STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Jon Gaboric	)	*Opinion No. 12-04WC*
	)	
	)	*By: George K. Belcher*
v.	)	*Hearing Officer*
	)	
	)	*For: Michael Bertrand*
Stratton Mountain and Royal and	)	*Commissioner*
Sunalliance, and Wilburton Inn and	)	
TIG Insurance Company	)	*State File Nos. S-08346*
& T-18904		

Hearing held in Montpelier, Vermont on December 3, 2003
Record closed on January 19, 2004

APPEARANCES:

Patrick L. Biggam, Esq., for the Claimant
William J. Blake, Esq., for Defendant, Stratton Mountain
Jeffrey W. Spencer, Esq. and Eric N. Columber, Esq. for Defendant, Wilburton Inn

ISSUES:

1. *Is the Claimant's injury of his right knee and the subsequent surgery, treatment and impairment chargeable to either employer under the Workers' Compensation Act?*

2. *If the injury is compensable, what is the temporary and/or permanent disability which is due from each employer?*

3. *What was the Claimant's average weekly wage from each employer?*

4. *What are the compensable medical benefits?*

EXHIBITS:

<u>Joint Exhibits</u>

Joint Exhibit 1: Joint Medical Exhibit

<u>Claimant's Exhibits</u>

1. *Claimant's Exhibit A: Average Weekly Wage Summary*
2. *Claimant's Exhibit B: Average Weekly Wage Summary, DOL Form 25 And Ski Pass Price Advertisement*
3. *Claimant's Exhibit C: Medical Bill Summary*
4. *Unnumbered Exhibit: Fee Agreement filed on 1/6/04*
5. *Unnumbered Exhibit: Statement of costs filed on 1/6/04*

Defendant's Exhibits

1. *Defendant's Exhibit 1: Ski School Ending Report, Stratton, 3/31/01*
2. *Defendant's Exhibit 2: Payroll Detail Report, Stratton, 3/17/01*
3. *Defendant's Exhibit 3: Curriculum Vitae, Mark J. Bucksbaum*
4. *Unnumbered Exhibit: Certification of Fiona Avery dated Jan. 2, 2004*

STIPULATED FACTS:

1. *Claimant was a ski instructor employee of Stratton Mountain within the meaning of the Vermont Workers' Compensation Act (hereinafter "Act") at all relevant times.*

2. *Claimant was also a chef of Wilburton Inn within the meaning of the Vermont Workers' Compensation Act ("Act") at all relevant times.*

3. *Defendants Stratton Mountain and Wilburton Inn were employers within the meaning of the Act at all relevant times.*

4. *Royal and Sunalliance was the Workers' Compensation insurance carrier for Defendant, Stratton Mountain, at all relevant times; TIG Insurance Company was the Workers' Compensation insurance carrier for Defendant, Wilburton Inn, at all relevant times.*

5. *On or around February 28, 2001, Claimant suffered a personal injury by accident arising out of and in the course of his employment with Stratton Mountain when he was acting as a ski instructor and was hit and struck in his leg by a student who was skiing out of control.*

6. *On said date Claimant was transported off the mountain by the ski patrol and taken to the Carlos Otis Stratton Mountain Clinic for treatment.*

7. *On November 13, 2001 Claimant underwent knee surgery for the repair of his right ACL and meniscus.*

8. *Claimant suffered a permanent impairment to his right knee as a result of his ACL and meniscus injury, which resulted in a rating of 14% whole person, or 56.7 weeks, as rated in accordance with the A.M.A. Guide, 5th edition. (Dr. Bucksbaum and Dr. Fenton gave the same rating.)*

FINDINGS OF FACT:

1. *The Claimant is a trained chef who graduated from Johnston and Wells University in Providence, Rhode Island in culinary arts in 1994. He is also a long-time skier.*

2. *In February of 2001 he was employed as a chef at the Wilburton Inn. He started working at the Wilburton Inn in September of 2000. He was also a part-time ski instructor for the Stratton Corporation. He was hired there on October 19, 2000. He worked as a ski instructor several days per week for several hours during each day in which he was scheduled to work. He received an hourly wage of $7.00 per hour (plus some tips) and a ski pass to the mountain as compensation from Stratton Mountain. The value of the ski pass as of October 19, 2001 was $1,129.00 per season. The season ran from November 22, 2000 to April 15, 2001. The ski pass was an important reason for his working at Stratton Mountain.*

3. *Prior to February 28, 2001, the Claimant had no prior significant injury to his right knee.*

<u>The Incidents Prior to Surgery</u>

4. *On February 28, 2001, the Claimant was supervising and instructing a group of about six youngsters who were experienced skiers. While the Claimant was standing downhill from the group, one of the young ski students lost control and ran into the Claimant, striking him on the right side and pushing him over. At the time of the collision, the Claimant felt and heard a "pop" He felt "horrible pain". He could not stand or walk and was transported by the ski patrol to the Carlos Otis Stratton Mountain Clinic. There he was diagnosed with a "knee sprain". He had swelling in the knee at the time of this incident. He was completely restricted from work by the treating physician to March 3, 2001. See Joint Exhibit 1, Page 1-1.*

5. *The Claimant returned to work at the Wilburton Inn on March 2, 2001*

and did not lose any significant time at that employment. He returned to work at Stratton on March 17, 2001 where he worked inside. He did not do significant skiing for the rest of the year. (He tried to ski twice in April 2001, but he could not safely ski because of his right knee.)

6. *There were several subsequent events which involved his right knee. One was in late April 2001 when he was recreationally hiking on a hiking trail. He was walking up-hill when his foot broke through some ice/snow about 6-8 inches deep and he felt a "pop" and pain in his knee. With assistance, he was able to return to his car. He had swelling associated with this incident. He did not seek medical treatment after this incident for about two weeks.*

7. *In late May or early June 2001, while working at the Wilburton Inn, the Claimant slipped on a wet floor of the kitchen and fell to the floor. He felt his knee give out.*

8. *In June 2001 the Claimant was playing tennis on the tennis courts of the Wilburton Inn when his knee went out. He was playing tennis while on a break from work or on his day off. The owners of the Wilburton Inn allowed the employees to use the tennis courts of the inn.*

9. *On or about September 23, 2001, while the Claimant was walking down a path at the Wilburton Inn, he stepped on a rock while turning to his rear. He lost his footing. His knee locked and would not straighten. Following this incident, the Claimant was examined and referred for surgery on his right knee.*

<u>The Medical History</u>

10. *On February 28, 2001 (the day of the ski accident) the treating physician at the Carlos Otic Clinic diagnosed a right knee "sprain" and he completely restricted the Claimant from work until March 6, 2001. (Joint Exhibit, Page 1-1)*

11. *On May 21, 2001 (several weeks after the hiking incident) the Claimant was seen at Northshire by Mara Liebling, MD, who diagnosed a suspected meniscal injury of Claimant's right knee. He was referred to Dr. Matheny (Joint Exhibit 1, Page 2-2)*

12. *On June 5, 2001 the Claimant was examined by Dr. Jeffrey*

Matheny who diagnosed a right knee anterior cruciate ligament (ACL) tear with possible medial meniscal injury. On June 26, 2001 Dr. Matheny met with the Claimant and reported that an MRI performed on June 19, 2001, showed an ACL tear without meniscal involvement. (Joint Exhibit 1, Page 3-3)

13. *On September 24, 2001 (following an incident on the path at Wilburton) the Claimant sought treatment from Dr. Matheny again who diagnosed a "Locked bucket handle tear of the medial meniscus". (Joint Exhibit 1, Page 4-2)*

14. *On November 5, 2001 Dr. Melbourne Boynton examined the Claimant. Dr. Boynton noted that the knee was unstable and had been in a flexed posture for several months and was causing pain. Dr. Boynton recommended surgery to repair the meniscus if possible and reconstruct the ACL. (Joint Exhibit 1, Page 4-4)*

15. *The surgery was performed on November 13, 2001 and the surgeon found a "large displaced medial meniscal tear", "a second double bucket tear in the posterior horn of the medial meniscus", "a radial tear of the lateral meniscus", and "the anterior cruciate ligament was completely disrupted and discarded at the posterior cruciate ligament". The ACL was reconstructed.*

The Medical Opinions

16. *Dr. Boynton was of the opinion that the need for surgery was caused by the injury on February 28, 2001. According to Dr. Boynton, "Once the ACL is torn, that leaves the knee unstable and will result in 90% of cases in a meniscal injury if the patient remains active." Joint Exhibit 1, Page 4-14. Further, he was of the opinion that the incidents subsequent to the February 28, 2001 incident caused the damage to the meniscus, but "[t]hese meniscal injuries are, however, causally related to the injury of February 28, 2001. On February 28, 2001 it is my opinion to a reasonable degree of medical certainty that Jon did damage his ACL. This left his knee susceptible to meniscal injury with other activities." (Joint Exhibit 1, Page 4-15)*

17. *Dr. Jonathan E. Fenton, a Doctor of Osteopathy, examined the Claimant on March 13, 2003. His report states, "It is my opinion within a reasonable degree of medical certainty that his [the claimant's] ACL was torn at the time of his initial injury as a ski instructor at Stratton Mountain. The Claimant gave a fairly classic description of the mechanism of injury, where his legs were taken out from under him..." Joint Exhibit 1, Page 6-4, The doctor's report further states, "As for the meniscal injuries, this would be a normal sequella of having an unstable knee for an ACL tear." Id., p. 6-4*

18. *Dr. John T. Chard, an orthopaedic surgeon hired by the insurer for Stratton Mountain, did a medical records review. He first concluded that the ACL tear occurred at some time after February 28, 2001 because there was no evidence of swelling at that time. When it was demonstrated to him that there was swelling in the knee at the time of the February 28, 2001 incident, he changed his opinion to conclude that the ACL was torn on February 28, 2001.*

19. *Dr. Mark Bucksbaum conducted an independent medical examination of the Claimant. After an examination of the medical records, an examination of the Claimant, and an interview of the Claimant, he concluded that the February 28, 2001 injury was mild, in part, because there were no "clinical findings of knee instability". He determined that the February 28, 2001 incident "did not represent a significant injury at that time". Joint Exhibit 1, Page 5-10. At the hearing Dr. Bucksbaum testified that the February 28, 2001 ski injury was "mild" because there was minimal medical attention and a return to work. He then went on to determine that the April hiking incident and the "June running injuries" represented significant aggravations of his underlying knee injury". Id. He concluded that the ACL tear and the meniscus injury were not causally related to the February 28, 2001 incident.*[1]

20. *To summarize, Dr. Boynton was of the opinion that in 90% of cases of a torn ACL, there will result in a meniscal injury if the patient remains active. Joint Exhibit 1, Page 4-14. Dr. Chard also agreed with Dr. Boynton, that tears of a meniscus would unlikely occur without a concomitant and antecedent anterior cruciate ligament tear. Joint Exhibit 1, Page 7-3. Dr. Fenton also was of the opinion that the meniscal tears were directly causally related to the original ACL tear. Joint Exhibit 1, Page 6-4.*

[1] Dr. Fenton made a query of Dr. Bucksbaum's conclusion of mild injury on February 28, 2001. He questioned the basis for this conclusion since there was no documented physical examination at the time of the injury and no way to discern whether there was, or was not, physical evidence of knee instability. It is further hard to understand Dr. Bucksbaum's conclusion that the injury was mild based on lack of medical intervention and return to active work, since the Claimant had less active medical intervention and similar work levels following the hiking incident, which Dr. Bucksbaum concluded, to be the likely time and place of the ACL tear.

Average Weekly Wage, Temporary Total Disability and Temporary Partial Disability

21. *The Claimant and the Defendant are in stark disagreement about the calculation of the Average Weekly Wage. Claimant's wages and tips at Stratton Mountain for the four weeks in which he worked before the accident of February 18, 2001 total $398.00. Claimant's Exhibit B. If the value of the ski pass is included, it would be included at its weekly value, over the time in which the value is delivered and earned. The total value of the ski pass when the Claimant was hired was $1,129.00. Affidavit of Fiona Avery. The weekly value of the ski pass over the term in which the ski area was opened (November 22 through April 15, 2001) is $56.45 per week. For the four weeks in which he worked before the injury, the sum of $225.80 would be added to the calculation of the weekly wage on account of the ski pass. Thus, the gross wages would be $623.80 for the four week period in which he worked and for which he was paid before the injury, resulting in an average weekly wage from Stratton Mountain of $155.95 per week. The average weekly wage from Wilburton was $751.55. The combined average weekly wage under these calculations is $907.50, which results in compensation rate of two-thirds or a weekly compensation amount of $605.00.*

22. *The Claimant lost 16 days of work at Stratton or 2.3 weeks. The temporary partial disability calculation is two thirds of the difference between his pre-injury compensation and his post injury compensation or $239.12.*

23. *The Claimant underwent surgery on November 11, 2001 and was unable to work until December 29, 2001 for a period of seven weeks. At the rate of $605.00 per week, the temporary total disability would be $4,235.00, however $3,713.57 had been advanced by Defendant Stratton without prejudice, so the total which would be due if Stratton Mountain is liable is $512.43.*

24. Thereafter, the Claimant worked part time at Moose Crossing as a consultant from the beginning of January 2002 until mid-April 2002 for 14 weeks. The difference between the average weekly wage as determined herein ($907.50 for 14 weeks) less the actual wages earned Moose Crossing results in a difference of $5,355.00 for this period. Two-thirds of this amount equals $3,570.00 as temporary partial disability.

Medical Bills

25. In the pre-hearing pleadings, the issue of the amount of the compensable medical bills was raised. The fee schedule amount for medical services as set forth in Claimant's Exhibit A is $13,015.77. It was resolved at the hearing that the Defendant would submit counter evidence or objection to the evidence of the Claimant following the hearing if there was an objection. Defendant Stratton Mountain stated in its proposed findings that it was entitled to the actual medical bills and that it wanted to perform an independent fee schedule audit of the bills. It does not appear that any discovery was done on this issue. No countervailing evidence was offered by the Defendant Stratton, despite the record being kept open for additional evidence.

Permanent Partial Disability

26. The parties stipulated that the impairment rating which resulted from the torn ACL and the meniscus injury is a 14% whole body impairment. There was no difference of opinion between the doctors as to that rating. That rating results in a permanent partial compensation of 56.7 weeks of compensation at the rate of $605.00 per week or a total permanent partial compensation amount of $34,303.50.

Costs, Interest, and Attorneys Fees

27. The Claimant hired counsel to represent his in this claim pursuant to a contingent fee agreement. The contingent fee agreement called for a contingent fee of 25% of the recovery.

28. Claimant incurred recoverable costs in the amount of $1,257.89 in pursuit of his claim.

29. Denial of Claimant's claim for Workers' Compensation was made

on November 12, 2001 by Francine Dumas on behalf of Stratton Mountain. See, DOL Form 2. The Claimant has made a request for the legal rate of interest on the unpaid amounts commencing on November 13, 2001 to the date of payment concerning medical bills, commencing on December 30, 2001 to the date of payment on the temporary total disability, and commencing on April 1, 2002 to the date of payment concerning the temporary partial disability payments and the permanent partial disability payments.

CONCLUSIONS OF LAW:

1. *It is the burden of the Claimant to establish all facts essential to support his claim. Goodwin v. Fairbanks, Morse and Co., 123 Vt. 161 (1963).*

2. *Sufficient competent evidence must be submitted verifying the character and the extent of the injury and disability, as well as the causal connection between the injury and the employment. Egbert v. The Book Press, 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of injury and the inference from the facts proven must be the more probable hypothesis. When the causal connection between an alleged work accident and an injury is obscure and a lay person would have no well-grounded opinion as to causation, there must be expert medical testimony to sustain the burden of proof. Jackson v. True Temper Corporation, 151 Vt. 592 (1989); Hasey v. Northeast Well Drilling, Op. No. 82-95 WC (1995).*

<u>Liability of Stratton Mountain for Knee Injury</u>

3. *When evaluating and choosing between conflicting medical opinions, the Department has considered several factors: (1) the nature of the treatment and the length of time there has been a patient-provider relationship; (2) whether accident, medical, and treatment records were made available to and considered by the examining physician; (3) whether the report or evaluation is clear and thorough and included objective support for the opinions expressed; (4) the comprehensiveness of the examination, and (5) the qualifications of the experts including professional training and experience. Miller v. Cornwall Orchards, Op. No. 20-97 WC (1997). Factors (1) and (3) support the opinion of Dr. Boynton. All the other factors are relatively equal as between the doctors.*

4. *Dr. Bucksbaum's opinion was that the ACL tear likely occurred during the hiking incident, but not during the ski accident. Not only is this opinion contrary to the opinion of the treating physician, but, also, it is contrary to the three doctors (other than himself) who examined the Claimant or his records. Dr. Bucksbaum's opinion discounted or ignored the mechanism of injury (the clipping, twisting action of the ski injury which was a classic type of ACL injury event). He based his opinion on factors, which were inconsistent with his overall opinion (i.e., the ACL could not have torn during the ski injury because of lack of medical intervention after the ski injury and the Claimant's return to work. These same factors do not support Dr. Bucksbaum's own conclusion that the ACL tore during the hiking injury.) Following the ski injury the Claimant did not return to his work as a ski instructor. His knee was unstable preventing him from skiing. After consideration of the factors, the medical reports, and the testimony of Dr. Bucksbaum, the opinion of Br. Boynton is found to be more persuasive. Accordingly, it is determined that the ACL was torn while the Claimant was working as a ski instructor on February 28, 2001.*

5. *The hiking incident of April 2001 was an activity of daily living. There was no indication that the Claimant was doing anything more strenuous than walking up a hill when his foot slipped through a crust of snow. Given the prior finding that the ACL tore on February 28, 2001, the hiking incident was not an intervening event "sufficient to break the causal link with an established compensable injury". See John Moran v. City of Barre, Opinion No. 33-02 WC (July 31, 2002); Verchereau v. Meals on Wheels, Opinion No. 20-88 WC. "Once the work-connected character of an injury... has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent non-industrial cause." Mary Jane Morgan v. C & S Wholesale Grocers, Opinion No. 24-93 WC.*

6. *Stratton Mountain has argued that even if the initial injury did occur on February 28, 2001, the disability occurred after successive injuries, several of which occurred on the premises and during the Claimant's work at Wilburton Inn. Stratton claims that these injuries constitute an aggravation of a prior condition and are, therefore, the responsibility of the Wilburton Inn.*

7. *In the workers' compensation context, "The terms 'aggravation' and 'recurrence' are legal rather than purely medical terms. To determine*

which applies, one must closely consider the medical evidence, but ultimately the determination is a legal one." Taro v. Town of Stamford, Opinion No. 25-00 WC (Aug. 9, 2000)(quoting Monaney v. Geka Brush Manufacturing, Opinion No. 44-99 WC (Nov. 17, 1999). If Claimant's work contributes even slightly to the causation of a disabling condition, the incident constitutes an aggravation of an earlier injury rather than a recurrence. Lavigne v. General Electric Lockheed Martin, Opinion No. 12-97 WC (June 17, 1997).

8. *"Aggravation" is defined as "an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." Rule 2.1110, Vermont Workers' Compensation and Occupational Disease Rules (2001). This has been explained as "a destabilization of a condition which has become stable, although not necessarily fully symptom free." Cote v. Vermont Transit, Opinion No. 33-96 WC (June 19, 1996).*

9. *A "recurrence" is defined as "the return of symptoms following a temporary remission". Rule 2.1312, Vermont Workers' Compensation and Occupational Disease Rules (2001). In prior cases the Department has explained this to be a continuation of a problem that has not previously resolved or become stable. Cote, supra.*

10. *The factors that this Department has traditionally considered as supporting a finding of aggravation, with the final factor receiving greatest weight under Pacher v. Fairdale Farms, 166 Vt. 626 (1997) are:*
    1) *Whether there is subsequent incident or work condition, which destabilized a previously stable condition;*
    2) *Whether the Claimant stopped treating medically;*
    3) *Whether the Claimant had successfully returned to work;*
    4) *Whether the Claimant had reached an end medical result;*
    5) *Whether the subsequent work contributed independently to the final disability.*

    Trask v. Richberg Builders, Opinion No 51-98 WC (Aug. 25, 1998).

11. These factors do not support a finding of aggravation. First, the Claimant's right knee was never stable after his ski injury. He could not ski and he did not return to work as a ski instructor during the ski season. (Stratton implied that Stratton's logs show him as having worked with various groups of ski students during his return to employment at Stratton, but part of his inside job was to organize groups of children going out onto the mountain. The Claimant's unrefuted testimony was that he was not able to successfully ski after the injury because of his knee.)

12. While the Claimant's treatments may have been sparse (because he hoped his knee was getting better), he sought treatment in May, June and September of 2001. No medical end result was reached because the medical digression never reached a plateau; rather, his condition continued to decline with more serious knee failures recurring until his knee locked in late September. Most importantly, there is no credible evidence whatsoever that any subsequent work incident contributed independently to the final disability. To the contrary, it was stated by Dr. Boynton that a knee left unstable by an ACL tear would result in further injury in 90% of the cases of active people.

13. A review of the Trask factors and the facts of this case lead to the conclusion that there was no aggravation of the initial injury, but rather a continuum of symptoms (a recurrence) of the initial injury.

14. Clearly the meniscus injury did not appear on the MRI of June 19, 2001, but the fact that a meniscus injury developed later as "a normal sequelae" of the ACL tear does not change the fact that it was a product of the initial injury. This was the majority opinion of the doctors who addressed this question. When an injury changes its form as a natural consequence of the initial injury, there is not necessarily a break in the chain of causation; nor is there necessarily an aggravation. See Hatin v. Our Lady of Providence, Opinion 21-03 WC (Apr. 29, 2003) (where an ulnar neuropathy involving the elbows transformed into carpel tunnel syndrome as a product of the initial injury). The meniscal injury was shown to be a direct and causal result of the initial injury for a normal active person. There was no credible evidence that it was the result of any specific subsequent incident. For this reason, it is not necessary to determine whether the incidents of the Claimant, which occurred on the premises of the Wilburton Inn, were within the scope of employment. Employment or

not, they were not the cause of the meniscal injury.

Calculation of Average Weekly Wage

15. *The calculation of the average weekly wage became an issue when the Claimant asked that the value of the ski pass be included as a lump sum in the calculation of the average wages. 21 VSA Sec. 601 (13) defines employee wages to include "...bonuses and 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 part of his remuneration..." (Emphasis added). Rule 15.4100 of Vermont Workers' Compensation and Occupational Disease Rules states that wages used in the calculation shall include the fair market value of any room, board, food, electricity, telephone, uniforms or similar benefits provided the claimant. The Claimant cites Aspen Highlands Skiing Copr. V. Apostolou, 854 P.2d 1357 (Colo. Ct. App. 1992) as authority for including the value of a ski pass. This case held that a ski pass given to a volunteer ski patrol person made them an "employee" for Workers' Compensation purposes. Stratton argues that the case of Pickens v. NSA Industries, Opinion No. 36-98 WC (which held that health insurance was not to be included in the value of wages) is dispositive. The Pickens case was decided in part based upon the weight of authority from other jurisdictions that health insurance should not be included in the calculation of wages. The majority of courts considering the question of health insurance payments have determined that they should not be included in the definition of wages, although it is not unanimous. According to Larsons, Workers' Compensation Law, the reasons for not including health insurance premiums involved the difficulty of calculating the value of the benefits, the overall history of such benefits, and the practical difficulty of complex calculations in each case to determine average weekly wage. See generally Larson, Larson's Workers' Compensation Law, Sec. 93.01(2). These same considerations were weighed by this Department in the Pickens case.*

16. The case now before the Department case is distinguishable from the Pickens case. In Mr. Gaboric's case, the ski pass was a major reason why he was working at the ski area. It was a significant part of his compensation. The value of the ski pass is an "advantage" which can readily be valued (as contrasted with insurance which has varying values dependant upon whether it is used or not).

17. Finally, the language of the section, which defines wages to include "other advantages", is meant to be flexible and broad enough to include similar items to those listed. The fact that health insurance premiums or contributions to union trust funds have been determined not to be included in the calculation of wages should not preclude independent consideration of a ski pass benefit. In Pickens, the Commissioner determined that health insurance benefits were not "ejusdem generis" to the items, which were listed in the statute. In other words, if a ski pass is a similar benefit to "board, lodging, [or] fuel" as an employment benefit, then it should be included. A ski pass is very similar to lodging because it enables and encourages the employee to be on premises. "The act is to be construed liberally to accomplish the humane purposes for which it was passed, but a liberal construction does not mean an unreasonable or unwarranted construction." Rule 1.1100, Vermont Workers' Compensation and Occupational Disease Rules. It is reasonable to conclude that the value of a ski pass given to an employee as a significant part of his compensation is an "other advantage" Under 21 VSA Sec. 601(13).[2]

18. The value of the ski pass should be credited as being paid on a weekly basis for each week in which the Claimant worked, averaged over the entire ski season (November 22, 2000 to April 15, 2001). See Exide Corp. V. Workmens Compensation App. Bd., 653 A.2d 50 (Pa. Comm. Ct., 1994) (holding that vacation pay should be attributable for the period in which it was earned, be that the whole year or a shorter period of time).

19. As part of the formal hearing procedure the Commissioner is to make a determination as to the date upon which the employer's

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[2] See also *Betz v. Telegraph Investment, Inc*. 844 S.W.2d 556 (Mo. Ct. App. 1993) where it was held that an accountant who ate two free meals per day at a restaurant which was run by his Subchapter S corporation was compensated by the two meals and that the calculation of average wages should be based on the value of the meals.

obligation to pay compensation began. Interest shall accrue from that date at the statutory rate. 21 VSA Sec. 664. See Berno v. Stripping Unlimited, Inc. Opinion No. 07-98 WC (Feb. 6, 1998).

20. In the discretion of the Commissioner, the prevailing party may be awarded attorneys fees. 21 VSA Sec. 678 (a). Rule 10.1000 Vermont Workers' Compensation and Occupational Health Rules. The Claimant prevailed in this formal proceeding and is entitled to reasonable attorney fees. Attorneys fee are limited to 20% of the award on a contingency fee agreement with a cap of $9,000.00. Rule 10.1220 Vermont Workers' Compensation and Occupational Health Rules. Here, the value of the award justifies the maximum allowable attorney fee under a contingency agreement. The fee, which is claimed, is reasonable under the criteria used to evaluate the reasonableness of attorney fees. See Estate of Lyons v. American Flatbread, Op. No. 36A-03 WC.

ORDER:

THEREFORE, based upon the foregoing findings of fact and conclusions of law, the Commissioner orders that the employer Stratton Mountain and its insurer shall pay to the Claimant compensation as follows:

1. *Temporary partial disability in an amount of 2.3 weeks from February 28 to March 17, 2001 for the amount of $239.12; plus, 13.1 weeks for the period from January 1, 2002 to April 1, 2002 for the amount of $3,570.00, resulting in an aggregate temporary partial disability award of $3,809.12 due from the employer as of April 1, 2002;*
2. *Temporary total disability for the period of November 11, 2001 to December 29, 2001 for a period of seven (7) weeks of temporary total or $4,235.06 with a credit for the advancement of $3,713.57 for a net amount of $521.49 due as of December 30, 2001;*
3. *Permanent partial disability calculated as 14% whole person or 56.7 weeks of compensation at the weekly rate of $605.00 per week for a total of $34,303.50 due from the employer as of April 1, 2002;*
4. *Medical benefits (payable to Claimant subject to any lien on the recovery by another medical benefit provider) in the amount of $13,015.77 due from the employer as of November 13, 2001;*
5. *Attorneys fees of $9,000.00 and costs of $1,535.28 are awarded to the Claimant, due from the employer upon this award becoming final.*

Dated at Montpelier, Vermont this 26th day of April 2004.

_____

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 VSA Sec. 670, 672.