STATE OF VERMONT
DEPARTMENT OF LABOR

Paul Martin

v.

L.F. Hurtubise

Opinion No. 15-07WC

By: Phyllis Severance Phillips, Esq.
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. W-04601

OPINION AND ORDER

Hearing on average weekly wage issue held in St. Albans on February 8, 2007
Hearing on permanent partial impairment held in Montpelier on April 2, 2007

APPEARANCES:

Joshua Simonds, Esq. for Claimant
Corinna Shaffner-Fegard, Esq. for Defendant

ISSUES PRESENTED:

1. Whether Claimant's average weekly wage for the twelve weeks preceding his October 2005 disability should include the value of a bull calf given him in August 2004 but not slaughtered until September 2005;

2. If yes, what is the proper valuation to be given to the calf;

3. What is the fair market value of the housing provided to Claimant by his employer in conjunction with his employment; and

4. What is the extent of Claimant's permanent partial impairment attributable to his October 8, 2003 work-related injury.

EXHIBITS:

Joint Exhibits:

Joint Exhibit I: Medical Records

Claimant's Exhibits:

Claimant's Exhibit 3: Town of Richford Lister's Card for "Davis Farm" mobile home
Claimant's Exhibit 5: Clarence Brown, Inc. fuel delivery records
Claimant's Exhibits 8-20: Photographs
Claimant's Exhibit 21: Deposition of Rosaire Bisson, P.A., March 15, 2007
Claimant's Exhibit 22: Deposition of Thomas Zweber, M.D., March 13, 2007
Claimant's Exhibit 23: Dr. Zweber office notes, April 11, 2007 and April 17, 2007
Claimant's Exhibit 24: Contingent Fee Agreement;
Claimant's Exhibit 25: Itemized Statement of Attorney's Fees and Expenses

Defendant's Exhibits:

Defendant's Exhibit A: September 2005 calendar
Defendant's Exhibit B: October 2005 calendar
Defendant's Exhibit C: Curriculum Vitae, George White, M.D.
Defendant's Exhibit D: George White, M.D., Independent Medical Evaluation Addendum, April 30, 2007

CLAIM:

Additional temporary total disability benefits under 21 V.S.A. §642, based on recalculation of average weekly wage and compensation rate;
Permanent partial disability benefits under 21 V.S.A. §648;
Interest on the above under 21 V.S.A. §664; and
Attorney's fees and costs under 21 V.S.A. §678.

PRELIMINARY EVIDENTIARY RULING:

Defendant filed a motion in limine seeking to exclude the deposition testimony of Robert Davis. Mr. Davis owns a home across the road from the mobile home in which Claimant resides, the fair market rental value of which is at issue in this claim. Mr. Davis' home includes a rental unit. Claimant's attorney sought Mr. Davis' testimony as to the rent he charged for his rental unit in order to support Claimant's assertions as to the fair market rental value of the mobile home Claimant rented.

Claimant's attorney issued a subpoena for Mr. Davis' deposition testimony, as he refused to appear voluntarily. Claimant's attorney had duly noticed the deposition to Defendant's workers' compensation insurance adjuster, who had not yet retained defense counsel. Due to unintentional oversight, the insurance adjuster did not appear at the deposition and did not retain counsel to appear on Defendant's behalf. Thus, Defendant was not represented at Mr. Davis' deposition and did not have any opportunity to cross-examine him.

Mr. Davis testified in his deposition as to the dimensions and layout of his rental unit and the rent he currently charges. Claimant's expert witness as to the fair market rental value of Claimant's mobile home, Sandi Murphy, testified that she reviewed Mr. Davis' deposition testimony along with other information she gathered in the process of formulating her expert opinion.

Defendant argues in its motion in limine that Mr. Davis' deposition testimony should be excluded on two grounds. First, Defendant contends that the rental unit about which Mr. Davis testified is so different from the rental unit at issue in the current claim that testimony as to its rental value is neither relevant nor probative. Second, Defendant contends that because it was not present or represented at Mr. Davis' deposition, to admit his testimony would be unfairly prejudicial.

Generally, relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." V.R.E. 401. Evidence which is not relevant is not admissible. V.R.E. 402. Even relevant evidence may be deemed inadmissible if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or by considerations of . . . needless presentation of cumulative evidence." V.R.E. 403. With these rules in mind, the admissibility of evidence is left to the broad discretion of the fact finder to determine the probative value of the facts proffered. *State v. Hanks*, 172 Vt. 93, 97-8 (2001); *State v. Lynds*, 158 Vt. 37 (1991).

I find that Mr. Davis' deposition testimony meets the definition of relevant evidence. However, in light of the fact that Mr. Davis' testimony was only one of many pieces of evidence relied upon by Claimant's expert witness in developing her opinion as to fair market rental value, I find that the evidence is cumulative and of limited probative value. With that in mind, given that Defendant was neither present nor represented at the deposition and therefore had no opportunity to cross-examine, I find that the probative value of Mr. Davis' testimony is outweighed by the danger of unfair prejudice. Defendant's motion in limine is **GRANTED** and Mr. Davis' proffered deposition testimony is excluded.

FINDINGS OF FACT:

Preliminary Findings

1. From November 2002 until October 17, 2005 Claimant was an employee of Defendant, and Defendant was Claimant's employer, within the meaning of Vermont's Worker's Compensation Act.

2. Claimant began working as a milker on Defendant's Richford dairy farm in November 2002. At the time of Claimant's employment, Defendant owned and operated two dairy farms. The farm at which Claimant worked, the so-called "Davis farm," had a herd of between 100 and 160 cows, comprised of a mixture of older cows, crippled cows and "first-calf" heifers. The cows in this herd were milked twice a day. In contrast, the second farm owned and operated by Defendants, referred to as the "home farm," had a herd of 600 milking cows. This farm operated at a faster pace than the Davis farm and the cows were milked three times per day.

3. The principals of L.F. Hurtubise & Sons, Inc. are brothers Wayne, Oliver and Lyle Hurtubise and their parents. At the time of Claimant's employment, Oliver Hurtubise oversaw the Davis farm operation and was primarily responsible for hiring and firing its employees. Wayne Hurtubise dealt mainly with the home farm. In addition, Carol Carpenter, Oliver Hurtubise's "common law wife," was the herdsperson for both herds. As such, she kept the milking herds at both farms in order and was in charge of supervising the hired help.

4. Claimant's job responsibilities at the Davis farm included caring for the calves and cows, milking them twice a day, cleaning the milking parlor, breaking in heifers for milking and handling difficult cows. He also did a variety of chores associated with these responsibilities. Claimant's work week began with the Sunday morning milking and ended after the Friday morning milking. On the weekends, either Carol Carpenter or other Hurtubise employees or family members covered.

5. For his employment as the Davis farm milker, Claimant's wages were $475 per week plus housing, with heat included, in a mobile home located on the Davis farm premises. Claimant lived in the mobile home with his wife and two children.

6. On October 10, 2003 Claimant was milking a new calf when he was kicked in the right hand. The force of the blow drove his right elbow backwards into a metal bar. Claimant reported the incident to Defendant and sought medical treatment. Defendant accepted the injury as a compensable workers' compensation claim and paid benefits accordingly.

7. Claimant treated conservatively for his injury until October 30, 2004, when he underwent surgery. Following surgery, Claimant was unable to work for a period of two months. He returned to work at the Davis farm on January 3, 2005.

8. Claimant's injury did not heal with surgery, and he continued to experience pain and other troublesome symptoms. Nevertheless, he continued to work.

9. In the fall of 2005, Defendant's workers' compensation insurance adjuster directed Claimant to schedule an appointment with his surgeon, Dr. Benoit, to determine whether he had reached an end medical result. Claimant saw Dr. Benoit for this purpose on October 3, 2005. Dr. Benoit concluded that Claimant was not yet at end medical result and instead referred Claimant for an additional course of physical therapy. In the meantime, he disabled Claimant from working for at least six weeks.

10. On October 17, 2005 Defendant terminated Claimant's employment and demanded that he and his family vacate the Davis farm mobile home. Claimant and his family vacated the premises on November 13, 2005.

The Davis Farm Mobile Home

11. As noted above, as part of the compensation package for Claimant's work as a milker, Defendant provided rent-free living accommodations for both Claimant and his family, consisting of a three-bedroom, two-bathroom single-wide trailer located on the Davis farm. Defendant purchased the trailer, originally manufactured in 1984, in 2000.

12. After purchasing the trailer, Defendant performed extensive repairs to it so as to make it habitable. In addition, Claimant and his wife made various cosmetic improvements. Early in their tenancy, leaking water from the dishwasher and/or refrigerator caused the kitchen floor to become spongy. Parts of the floor were replaced, but the problem recurred and was not repaired fully until after Claimant and his family had quit the premises. Notwithstanding these problems, the trailer was in reasonably good and certainly livable condition during the entire term of Claimant's employment.

13. Defendant paid for all heating costs associated with the trailer. For the period from November 15, 2004 to November 15, 2005 the cost of heating oil for the trailer averaged out to approximately $114.00 per month. This average included a quarterly fuel oil delivery on October 4, 2005 at a significantly higher price per gallon than prior oil deliveries. In contrast, the average monthly fuel oil cost for Claimant's trailer during the prior year was only $75.00 per month.

14. Wayne Hurtubise testified that he and his brothers would offer a $300 per month living allowance to a milker who did not require housing on the farm. This allowance was based on what Defendant believed to be the fair rental value of a two-bedroom mobile home. With this in mind, Defendant believed the fair rental value of Claimant's mobile home to be $400.00 per month, including heating costs. Defendant admitted that in coming to this valuation it did not obtain advice from any realtor, property appraiser, rental property manager or other professional.

15. Sandi Murphy testified as an expert witness on Claimant's behalf as to the fair market rental value of the Davis farm trailer. Ms. Murphy is a licensed real estate broker and certified real estate appraiser. She has worked in the real estate business since 1979. As part of the regular and usual conduct of her business, Ms. Murphy is familiar with rental values in and around the Richford area. She estimated that she conducts between 400 and 500 appraisals per year, including mobile home appraisals.

16. Ms. Murphy did not conduct a formal appraisal of the Davis farm trailer. Nor did she physically inspect the property. She did view photographs of both the interior and exterior of the trailer. She obtained and reviewed information as to the current market rent charged for two comparably sized three-bedroom mobile homes in the area. She also researched the rents charged for three-bedroom apartments in the Richford area. Last, Ms. Murphy calculated what she would charge for a comparably sized mobile home she herself owned in Irasburg in order for the rental to be viable financially.

17. Ms. Murphy defined a property's fair market rental value as the price that a prospective tenant in the marketplace is willing to pay. In Ms. Murphy's opinion the number of bedrooms is more determinative than total square footage. Location is important, and generally stand-alone units, including mobile homes, are more desirable than apartments. As to a rental unit's overall condition, Ms. Murphy testified that given both the general shortage of rental units and each prospective tenant's particular tastes, so long as a property is habitable its interior or exterior condition usually is not a factor in determining fair market rental value.

18. Based on her research, Ms. Murphy testified that in her opinion the fair market rental value of the Davis farm trailer in the fall of 2005 was in the range of $650 to $700 per month without utilities and $750 to $800 per month with utilities included.

19. Wilford Pollander testified as an expert witness on Defendant's behalf as to the fair market rental value of the Davis farm trailer. Mr. Pollander has been a licensed real estate broker since 1967. He grew up in Richford, but worked in the Vergennes, Addison County area for most of his career. Mr. Pollander returned to the Richford area five years ago and now works as both a realtor and real estate speculator in and around Richford. As part of his business, Mr. Pollander buys, sells, rents and manages both commercial and residential properties. Mr. Pollander is not a licensed appraiser but is familiar with appraisal techniques.

20. In formulating his opinion as to the fair market rental value of the Davis farm trailer, Mr. Pollander viewed photographs of the trailer and also physically inspected it recently. He reviewed information as to current rentals for several one-, two-, three- and four-bedroom apartments in and around Richford. Most of these were in multi-unit buildings. Mr. Pollander also reviewed current rental information for two stand-alone mobile homes located in a Richford trailer park, but his testimony was unclear as to whether the rental values he obtained from these units included lot rental charges or not.

21. Mr. Pollander disagreed with Ms. Murphy's testimony that in determining the fair market rental value of a residential property the number of bedrooms is more important than the overall size. He also disagreed with Ms. Murphy's testimony that so long as a property is habitable, its interior or exterior condition is irrelevant to determining fair market rental value. Mr. Pollander testified that in his opinion a rental property's condition is an important factor in determining its fair market rental value.

22. Mr. Pollander agreed with Ms. Murphy that location is important to determining a rental property's fair market rental value, and also that generally a stand-alone unit commands a higher rental than an apartment in a multi-unit building.

23. Based on his research, Mr. Pollander testified that in his opinion the fair market rental value of the Davis farm trailer in the fall of 2005 was in the range of $450 to $550 per month with utilities included.

24. Claimant's wife testified that after leaving the Davis farm trailer, she and Claimant looked at a variety of apartments in the Richford area before finding one that was both affordable and appropriately sized for their family. They investigated one three-bedroom apartment in Richford that rented for $400 per month without utilities, but the bedrooms were too small to accommodate their furniture. They saw advertisements for three-bedroom trailers renting for $650 to $750 per month, but did not investigate them because they were outside their price range. Currently they rent a two-bedroom apartment in Richford for $500 per month.

The Bull Calf

25. In December 2002 Oliver Hurtubise gave Claimant a box of meat as a Christmas present. The meat came from steers that Oliver Hurtubise and Carol Carpenter raised on the home farm for their own personal meat consumption.

26. In the spring of 2003, Claimant asked Oliver Hurtubise if he could have a Brahma bull calf to raise for his personal meat consumption. The calf weighed approximately 60 pounds at birth and was worth no more than $20. Oliver Hurtubise gave Claimant the calf at no charge.

27. Claimant kept the calf in a vacant barn on the Davis farm. He fed it waste milk and waste feed, for which Defendant did not charge him.

28. Claimant slaughtered the calf when it was eight months old because it began to "get ugly" and became difficult to tend. Claimant testified that the calf weighed 800 to 900 pounds when it was slaughtered, and yielded approximately 500 pounds of meat.

29. In August 2004 Oliver Hurtubise gave Claimant a second bull calf, a Jersey-Holstein cross, to raise for his personal meat consumption. As with the first calf, Defendant did not charge Claimant for this calf. Also as with the first calf, Claimant kept it in a vacant barn and fed it waste milk and waste feed, for which Defendant did not charge him.

30. Aside from family members, Claimant was the only employee of Defendant who was given a bull calf to raise for his personal meat consumption at no charge. Defendant gave another milker on the farm, Keith Noyes, a bull calf in September 2004, but charged him $40 for it.

31. There was disputed testimony as to Defendant's motivation for giving Claimant both the 2003 Brahma calf and the 2004 Jersey-Holstein calf. Claimant testified that Oliver Hurtubise offered him both calves as a reward for good job performance. Oliver Hurtubise testified that he did not offer Claimant the calves; rather, Claimant requested them. Mr. Hurtubise further testified that he complied with Claimant's request not in recognition of Claimant's good job performance but merely as a charitable gesture to allow Claimant to "help himself out." In fact, Oliver Hurtubise testified that Claimant's job performance, though satisfactory overall, lagged in some areas and was by no means exemplary.

32. Claimant slaughtered the second calf on September 30, 2005. The calf was thirteen months old and weighed somewhere between 650 pounds (according to Oliver Hurtubise) and 800 pounds (according to Claimant). Claimant paid $60 for the slaughter and $.32 per pound for butchering and packaging.

33. Claimant testified that the total yield from the second bull calf was 385 pounds of packaged meat, or approximately 50% of the calf's live weight.

34. Oliver Hurtubise disputed Claimant's testimony as to the typical reduction in a slaughtered calf's yield from live weight to packaged meat. In Mr. Hurtubise's opinion, the total yield is only 30-35%.

35. Michael Bessery, an experienced butcher and meat cutter, testified on behalf of Claimant as to the typical yield from an 800-pound calf and the value of the various cuts of meat it produces. Mr. Bessery agreed with Claimant's estimation that a calf typically yields packaged meat amounting to approximately 50% of its live weight. Mr. Bessery also agreed that Claimant's description of the amount and type of the various cuts of meat he obtained from the slaughter was reasonable.

36. Mr. Bessery testified that the value of the various cuts of meat Claimant obtained from the second calf's slaughter totaled approximately $1,900. After subtracting slaughtering, butchering and packaging costs, the net value of the meat was approximately $1,700.

Medical Diagnosis and Extent of Permanent Impairment

37. Claimant's preliminary diagnosis in the weeks following his October 2003 injury was right elbow olecranon bursitis and lateral epicondylitis. As noted above, initially Claimant treated conservatively for this injury. When his symptoms did not improve, in October 2004 he underwent a surgical right lateral epicondylar release.

38. Following surgery, Claimant was disabled from working until January 2005. Claimant's symptoms improved during this time, but immediately recurred when he returned to work. These symptoms included marked tenderness to palpation both around his elbow and in the associated muscle group, decreased range of motion and decreased strength. Over the ensuing year Claimant's symptoms progressed to include constant, sharp, throbbing pain throughout his upper extremity and down into his wrist and fingers. Claimant reported that the pain worsened with any movement.

39. In June 2006 Claimant reported to his family practitioner, Rosaire Bisson, P.A. that within the past three or four months he had begun to experience intermittent redness and warmth in his elbow and forearm. Mr. Bisson expressed "hope" that this was not a sign of reflex sympathetic dystrophy, or RSD. RSD is also known as Complex Regional Pain Syndrome.

40. RSD is a pain disorder involving the sympathetic nervous system. The disorder is characterized by generalized pain and hypersensitivity that extends well beyond the initially affected joint and into the entire extremity. Other clinical signs include mottled skin color, changes in skin temperature and texture, edema, soft tissue atrophy, joint stiffness, fingernail changes and changes in skin hair growth. In all, the American Medical Association Guides to the Evaluation of Permanent Impairment, 5^{th} edition ("AMA Guides") list eleven objective diagnostic criteria for RSD; at least eight of these must be present for the diagnosis to be ratable.

41. The symptoms of RSD often can be fleeting and may fluctuate significantly within the space of just a few minutes.

42. In November 2005 Claimant underwent an independent medical evaluation with George White, M.D., an occupational medicine specialist. Dr. White concluded that Claimant had findings suggestive of a chronic pain disorder, but did not meet the diagnostic criteria for RSD as laid out in the AMA Guides.

43. Dr. White is experienced in rating impairment according to the AMA Guides. He performs four or five impairment evaluations weekly. Dr. White has evaluated patients with RSD, but does not see this condition frequently. He has had training in how to rate RSD under the AMA Guides.

44. Dr. White re-evaluated Claimant in July 2006. Again, he did not observe sufficient signs of RSD to meet the AMA Guides' diagnostic criteria. In fact, the only criterion he observed was possible joint stiffness and decreased passive range of motion.

45. Also in July 2006 Claimant underwent an evaluation with Thomas Zweber, M.D., a physiatrist. Dr. Zweber has maintained a specific interest in evaluating and treating Complex Regional Pain Syndrome for 25 years. He has treated hundreds of patients with this condition. Dr. Zweber also has training and experience in performing impairment evaluations under both the AMA Guides and other rating mechanisms.

46. Dr. Zweber's diagnosis was Complex Regional Pain Syndrome, Type I. His basis for this conclusion included such observed symptoms as generalized pain and hypersensitivity, mottled skin color, skin temperature changes, edema, asymmetric fingernail growth, tender and stiff joints and thinned, perspiring skin. Dr. Zweber also referred to what he described as Claimant's "classic" clinical history in support of his diagnosis.

47. Dr. Zweber's observations as to the RSD symptoms Claimant exhibited, particularly mottled skin, edema and joint stiffness, were corroborated by other treatment providers, including Rosaire Bisson, Claimant's aquatic physical therapist and the functional capacity evaluator. Claimant's wife also testified as to the symptoms she observed. Last, Claimant himself testified credibly as to generalized pain and hypersensitivity throughout his upper extremity, swelling in his elbow, wrist and hand, a feeling of his arm getting "hot inside" as if it were "on fire," and skin color changes. Claimant testified that the frequency of the latter two symptoms has increased significantly in the past four to six months.

48. In addition to RSD, Dr. Zweber also diagnosed Claimant with chronic lateral epicondylitis. He attributed Claimant's decreased grip strength to this condition.

49. Neither Dr. Zweber nor Dr. White observed any signs that Claimant was malingering or faking symptoms.

50. Dr. White concluded that Claimant has sustained an 8% whole person permanent impairment referable to his work-related injury. Because Dr. White did not believe that Claimant met the diagnostic criteria for RSD, he did not rate any impairment for that condition. Instead, he rated Claimant with a 6% whole person impairment due to deficits in elbow range of motion, and an additional 2% impairment for chronic pain.

51. Dr. White admitted that some of the symptoms Claimant claims to have exhibited, including edema, changes in skin sensation and color, and pain throughout the upper extremity, would not be expected in a patient suffering solely from lateral epicondylitis.

52. Dr. Zweber rated Claimant with a 41% whole person permanent impairment. The difference between his rating and Dr. White's is attributable primarily to Dr. Zweber's conclusion that Claimant did in fact meet the diagnostic criteria for RSD. Thus, Dr. Zweber measured both motor and sensory deficits throughout the upper extremity in calculating the extent of impairment, whereas Dr. White considered only the motor deficit in Claimant's elbow.

53. Dr. Zweber also included consideration of Claimant's decreased grip strength in his impairment rating. Although the AMA Guides specifically preclude this in the context of rating for RSD, in Dr. Zweber's opinion it was appropriate to do so in Claimant's case because the symptom related not to RSD but rather to chronic lateral epicondylitis. According to Dr. Zweber, the AMA Guides do not require a diagnosis of Complex Regional Pain Syndrome to "trump" other findings that might independently affect upper extremity function.

54. Dr. Zweber's impairment rating was calculated as follows:

(a) 23% upper extremity impairment for loss of joint motion;
(b) 50% upper extremity impairment for sensory deficits and pain;
(c) 20% upper extremity impairment for loss of grip strength;
(d) Combined value of (b) and (c) equals 60%;
(e) Combined value of (d) and (a) equals 69% upper extremity impairment;
(f) 69% upper extremity impairment converts to 41% whole person impairment.

55. Dr. White has not examined Claimant since July 2006. Dr. Zweber last examined Claimant on April 11, 2007. He observed various signs of RSD, including puffy, red, mottled, perspiring skin that was hypersensitive to touch. Dr. Zweber diagnosed a significant flare of RSD and prescribed a Medrol dose pack. Claimant's symptoms improved with this medication.

56. Oliver Hurtubise testified that he never observed Claimant exhibiting any guarding of his right upper extremity or other pain behaviors. Mr. Hurtubise recalled that in October 2005 Claimant hoisted himself up onto a truck platform with his right arm in order to present Mr. Hurtubise with his out-of-work slip. He stated that Claimant often carried five-gallon buckets of milk and feed, one in each hand. Last, Mr. Hurtubise testified that he observed Claimant shoveling snow from his driveway in February 2007 using his right arm, and again appeared in no apparent distress. Claimant disputed each of these observations. He testified that he hoisted himself up onto the truck platform with his left arm and that he carried the milk and feed buckets one at a time in his left hand. As for the snow shoveling incident, Claimant testified that his son did virtually all of the shoveling; Claimant managed only one or two shovels of snow in an effort to spell his son, but had to stop due to increased pain.

CONCLUSIONS OF LAW:

Average Weekly Wage – Generally

1. Under Vermont's workers' compensation law, a claimant who is temporarily disabled as a result of a work-related injury is entitled to receive weekly compensation benefits equal to two-thirds of his or her average weekly wage for the twelve weeks preceding the injury. 21 V.S.A. §§642, 650(a).

2. Where a claimant's temporary disability does not occur in a continuous period immediately following the injury but rather occurs in separate intervals, compensation is adjusted to reflect any increase in wages or benefits prevailing at that time. 21 V.S.A. §650(c). Thus, the twelve-week period upon which Claimant's compensation rate is based in the current claim is the period immediately preceding his October 2005 disability, not the period preceding his original injury in 2003.

3. Vermont's workers' compensation statute defines the term "wages" as follows:

> "Wages" includes 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 a part of his remuneration.
> 21 V.S.A. §601(13).

4. As to bonuses, Workers' Compensation Rule 15.4120 requires that they be "paid, due or received" within the twelve-week period specified by 21 V.S.A. §650 in order to be included in the average weekly wage calculation.

<u>Fair Market Rental Value of Davis Farm Trailer</u>

5. There is no question but that Defendant provided the Davis farm trailer in which Claimant and his family lived during Claimant's employment "as a part of [Claimant's] remuneration." Claimant's average weekly wage calculation, therefore, should include the trailer's fair market rental value. The dispute centers on the appropriate value to be given.

6. I find Claimant's expert witness' opinion to be more credible than Defendant's expert witness' opinion in this regard, for the following reasons:

   (a) Ms. Murphy is a certified appraiser, whereas Mr. Pollander lacks this designation;

   (b) Ms. Murphy's opinion was based on similarly sized (three-bedroom) and situated (stand-alone) units, whereas Mr. Pollander averaged in the rental value of units that were both much smaller (one-bedroom) and much larger (four-bedroom) and were situated primarily in multi-unit buildings;

   (c) Ms. Murphy's opinion is corroborated by Claimant's own housing search, during which he and his wife reviewed advertisements for three-bedroom mobile homes renting in the $650-$750 per month range; and

   (d) Mr. Pollander's opinion is rendered less credible when considered in light of the unit Claimant ultimately rented, a two-bedroom apartment for $500 per month.

7. I find, therefore, that Claimant's average weekly wage for the twelve weeks preceding his October 2005 disability should include a fair market rental value of $750 per month for the Davis farm trailer.

Inclusion of the Bull Calf in Claimant's Average Weekly Wage

8. The dispute as to whether Claimant's average weekly wage for the twelve weeks preceding his October 2005 disability should include the value of the second bull calf he received from Defendant requires a determination as to when the calf was "received" for the purposes of Workers' Compensation Rule 15.4120. If Claimant "received" the calf as a live animal in August 2004, then clearly the receipt falls outside the twelve-week window preceding his October 2005 disability and cannot be included in his average weekly wage calculation. Claimant argues, however, that because the calf's value is derived not as a live animal but rather as packaged meat, it should not be considered to have been "received" until it was slaughtered in September 2005, which would be within the twelve-week window.

9. Claimant's argument flies in the face of the undisputed facts. The fact is Defendant did not give Claimant packaged meat; it gave him a live animal. Had Defendant wanted to give Claimant packaged meat, it certainly could have done so. It chose not to.

10. In truth, Claimant is not really disputing that he received the calf in August 2004 rather than in September 2005. He has characterized his argument as involving the date of receipt solely so as to come within the twelve-week window mandated by 21 V.S.A. §650 and Rule 15.4120. In reality, though, his argument speaks to the date of valuation, not the date of receipt. Essentially, Claimant's position is that Rule 15.4120 should be interpreted to allow for the *speculative* value of a bonus to determine its date of receipt rather than its *present* value. Thus, a calf is not "received" until slaughtered, a junk car is not "received" until restored, and presumably even a cash bonus is not "received" until invested.

11. Workers' compensation benefit calculations "have always begun with a wage basis calculation that make 'wage' mean the wages that the worker lives on and not miscellaneous values that may or may not someday have a value to him depending on a number of uncontrollable contingencies." 5 *Larson, Workers' Compensation Law,* §60.12(b), cited in *Pickens v. NSA Industries*, Opinion No. 36-98WC (June 24, 1998). On these grounds, this Department has concluded that the value of employer-paid health insurance benefits is not included in the calculation of a claimant's average weekly wage for workers' compensation purposes. *Pickens, supra*; *Antilla v. Edlund Co., Inc.*, Opinion No. 7-90WC (Sept. 19, 1990); *see Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624 (1983).

12. In *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624 (1983), the U.S. Supreme Court considered whether the present value of an employer-funded pension fund should be included in an injured worker's average weekly wage for the purposes of the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §902(13). The Court held that the statutory language, which allowed for the value of employer-provided board, rent, lodging or "similar advantages" to be included in an employee's wage calculation, was intended to include benefits "with a present value that can be readily converted to a cash equivalent on the basis of their market value." *Id.* at 630. The Court found that the trust fund at issue did not meet that standard and therefore was not includable in the employee's wage calculation. Of note, the Court concluded that the value of the employee's "expectation interests" in the pension funds was too speculative to form the basis for determining the funds' present value. *Id.* at 631.

13. Citing *Morrison-Knudsen* with approval, in *Lyons v. American Flatbread*, Opinion No. 36-03WC (Aug. 22, 2003), the Commissioner found that the value of employer-paid massage therapy services was includable in the claimant's average weekly wage, but the value of factory second breads given to employees free of charge were not. The massage therapy services had a present market value that made them easily convertible to cash. In contrast, the factory second breads could not be sold to the public and therefore had no market value.

14. The calf at issue in the current claim had an easily determinable market value when Claimant received it in August 2004 – approximately $40, as evidenced by Defendant's sale of a similar calf to Claimant's co-employee at around the same time. The fact that the calf's "present value" was far less than Claimant's "expectation interest" in its anticipated slaughter thirteen months later does not negate either its receipt or its value on that earlier date.

15. Claimant's argument is a creative attempt to avoid the statutory time frame for calculating average weekly wage, but the plain language of Rule 15.4120 precludes such an interpretation. *Martyn v. Visiting Nurse Alliance of Vermont & New Hampshire, Inc.*, Opinion No. 59-98WC (October 6, 1998) (bonuses and extras appraised in terms of their date of receipt and can only be included in the average weekly wage calculation if they were received within the twelve-week window mandated by 21 V.S.A. §650); *Millhoff v. Village Country Inn, Inc.*, Opinion No. 39-96WC (July 10, 1996) (Workers' Compensation Rule 15.4120 specifically limits the inclusion of bonuses to those received within the twelve weeks prior to the injury).

16. I find, therefore, that Claimant "received" the calf at issue here in August 2004, well outside the twelve-week window preceding his October 2005 disability. The calf's value, therefore, should not be included in Claimant's average weekly wage calculation.[1]

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[1] Because I find that the calf was not "received" within the twelve weeks prior to Claimant's disability, I need not reach the question whether Defendant intended it to be "a part of [Claimant's] remuneration rather than simply a gift.

Extent of Permanent Impairment

17. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He must establish by sufficient credible evidence the character and extent of the injury 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 the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993). Sufficient competent evidence must be submitted verifying the character and 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).

18. Where expert medical opinions are conflicting, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (Sept. 17, 2003). With these factors in mind, the key question is which expert medical opinion is the most credible? *Bonenfant v. Price Chopper*, Opinion No. 13-07WC (May 8, 2007).

19. In the current claim, the medical issue in dispute concerns the extent of Claimant's permanent partial impairment. Its resolution depends primarily on whether the medical evidence is sufficient to establish that Claimant suffers from RSD. Claimant's expert, Dr. Zweber, says yes; Defendant's expert, Dr. White, says no.

20. I find that the extent of Dr. Zweber's training and experience in evaluating and treating patients with RSD renders his expert opinion more credible than Dr. White's on the specific question whether Claimant suffers from that condition. Dr. Zweber has maintained a particular interest in RSD for more than 25 years and has treated hundreds of patients who suffer from it. In addition, Dr. Zweber has examined Claimant both more often and more recently than Dr. White has, and personally has observed the symptoms indicative of RSD, while Dr. White has not. Given that the symptoms of RSD may fluctuate significantly from examination to examination, this is neither surprising nor indicative of any fakery on Claimant's part. Last, Dr. Zweber's diagnosis aptly accounts for all of the symptoms Claimant has exhibited, while Dr. White's diagnosis does not.

21. Having accepted that the condition from which Claimant suffers appropriately is diagnosed as RSD, the remaining question is to determine the extent of his permanency. Because Dr. White's opinion omits any consideration of RSD, I cannot accept it. However, Dr. Zweber's opinion is faulty because it includes consideration of both the motor and sensory deficits attributable to Claimant's RSD and the loss of grip strength attributable to his lateral epicondylitis. The AMA Guides specifically preclude this in the context of rating for RSD. The appropriate permanency rating, therefore, is one that includes consideration of motor and sensory deficits, but omits consideration of loss of grip strength.

22. I take judicial notice of the relevant sections of the AMA Guides, specifically §16.5e at p. 496, and using Dr. Zweber's measurements for motor and sensory deficits, I calculate Claimant's permanent partial impairment as follows:

(a) 23% upper extremity impairment for loss of joint motion;
(b) 50% upper extremity impairment for sensory deficits and pain;
(c) Combined value of (a) and (b) equals 62% upper extremity impairment due to RSD (using Combined Values Chart, p. 604);
(d) 62% upper extremity impairment converts to 37% whole person impairment (using Table 16-3).

23. I conclude, therefore, that Claimant has suffered a 37% whole person permanent impairment as a consequence of his October 2003 work-related injury.

Attorney's Fees

24. Claimant has made a request under 21 V.S.A. §678(a) and Workers' Compensation Rule 10.0000 for costs totaling $4,017.74 and attorney's fees totaling $16,531.50. Defendant does not contest the costs, but argues that the attorney's fees are excessive.

25. An award of costs to a prevailing Claimant is mandatory under 21 V.S.A. §678; awarding attorney's fees, however, lies within the Commissioner's discretion. Mindful of the purposes of Vermont's workers' compensation statute, the Commissioner has considered several factors when awarding fees, including (a) whether the efforts of the claimant's attorney were integral to the establishment of the claimant's right to compensation; (b) the difficulty of the issues raised, skill of the attorneys and time and effort expended; and (c) whether the claim for fees is proportional to the efforts of the attorney. *J.R. v. Benchmark Assisted Living*, Opinion No. 46A-05WC (Nov. 23, 2005) and cases cited therein. When a claimant has partially prevailed, a fee will be based on the degree of success. *Id.*

26. This was a complex claim involving many diverse issues, both factual and legal. Upon review of Claimant's itemized statement of attorney's fees, I find that there was an appropriate delegation of assignments between attorney and paralegal, and that the time spent on the tasks itemized was not excessive.

27. However, I also find that the billing submitted included time spent on matters that were not directly germane to the issues in dispute here, for example, medical case management and vocational rehabilitation. I decline to award attorney's fees for such matters, and therefore deduct the sum of $1,332 from the total submitted, for a new total of $15,199.50.

28. Last, because Claimant did not prevail on all of the issues he pursued, some additional diminution in the attorney's fees awarded is appropriate. I conclude that Claimant's award of attorney's fees should be reduced by 20% to reflect the fact that first, he did not prevail on one of the average weekly wage issues he pursued, and second, the award for permanency was somewhat less than what he had sought. The total amount of attorney's fees awarded, therefore, is $12,159.60.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is ORDERED to pay:

1. Adjusted temporary total and/or permanent partial disability benefits in accordance with an average weekly wage that includes the value of Claimant's employer-provided housing at $750 per month;

2. Additional permanent partial disability benefits in accordance with a 37% whole person impairment rating;

3. Interest on the above amounts in accordance with 21 V.S.A. §664;

4. Costs in the amount of $4,017.74; and

5. Attorney's fees in the amount of $12,159.60.

Dated at Montpelier, Vermont this 12 day of June 2007.

Patricia Moulton Powden
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.