STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No.S-8340; P-23956
	)	
Jon DiDio	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: Michael S. Bertrand
State of Vermont	)	Commissioner
Agency of Transportation	)	
	)	Opinion No. 05-03WC

Submitted on the record
Record closed on October 23, 2002

APPEARANCES:

Todd Kalter, Esq. for the Claimant
Keith J. Kasper, Esq. for the Defendant

ISSUE:

What is the appropriate calculation of Claimant's average weekly wage (AWW) and temporary total disability (TTD) benefits when a subsequent but independent injury occurs while Claimant is working pursuant to a light duty work release?

STIPULATION OF FACTS:

1. At all relevant times, Claimant was an employee of Defendant within the meaning of the Vermont Workers' Compensation Act (Act).

2. At all relevant times, Defendant was the employer of Claimant within the meaning of the Act.

3. On June 1, 2000 Claimant suffered a work-related injury to his right upper extremity resulting in an initial period of temporary total disability beginning on April 30, 2001.

4. At the time of this initial injury, Claimant was earning $577.18 resulting in an initial compensation rate of $384.79.

5. At the time of this initial injury Claimant had no dependents within the meaning of the Act and has had none since.

6. Claimant had returned to work sporadically after April 30, 2001, but had returned to full-time work as of October 6, 2001.

7. Claimant suffered an independent work-related injury to his left arm on October 30, 2001.

8. At the time of this injury to Claimant's left arm, he had not been released to return to full-duty work, despite having been released to full-time work.

9. At the time of this October 30, 2001 work-related injury, Claimant was earning $412.92, resulting in a compensation rate equal to the minimum statutory rate of $276.00.

10. Claimant was temporarily totally disabled as a result of this October 30, 2001 work-related injury.

11. The parties agree to the admission of the two Forms 25 in this matter.

ADDITIONAL FACTS:

1. Claimant worked in highway maintenance, a job that included snowplowing.

2. The First Report of Injury for the June 2000 incident recounts that Claimant injured his right shoulder while pulling on a log. Ultimately a rotator cuff tear was diagnosed and surgically repaired in April 2001 when he lost time from work.

3. A Form 25 Wage report indicates Claimant worked 40 hours in each of 2 weeks, more than 60 hours in each of 2 weeks and between 42 and 63 hours in each of the other weeks in the February to April 2001 twelve week period leading to his absence from work for his June 2000 injury.

4. The First Report of Injury for the October 2001 incident states that Claimant hurt his left arm while picking up wood.

5. Claimant did not work in each of the twelve weeks leading to the October 2001 injury. However, his wages as reflected in the Form 25 were based on an average of 40-hour weeks.

DISCUSSION:

1. The twelve weeks leading up to the date of disability for Claimant's first injury began in February. Because he was driving a snowplow, that three-month period involved considerable overtime. At the time of the second injury, in October 2001, Claimant was earning full time wages, but no overtime. There is no evidence to suggest that the two injuries are related. Nor is there evidence to suggest that other highway maintenance workers were working over-time during the second period.

2. Whether the Claimant after a second work-related injury is entitled to compensation based on the higher wages he was earning at the time of his first injury is a question of first impression in Vermont. Although the issue is stated broadly, the determination depends on case-specific facts.

3. While Claimant was still on light duty at the time of the second injury, there is nothing to suggest that the light duty capacity affected the determination that his compensation rate was based on 40-hour weeks.

4. Claimant argues that there is a direct chain of causation between the original work-related injury and the lower wage, thereby justifying payment of the higher wage after the second injury. Yet he does not refute the defense position that the higher wage at the time of the first injury was not due to a higher hourly rate, but to the number of overtime hours worked. He argues that to calculate his benefits based on the lower wage would be the antithesis of Vermont's Workers' Compensation Law, which requires that the AWW reflect pre-injury earning capacity. This argument brings us back to the key issue: what is the pre-injury wage applicable to this case?

5. Pursuant to 21 V.S.A.§ 650(a), the average weekly wage is to be computed based on the average earnings for the 12 weeks "preceding an injury." Only the time when a claimant is able to work is used, with sick days or other days not worked excluded from the calculation. The provisions for other methods of calculation, none directly applicable here, lead Claimant to the argument that deviation from the typical method of calculation is permissible and that the calculation ought not be automatic and rigid.

6. Although the Claimant was earning less at the time of the second injury than at the time of the first, his hourly rate was not reduced. The difference in the two average weekly wages can be attributed only to the overtime Claimant was earning for the 12 weeks prior to the first period of disability and which he was not earning prior to the second injury. Claimant does not challenge the defense assertion that the overtime work was due to snowplowing, which would not have been available to him in the 12 weeks prior to October 2001 injury, nor produced evidence to support his suggestion that, but for the first injury, he would have been earning a higher average weekly wage at the time of the second. For example, there is no evidence to suggest that co-employees were earning overtime in October of 2001, which arguably would have been available to the Claimant had he been able to do the work. If such work had been available, Claimant could argue that a calculation based solely on his 12 week earnings would not be practicable and that his AWW should "be based on the average weekly earnings during the twelve weeks previous to the injury earned by a person in the same grade employed at the same or similar work by the employer of the injured worker." Id. But no facts supporting such an assertion have been presented.

7. Because the plain meaning of § 650 is unambiguous, this Department must "apply the provision using the plain meaning of the words chosen by the Legislature." *Barrett/Canfield, LLC v. City of Rutland,* 171 Vt. 196, 200 (2000) (citation omitted). "Average weekly wages shall 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…If during the period of twelve weeks an injured employee has been absent from employment on account of sickness or suspension of work by the employer, then only the time during which the employee was able to work shall be used to determine the employee's average weekly wage." 21 V.S.A.§ 650(a). The Form 25 in this case accurately follows the direction in § 650, including the wages for weeks actually worked full time in the twelve weeks prior to the October 2001 injury, and averaging them to determine the AWW from which benefits would then be calculated. To accept the Claimant's contention that the wages prior to the first injury should be used would be to ignore the plain language of § 650, provide to the Claimant a compensation rate based on more than he was actually earning, ignore the reality of seasonable overtime and remove from consideration the requisite relationship between an injury and the benefits claimed.

ORDER:

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law,

Claimant's average weekly wage shall be computed based on the 12 weeks prior to his October 2001 work-related injury.

Dated at Montpelier, Vermont this 16th day of January 2003.

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Michael S. Bertrand
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.