is a 49-year old woman, who holds a master's degree in early childhood education from Endicott College. *Deposition of Catherine Lyons ("Claimant's deposition") (Claimant's Exhibit 1) at 6, 31; Defendant's Exhibit A.* She has prior teaching experience in New Hampshire, both as a paraprofessional and as a substitute teacher. *Claimant's deposition (Claimant's Exhibit 1) at 53; Defendant's Exhibit A.*

3. During the 2012-2013 academic year, Claimant worked as a substitute teacher at various elementary schools in the Essex Junction School District, including several long-term positions at its Summit Street School. *Claimant's deposition (Claimant's Exhibit 1) at 13*. The Essex Junction School District is a member of Defendant's supervisory union. Summit Street School serves children from preschool age through third grade. *Affidavit of Deborah [Robbins] Anderson ("Anderson affidavit") (Defendant's Exhibit E) at ¶5.*

UVEI's Teacher Internship Program

4. In January 2013 Claimant completed an application for admission to the Upper Valley Educators Institute (UVEI), *Defendant's Exhibit A*, so that she might obtain elementary education teaching credentials in Vermont. *Claimant's deposition (Claimant's Exhibit 1) at 51.* UVEI's accredited 36-week Teacher Internship Program offers a means of satisfying the student teaching component of Vermont's licensure requirements through a somewhat unconventional process.[2] *Deposition of Deborah [Robbins] Anderson ("Anderson deposition"),*

[2] The Vermont Agency of Education defines "student teaching" as the "supervised, concentrated field experience required for initial licensure, including an internship, or other concentrated field experience however, named, in which the candidate shall gradually assume the full professional roles and responsibilities of an educator . . . ." *Vermont Agency of Education Standards Board for Professional Educators, Rules Governing the Licensing of Educators and the Preparation of Educational Professionals*

(Defendant's Exhibit G) at 25. Unlike traditional graduate programs in education, the focus of UVEI's program is on classroom practice rather than academic theory. Each student spends four days per week interning in a classroom, under the supervision of a mentor teacher. The fifth day (every Tuesday) is spent at UVEI's Lebanon, New Hampshire facility, attending seminars on various education-related topics and networking with both faculty and other students. *Defendant's Exhibit D at pp. 3, 8.*

5. Initial acceptance to the UVEI program is based on the prospective intern's written application, references, personal interview and writing sample. Upon payment of a $250.00 placement fee, the intern then confers with UVEI's associate director to identify potential placement schools and mentor teachers. Two four-month placements must be identified – one for the fall semester and one for the spring. *Defendant's Exhibit D at p. 3*. Final acceptance into the program occurs once the intern candidate and the mentor teacher for the fall semester have agreed to work together. *Defendant's Exhibit B; Defendant's Exhibit D at p. 5*. At some point thereafter, full tuition – $15,000.00 for the 2013-2014 academic year – becomes due. *Id.*

6. To graduate from UVEI's program, an intern must demonstrate mastery of ten teaching "competencies," that is, essential teaching skills, attitudes, techniques and areas of knowledge that are practiced throughout the internship. Support in this regard is provided not only by the intern's mentor teacher, but also by UVEI's assigned faculty coach. The faculty coach meets with both the intern and the mentor teacher at least two or three times each semester. This is in part to gauge the intern's progress and provide feedback, and in part to ensure that the intern is getting what he or she needs from the mentor teacher in order to achieve the required competencies. *Defendant's Exhibit D at pp. 7, 16; Claimant's deposition (Claimant's Exhibit 1) at 79.*

7. Other than on UVEI seminar days, the intern is expected to adhere to the mentor teacher's schedule in all respects – participating in team meetings and parent conferences, for example, as well as planning lessons and grading papers. He or she must notify the appropriate parties in the event of any absence from school. Gradually he or she assumes greater responsibility in the classroom. As a "culminating experience" at the end of each semester, the intern must plan and implement a unit of study involving consecutive solo teaching days (seven in the fall, twelve in the spring). In this way, he or she is introduced "to the realities of the teacher's world." *Defendant's Exhibit D at pp. 7, 13-14.*

8. UVEI imposes various responsibilities on the intern's mentor teachers as well. A mentor teacher is expected to plan for the intern's involvement in the classroom, meet regularly with him or her (and at least twice with the faculty coach as well),

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§5150. Prior to its revision in December 2014, the rule required that an applicant complete a minimum of twelve consecutive weeks of student teaching in order to qualify for professional licensure, *id. at §5233.1; see Anderson affidavit (Defendant's Exhibit E) at* ¶*3*, which UVEI's program would have satisfied.

establish ongoing expectations, observe student interactions and generally provide opportunities to share in the teaching experience. *Defendant's Exhibit D at p. 16.* The mentor teacher is expected to be proactive, by notifying the faculty coach if questions, concerns or problems develop with the intern's training experience. *Id.*

Claimant's Student Teaching Internship at Summit Street School

9. By letter dated February 12, 2013 UVEI offered Claimant preliminary acceptance into its Teacher Internship Program. *Defendant's Exhibit B.* Thereafter, a UVEI administrator offered to assist her in the process of finding a mentor teacher for the fall 2013 semester, but Claimant already had decided to ask Beth Dall, a kindergarten teacher at Defendant's Summit Street School. *Claimant's deposition (Defendant's Exhibit C) at 67.* Claimant previously had substituted in Ms. Dall's classroom, and had high regard for her as a teacher. After contacting her directly, Ms. Dall agreed to serve as the mentor teacher. *Claimant's deposition (Claimant's Exhibit 1) at 75.*

10. In August 2013 Claimant, Ms. Dall, Cathy Conti (Claimant's UVEI faculty coach) and Mary Hughes (the principal of Summit Street School) all executed a UVEI "Placement Contract," *Defendant's Exhibit F*. By the terms of the contract, Ms. Hughes agreed, on behalf of Summit Street School, to accept Claimant's UVEI internship placement for the fall 2013 semester, and Ms. Dall agreed to be her mentor teacher. More specifically, the contract stated as follows: "This document constitutes an agreement between the intern, the school district and UVEI. If you find the terms of this placement, as described in the UVEI Handbook [*Defendant's Exhibit D*], acceptable, please sign." As instructed, after obtaining the required signatures, Claimant returned the contract to UVEI. *Claimant's deposition (Claimant's Exhibit 1) at 73.*

11. Claimant began preparing for her fall internship placement in June 2013, even before her placement contract was executed. Over the course of the summer, she met with Ms. Dall, attended special education meetings with her and helped prepare their classroom. *Claimant's deposition (Claimant's Exhibit 1) at 62*. Her internship began in earnest with the start of the academic year in August. *Defendant's Exhibit D at p. 7; Anderson affidavit (Defendant's Exhibit E) at ¶4.*

12. On September 12, 2013 Claimant was acting in the course and scope of her student teaching placement at Summit Street School when she slipped and fell on a wet hallway floor, injuring her back, hip and leg. *Claimant's deposition (Claimant's Exhibit 1) at 96-97.*

13. As a consequence of her injury, Claimant was unable to continue her student teaching assignment. By letter dated October 1, 2013 she notified UVEI that she was withdrawing from its Teacher Internship Program. *Defendant's Exhibit J.* In January 2014 she was able to secure early childhood education teaching

credentials in Vermont, but this was through a peer review process rather than a UVEI-type internship. *Claimant's deposition (Defendant's Exhibit A) at 51.*

Defendant's Student Teacher Policies and Procedures

14. In addition to adhering to the guidelines described in UVEI's Teacher Internship Program Handbook, *Defendant's Exhibit D*, as a so-called "pre-service teacher"[3] Claimant also was subject to certain of Defendant's processes and procedures. Defendant's "Pre-Service Teacher Screening and Supervision" procedure, *Claimant's Exhibit 3*, and "Student Teacher Application Process," *Claimant's Exhibit 5*, describe the necessary steps to securing a student teaching placement at one of the district's schools:

- First, the prospective pre-service teacher must complete and submit an application to the placement school's principal;[4]

- Next, he or she meets with a prospective "cooperating teacher," and possibly with the school principal as well. The purpose of the meeting is to ensure that the proposed placement "will result in a good match between [the prospective pre-service teacher], the school and the cooperating teacher, which is necessary to increase [the prospective pre-service teacher's] chances for success;"

- Once the prospective pre-service teacher is accepted for placement, the assigned cooperating teacher and school principal complete an authorization form and forward it to Defendant's human resources department;

- A human resources employee then meets with the prospective pre-service teacher, to complete "required employment paperwork (e.g. Form W-4, Form I-9)," arrange for fingerprinting and undertake the statutorily-required record and background checks;

- The human resources employee provides the prospective pre-service teacher with a user name and password, so that he or she can access Defendant's "Mandatory Training," completion of which is required prior to starting a student teaching assignment;

[3] This is the label Defendant uses to identify "a post-secondary student working towards a teaching credential who is placed as a student teacher, post-baccalaureate, or intern at a district school." *Claimant's Exhibit 3.*

[4] Per Defendant's Student Teacher Application Process, *Claimant's Exhibit 5*, an applicant was permitted to submit an application completed through his or her college or university in lieu of the one available on the supervisory union's website, *see Claimant's Exhibit 6*. I presume in this case that Claimant submitted her application for admission to UVEI, *Defendant's Exhibit A*, as there is no evidence that she completed the one available from Defendant.

- Once the required fingerprinting and paperwork have been completed, the prospective pre-service teacher delivers an approved "Student Intern Authorization" form to the cooperating teacher, thus verifying his or her eligibility to student teach.

15. Defendant also sets minimum performance expectations for its pre-service teachers, *Claimant's Exhibit 5*. These include reporting for duty at designated locations and times; preparing and delivering assignments as directed by the assigned cooperating teacher; modeling acceptable standards of classroom behavior; taking necessary precautions to protect students, equipment and facilities; complying with school rules, regulations, policies and procedures; and participating in faculty, department and other meetings as requested. As noted on its "Application for Student Teaching," *Claimant's Exhibit 6*, the penalty for failure to adhere to these and other minimum performance expectations is "involuntary removal from [the pre-service teacher's] assignment."

16. Upon completion of required paperwork, a pre-service teacher is eligible to substitute teach – first for his or her cooperating teacher only, and after successfully completing the required solo activity, throughout the supervisory union. *Claimant's Exhibit 5*. For a substitute teacher, the required paperwork includes recommendations from the cooperating teacher and school principal, *id.*, as well as the W-4 and I-9 forms referenced in Finding of Fact No. 14 above. *Anderson deposition (Defendant's Exhibit G) at 10.*

Employee versus Student Status

17. Deborah Anderson is Defendant's executive director of human resources. *Anderson affidavit (Defendant's Exhibit E) at ¶1.* Her department does not itself maintain any files on pre-service teachers, as it does with substitute teachers.[5] What files exist are kept by the placement school's principal. *Anderson deposition (Defendant's Exhibit G) at 7-9.*

18. Aside from undertaking the state-mandated criminal and administrative background checks, Ms. Anderson's department does not play any role in placing, supervising or terminating pre-service teachers. *Id. at 10-11.* Thus, in Claimant's case, the decision whether to accept her placement at Summit Street School rested entirely with Ms. Dall, her cooperating teacher, and Ms. Hughes, the school principal. *Id. at 15 (Claimant's Exhibit 4).*

19. Upon recommendation from a principal, Ms. Anderson's department may inactivate a pre-service teacher in its substitute list. *Id. at 10-11 (Defendant's Exhibit G).* Unless a pre-service teacher intends to substitute, Defendant does not require completion of either W-4 or I-9 forms. *Id. at 10.* There is no central

[5] Defendant maintained a personnel file on Claimant, but this was related to her employment as a substitute teacher during the 2012-2013 academic year, and not to her status as a student teacher for the 2013-2014 academic year. *Anderson deposition (Defendant's Exhibit G) at 6-8.*

coordinator of pre-service teachers at the supervisory union level, and Ms. Anderson's department does not track the number of student teachers placed in its district schools. *Id. at 11*.

20. In Ms. Anderson's opinion, it is a good idea for district schools to participate in the student teacher process. She described the benefits as follows, *Anderson deposition (Defendant's Exhibit G) at 23*:

> It's a good way to prepare. They [the placement school principals] understand that students need that 12-week internship, and it's a way to give back to the community to be able to have them placed in their schools. And it's a good way to get to learn teachers, as well, or prospective teachers. And it's a good learning experience for the cooperating teacher.

21. The benefits associated with accepting student teachers come at a cost, however. It takes work for the cooperating teachers to provide their student teachers with the learning they need in order to complete their licensure requirements. Accepting a student teacher is both a service and a detriment for the placement school, therefore. *Anderson deposition (Defendant's Exhibit G) at 23, 25-26.*

22. According to Ms. Anderson's understanding, Defendant has never intended to create an employer-employee relationship with any student teacher, including Claimant. *Anderson affidavit (Defendant's Exhibit E) at ¶8*. A student teacher who is accepted for placement in a district classroom is neither replacing a position nor filling an identified need for one. If he or she were not there, Defendant would not take any steps to hire another employee for the classroom. *Anderson deposition (Defendant's Exhibit G) at 26*. In this respect, a student teacher's status is no different from that of a visitor or volunteer. *Id. at 27.*

23. Were student teachers considered employees, Ms. Anderson would be part of the executive team considering whether to continue Defendant's participation in various student teaching programs. In her opinion, re-characterizing them in this manner would be a strong deterrent. *Anderson deposition (Defendant's Exhibit G) at 27-28; Anderson affidavit (Defendant's Exhibit E) at ¶8.*

24. UVEI also considers its interns to be students, not employees either of UVEI or of the district schools in which they are placed. *Defendant's Exhibit I.*

25. Claimant acknowledged that no one at either Summit Street School or UVEI ever specifically told her that she was Defendant's employee while working to complete her student teaching requirement. Nor did anyone speaking on Defendant's behalf tell her so. *Claimant's deposition (Defendant's Exhibit C) at 86*. She received neither monetary wages nor any stipend. She was not enrolled in Defendant's group health insurance or retirement plans, and was not a member of the teachers' union. *Id. at 84.*

26. Nevertheless, in many respects Claimant enjoyed teacher status to the same extent as her Summit Street School peers. She had a photo ID badge, keys to both the school and her classroom and a supervisory union email address. She had access to the same confidential student files that Ms. Dall did. *Claimant's deposition (Claimant's Exhibit 1) at 87-88.* When she was injured, both Ms. Dall and many other faculty members as well were "incredulous" to hear that Defendant had denied her workers' compensation claim on the grounds that she was not an employee. *Id. at 88*.

27. Still, while Claimant may have understood that she had all of the responsibilities of a teacher at Summit Street School, UVEI's placement contract dictated otherwise. She was prohibited from writing reports or creating documents that were to become part of a student's permanent record, and was not to contact a student's parents without Ms. Dall's permission. She was not to be asked to substitute on UVEI seminar days, and during her placement she was encouraged to visit other classrooms, not only at Summit Street but also at other schools. *Defendant's Exhibit D at pp. 13-14.*

DISCUSSION:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979).

2. The legal question presented by this claim is whether Claimant's status as a "pre-service" or student teacher in one of Defendant's schools qualifies her as an "employee" as defined in Vermont's Workers' Compensation Act, 21 V.S.A. §601(14). The statutory definition reads:

> "Worker" and "employee" means an individual who has entered into the employment of, or works under contract of service or apprenticeship with, an employer.

3. Claimant asserts that by virtue of the UVEI Placement Contract that she, Ms. Dall (her mentor teacher) and Ms. Hughes (Summit Street School's principal) all executed, she was working "under contract of service or apprenticeship" with Defendant. As in most states, Vermont's workers' compensation statute makes the existence of such a contract, whether express or implied, an essential feature of the employment relationship. 3 Lex K. Larson, *Larson's Workers'*

Compensation §64.01(Matthew Bender Rev. Ed.) at p. 64-2 and cases cited therein. Professor Larson has explained the reasons why:

> Compensation law . . . is a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee status to which he has never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common-law damages.

Id. at p. 64-3, cited with approval in *Hill v. King*, 663 S.W.2d 435, 440 (Tenn.App. 1983).

4. Professor Larson correctly identifies the risk that in certain circumstances a negligent employer might assert an employment relationship in order to shield itself from tort liability on the grounds that workers' compensation is the injured individual's exclusive remedy. *Id.* at §65.02[1], p. 65-14; *see, e.g., Candido v. Polymers, Inc.*, 166 Vt. 15, 20 (1996). Claimant here does not seek tort damages; instead, she claims employee status so that she might establish her entitlement to workers' compensation benefits. Regardless, whether the existence of an employment relationship is used to support a claim or to defend against one, proving that the parties entered into a "contract of service" or "for hire," *Candido, supra*, is critical.

5. Claimant asserts that the UVEI Placement Contract that she, Ms. Dall and Ms. Hughes all executed adequately evidences the terms of an employment relationship established between her and Defendant.[6] It specifically delineates the parties' respective rights and responsibilities. It grants the supervisory union the right to control most of Claimant's student teaching-related activities. It allows the supervisory union to accept (or not) the terms of the Placement Contract, and therefore the placement itself. It affords Defendant the right to terminate her student teaching assignment for failure to adhere to its own minimum performance standards. These are all important indicators of an employment relationship. *Larson's Workers' Compensation*, *supra* at §60.01 and cases cited therein.

6. Most often, however, discussion of the right to hire, fire and otherwise control the work being done arises in the context of differentiating between an employee and

[6] Though no evidence was presented on this issue, I presume that Ms. Dall and Ms. Hughes were legally capable of binding Defendant to the terms of the UVEI Placement Contract by virtue of the Essex Junction School District's membership in its supervisory union. Certainly Defendant has not argued otherwise.

an independent contractor. *Id.* at §60.02D and cases cited therein; *see also Candido, supra* at 21 (applying right to control test to multiple-employer business situation). In the case before me now, the distinction is not between an employee and an independent contractor, but rather between an employee and a gratuitous worker.

7. Like an employee, a gratuitous worker – a volunteer, for example, *see, e.g., Appeal of Jenks,* 965 A.2d 1073 (N.H. 2008), or a person fulfilling a community service requirement, *see, e.g., Closson v. Town of Southwest Harbor,* 512 A.2d 1028 (Me. 1986), or a person advancing his or her own interests, *see, e.g., Harlow v. Agway, Inc.,* 327 A.2d 856 (Me. 1974) – may be subject to the employer's right to control the manner in which the work is performed. Unlike an employee, however, a gratuitous worker neither receives nor expects to receive any kind of payment for his or her services. *Larson's Workers' Compensation, supra* at §65.01, p. 65-2. The key indicator in these circumstances is not the right to control, but rather the right to bargained-for remuneration. Simply put, absent actual or expected payment of some form of remuneration by employer to employee, an employment relationship does not exist, and workers' compensation coverage does not attach. *Id.* at §65.01; *Appeal of Jenks, supra* at 1076; *Harlow, supra* at 859; *Board of Education of City of Chicago v. Industrial Commission,* 290 N.E.2d 247, 249-250 (Ill. 1972).

8. There is a practical reason why establishing the right to remuneration is so critical in the workers' compensation context. Underlying virtually every state's workers' compensation program is the assumption that a worker is gainfully employed at the time of his or her injury. Restoring lost wages is the very essence of the protection that the system affords. *Larson's Workers' Compensation, supra* at §64.01, p. 64-4. With that in mind, as a practical matter, "it would be impossible to calculate compensation benefits for a purely gratuitous worker, since benefits are ordinarily calculated on the basis of earnings." *Id.*

9. The element of remuneration necessary to establish a true employee-employer relationship need not be in money, however. Conceivably, anything of value can qualify. *Id.* at §65.03[1]. Thus, Claimant here asserts that the opportunity to complete the student teaching component of the state's licensure requirement constituted the "pay" she expected to receive from Defendant.

10. The Vermont Supreme Court has not yet had occasion to consider whether fulfilling a training requirement necessary for educational certification and/or state licensure constitutes "remuneration" sufficient to establish an employee-employer relationship in the workers' compensation context. Courts in other states are split on the issue. *Compare Orange County School Board v. Powers,* 959 So.2d 370 (Fla.App. 1 Dist. 2007) (student teacher completing degree requirements not employee of placement school); *Dustin v. DHCI Home Health Services, Inc.*, 673 So.2d 356 (La.App. 1 Cir. 1996) (medical support student completing clinical training program not employee of placement hospital); *Board*

of Education of City of Chicago v. Industrial Commission, supra (volunteer student teacher not employee of placement school); *Henderson v. Jennie Edmundson Hospital*, 178 N.W.2d 429 (Iowa 1970) (nurse's aide trainee not employee of training hospital) *with Croston v. Montefiore Hospital*, 645 N.Y.S.2d 471 (N.Y. 1996) (hospital lab trainee deemed employee of training hospital); *Betts v. Ann Arbor Public Schools*, 271 N.W.2d 498 (Mich. 1978) (student teacher completing degree requirements deemed employee of placement school); *Walls v. North Mississippi Medical Center*, 568 So.2d 712 (Miss. 1990) (student nurse deemed employee of training hospital).

11. Absent a specific statutory directive, *see, e.g., School District No. 60, Pueblo County v. Industrial Commission*, 601 P.2d 651 (Colo.App. 1979), I conclude that the better view is to exclude student teachers from workers' compensation coverage if the only "remuneration" to which their placement schools agree is the opportunity to fulfill their state-mandated licensure requirements.

12. In reaching this conclusion, I am mindful of both the practical and the philosophical underpinnings of Vermont's workers' compensation program. From a practical perspective, the value of a student teaching internship cannot be estimated "in money," and therefore does not satisfy the statutory definition of "wages," 21 V.S.A. §601(13).[7] As a consequence, no basis exists for calculating indemnity benefits. Nor is there a means of determining entitlement to vocational rehabilitation benefits, because that process as well uses pre-injury wages to identify "suitable employment." *Workers' Compensation Rules 51.2600 and 51.2700*.

13. True, even without a basis for calculating pre-injury wages an injured student teacher might still be entitled to medical benefits. However, I do not believe the legislature intended for workers' compensation to operate as a freestanding medical insurance program, without concurrently considering lost wages and restoration of earning capacity as well. *See Orvis v. Hutchins*, 123 Vt. 18, 22 (1962) (linking both temporary and permanent disability benefits to present and future reduction in injured worker's earning power).

14. I am also reluctant to establish a precedent whereby future litigants will be bound to an employment relationship that one or the other of them likely never intended. In this case, it is Defendant who objects to bestowing employee status and Claimant who desires it. As Professor Larson astutely observed, however, in another case it might be the injured worker who would be harmed by being labeled an employee, thus foreclosing a common law tort remedy to which he or she otherwise would have been entitled. *Larson's Workers' Compensation, supra* at §65.02[1], p. 65-14.

[7] Section 601(13) defines "wages" to include "the market value of board, lodging, fuel *and other advantages which can be estimated in money* and which the employee receives from the employer as a part of his or her remuneration." (Emphasis added).

15. There is no doubt here that had Claimant been able to complete her student teaching activities and thereby fulfilled her licensure requirement, she would have reaped a tangible benefit. Legally, however, her situation is indistinguishable from that of the young adult who volunteers in order to gain valuable work experience, or the retired senior who benefits both physically and psychologically from engaging with his or her community through volunteerism. Indeed, even in the workers' compensation context it is not uncommon for an injured worker's vocational rehabilitation plan to include a volunteer placement as the first step in transitioning back to the workforce after an extended disability.

16. In each of these cases, as in the one before me now, there are real benefits to the volunteer relationship, both for the individual and for the organization. Nevertheless, the test of remuneration is not whether either or both parties benefit from a volunteer's activities. The test is whether both parties intended the benefit as "wages." *See Appeal of Jenks, supra* (donations made to non-profit organization by racetrack operator not intended as wages for volunteer's services at fundraising event).

17. Through its human resources director, Ms. Anderson, Defendant proffered credible evidence establishing that it has never intended to create an employment relationship with any student teacher, including Claimant. The only evidence Claimant proffered in opposition was to the effect that her Summit Street principal and co-employees were "incredulous" to learn that Defendant had denied her workers' compensation claim on the grounds that she was not an employee. Even considering this evidence in the light most favorable to Claimant, *State v. Delaney*, *supra*, I conclude that it is insufficient to raise a question of fact on the issue.

18. I conclude as a matter of law here that by extending to Claimant the opportunity to collect the student teaching hours she needed in order to become licensed, Defendant did not thereby intend for her placement itself to constitute "wages." Because the key element of actual or expected remuneration is missing, I therefore conclude that no "contract of service" sufficient to create an employment relationship existed between them.

19. My conclusion applies equally to the question whether Claimant was working under a "contract of apprenticeship" with Defendant so as to confer employee status under §601(14). Black's Law Dictionary (10th ed. 2014) defines the term "apprentice" according to both its historical and its modern usage. Historically, the term connoted "a person bound by an indenture [a term of years, normally embodied in a deed], to work for an employer for a specified period, to learn a craft, trade or profession." The modern usage is broader: "A learner in any field of employment or business, especially one who learns by hands-on experience or technical on the job training by one experienced in the field."

20. The days of indentured servitude having long since passed, I accept the more modern definition of the term "apprentice" as the one most appropriately applied here. Nothing in that definition compels me to ignore the element of bargained-for remuneration that forms the basis of any employment relationship, whether one of service or of apprenticeship.[8] In either case, the mere fact of Claimant's student teaching placement at Defendant's school does not qualify.

21. There being no genuine issues of material fact regarding the absence of remuneration sufficient to create an employment relationship, I conclude as a matter of law that Claimant's student teaching placement did not render her an employee as that term is defined in §601(14). For that reason, her claim for workers' compensation benefits must fail.

ORDER:

Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's Motion for Summary Judgment is hereby **DENIED**, and her claim for workers' compensation benefits causally related to her September 12, 2013 injury is hereby **DISMISSED**.

DATED at Montpelier, Vermont this _____ day of _____, 2016.

_____
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.

[8] Certainly this is the case in the Department's Workforce Development apprenticeship program. An "apprentice" in that program "learns a craft through planned, supervised on-the-job training combined with classroom instruction," while at the same time receiving wages according to a progressive scale that increases as he or she moves from entry level to experienced. *Apprenticeship FAQ*, http://labor.vermont.gov/workforce-development/apprenticeship/.