

mailed 4/16-98 am.

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

)	State File No. K-13703
Fred Smith,)	
Claimant,)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: Steve Janson
Rock of Ages,)	Commissioner
Defendant.)	
)	Opinion No. 19-98WC

Submitted on stipulated facts and briefs.
Record closed on October 16, 1997.

APPEARANCES:

Attorney Andrea L. Gallitano for Claimant
Attorney Keith J. Kasper and Attorney Lori Reuschel Choiniere for Defendant

ISSUE:

Should the claimant's average weekly wage include the annual Partners in Production payments claimant received in the twelve weeks prior to the injury?

FINDINGS OF FACT:

1. Claimant was an employee of defendant within the meaning of the Vermont Workers' Compensation Act (Act) on January 9, 1997.
2. Defendant was an employer within the meaning of the Act on January 9, 1997.
3. Liberty Mutual was the workers' compensation insurance carrier for defendant on January 9, 1997.
4. On January 9, 1997 claimant suffered a personal injury by accident arising out of and in the course of his employment with defendant.
5. On January 9, 1997 defendant had in full force and effect a Partners In Productivity Program, pursuant to which each employee was entitled to participate in an incentive plan providing for monthly and annual payments for production efficiency over the course of the year at the quarry. If certain productivity levels were met during the ten month period between and including the months of March through December, the worker received a monthly incentive payment. In addition, the employer made an annual incentive payment to each employee for additional efficiencies for the same ten month period. The annual

incentive payment was to be paid on the last work day before the annual Christmas holiday, with any adjustments made within seven days. Employees were not guaranteed these payments which were dependent on the work performed throughout the year. Payment did not vest if the employee quit or was terminated before receiving benefits. Employees who worked less than a full year because of retirement, and other specified reasons, received a pro rata share for the months worked.

6. Claimant contends that the calculation of his average weekly wage, for purposes of temporary total and permanent partial disability payments, should include the annual incentive payments.
7. Liberty Mutual contends that, since the annual incentive payment was earned over a ten month period, it should be prorated over that period. It objects to lumping the payments into two weeks, thereby creating an unrepresentative spike in claimant's average weekly wage. Inclusion of the annual incentive payment would add approximately \$200 to the claimant's average weekly wage.
8. Claimant submitted a copy of his fee agreement with his attorney.

CONCLUSIONS OF LAW:

1. This case requires us to examine the terms "wages" and "earnings" as used in the Act. Claimant emphasizes 21 V.S.A. § 601 (13) which states in relevant part that "Wages" includes bonuses" Defendant points out that the Act is silent as to a definition of "earnings," but it does mandate that:

Average weekly wages ... be computed in such manner as is best calculated to give the average weekly *earnings* of the worker during the twelve weeks preceding an injury.

Id. § 650 (a).

2. Our rules direct that the employer file a Wage Statement (Form 25) and include the wages paid and/or due the claimant for each of the twelve weeks preceding the injury. "In addition, the Wage Statement shall include for each of the twelve weeks preceding the injury; overtime earnings and/or tips paid, due or received; and any bonuses paid, due or received ..." *Vermont Workers' Compensation Rule 15 (d) (1)*.
3. In a markedly similar case, a claimant would have benefitted from proration of income. But the Commissioner explained:

While this would in fact have given the claimant a higher average weekly wage for purposes of benefit calculations, there is absolutely no support for this proposition in either the statute or the rule. ... [and there is] clearly contradictory language in the statute. There would be no need to address the twelve weeks prior to the date of the injury if the best measure of the claimant's average weekly wage

were the claimant's yearly earnings. As Larson points out, many states have adopted an annualized basis for the determination of a compensation rate. Larson at §60.00. Vermont is not one of those states, and has specifically elected not to follow this path.

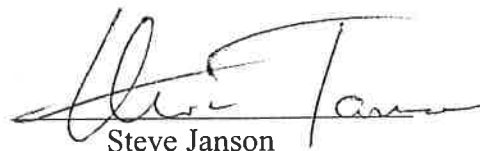
Millhoff v. Village Country Inn, Inc., Op. No. 39-96WC (July 10, 1996).

4. The legislative intent is clear. By determining that the twelve weeks preceding the injury must be used to compute average weekly wage, the legislature provided a bright line direction for such a computation. By mandating that the average weekly wage include bonuses, it undoubtedly realized that a claimant could receive more with such a calculation than with a proration. But as the *Millhoff* case amply illustrates, the twelve week rule without proration can also benefit the employer. Our law clearly favors ease of administration over proration. Consequently claimant's annual payments from the Partners in Productivity Program must be included.
5. Because claimant prevailed in this case, he is awarded attorney's fees in the amount of 20% of the difference between benefits with the incentive payments and benefits without it.

ORDER:

Based on these Findings of Fact and Conclusions of Law, defendant is ORDERED to include claimant's annual Partners in Production payments in the calculation of claimant's average weekly wage.

Dated at Montpelier, Vermont, on this 15th day of April, 1998.



Steve Janson
Commissioner