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

*C. S.*

*v.*

*First Choice Communications*

*Opinion No. 11-04WC*

*By: Margaret A. Mangan*
*Hearing Officer*

*For: Michael S. Bertrand*
*Commissioner*

*State File No. T-04803*

*Submitted on the record and written argument*

***APPEARANCES:***

*James J. Dunn, Esq., for the Claimant*
*Stephen D. Ellis, Esq., for the Defendant*

***ISSUE:***

*Was Claimant Charles Shaffer employed in the "concurrent service of" or "regularly employed for" Dartmouth College at the time of his injury with First Choice Communications, entitling him to include Dartmouth wages in the calculation of his average weekly wage?*

***PROCEDURAL COMMENT:***

*Although this issue came to the hearing docket on motions for summary judgment, the attorneys at a conference with the hearing officer on November 17, 2003 agreed that the issue could be decided on the record without the need for an evidentiary hearing. Accordingly, this opinion is one on the merits.*

***FINDINGS OF FACT:***

1. *Claimant was an "employee" and First Choice Communications his "employer" within the meaning of the Workers' Compensation Act at all times relevant to this action.*

2. *Claimant began working for First Choice on July 1, 2002 on a part-time basis, working three days per week. His average weekly wage, at $16.00 per hour, was $431.33.*

3. *On August 21, 2002, claimant sustained an injury that arose out of and in the course of his employment with First Choice.*

4. *From the date of hire until the date of injury, claimant worked up to 31 hours per week for First Choice.*

5. *From September of 1999, claimant also worked for Dartmouth College, an employer under the Act.*

6. *Claimant was paid $13.91 per hour for his work at Dartmouth in 2002.*

7. *Claimant's work for Dartmouth was full-time for the nine-month academic year, then on-call during the three summer months.*

8. *Claimant was afforded the benefits and privileges of full time employment with Dartmouth during the nine-month academic year. Benefits continued for the entire calendar year, with claimant's decision to "buy in" to full year coverage.*

9. *Under a labor agreement with Dartmouth, claimant was considered a regular employee.*

10. *During the summer months claimant was occasionally called in to work at Dartmouth.*

11. *For the twelve weeks before his injury at First Choice, Dartmouth College paid the claimant $3,804.50.*

12. *Claimant worked 14.5 hours for Dartmouth during the week ending July 13, 2002.*

13. *The last day he worked for Dartmouth before his injury was on July 12, 2002. Claimant did not work at all during August of 2002.*

14. *Claimant submitted a copy of his fee agreement with his attorney and statement with hours worked.*

***DISCUSSION:***

1. *Under the Workers' Compensation Act (Act), where an injury causes temporary total disability, the employer shall pay the injured employee a weekly compensation "equal to two-thirds of the employee's average weekly wages…." 21 V.S.A. § 642.*

2. *Computation of average weekly wage is usually based on the twelve weeks preceding the injury and "if the injured employee is employed in the concurrent service of more than one insured employer or self-insurer the total earnings shall be combined in determining the employee's average weekly wage…." § 650 (a).*

3. *Further addressing the two employer situation is the rule specifying that "[i]f a claimant is regularly employed for 2 or more employers at the time of the injury…the compensation rate shall be based on the combined average weekly wage from all employers." WC Rule 15.4260.*

4. *Claimant seeks to include in the computation of his average weekly wage the earning from Dartmouth for the twelve weeks before his injury. Defendant denied that aspect of the claim, arguing that uncertain and irregular work at Dartmouth during the summer was not "concurrent" employment under § 650(a) or "regular" employment under Rule 15.4260.*

5. *"Regular Full Time Employment" means a job, which at the time of hire was, or is currently expected to continue indefinitely with no projected end date. Rule 2.1320.*

6. *Although not full-time during the summer, claimant's work at Dartmouth was regular. It was continuous with no projected end date. It followed a fixed pattern, nine-months full-time, three months on call. The yearly pattern had gone through almost four cycles at the time of the injury at First Choice. That he was on-call with Dartmouth at the time of his injury at First Choice does not alter the regular nature of the employment, even though the actual schedule had nine-month and three-months cycles.*

7. *Our statute and rules provide a bright line test with the 12 weeks prior to the injury serving as the basis for the computation of average weekly wage. Had the claimant not worked at Dartmouth during those 12 weeks, there would be no concurrent wages to include. However, because he earned wages at Dartmouth during that time, he is entitled to benefits that include them.*

***CONCLUSIONS OF LAW:***

1. *Accordingly, the wages at claimant's concurrent employer, Dartmouth College, must be included in the computation of his average weekly wage. 21 V.S.A. § 650(a).*

2. *As a prevailing claimant who has provided the requisite supporting documentation, Charles Shaffer's attorney is entitled to 20% of the total award. 21 V.S.A. § 678(a); WC Rule 10.000.*

***SO ORDERED***

*Dated at Montpelier, Vermont this 27th day of February 2004.*

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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.*