

V. S. v. Kenametal, Inc.

(August 2, 2007)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

V. S.

Opinion No. 19-07WC

v.

By: Jane Dimotsis, Hearing Officer  
Renee Mobbs, Law Clerk

Kenametal, Inc.

For: Patricia Moulton Powden,  
Commissioner

State File No. W-03690

**OPINION AND ORDER**

Hearing held in Montpelier, Vermont on April 11, 2007.

Record closed on May 14, 2007.

**APPEARANCES:**

Claimant, *pro se*

Corina Schaffner-Fegard, Esq. for Defendant

**ISSUES:**

1. What date of injury should be used to calculate Claimant's average weekly wage?
2. What is the appropriate average weekly wage and compensation rate for each of Claimant's periods of temporary disability?
3. Is Claimant entitled to further mileage reimbursement?
4. Are there any unpaid medical bills for which the Carrier is responsible?

**EXHIBITS:**

Joint Exhibits:

Joint Exhibit 1: Medical Records

Claimant's Exhibits:

Claimant's Exhibit 1: Reimbursement Form for 100 miles

Claimant's Exhibit 2: Reimbursement Form for 120 miles

Claimant's Exhibit 3: Reimbursement Form for 135 miles

Claimant's Exhibit 4: 12/30/04 Dr. Kraus note

Claimant's Exhibit 5: 1/6/05 Dr. Kraus note

Defendant's Exhibits:

Defendant's Exhibit 1: 9/21/06 Letter from Adjuster Russo  
Defendant's Exhibit 2: 2004 ShopVue Absence Calendar  
Defendant's Exhibit 3: 2005 ShopVue Absence Calendar  
Defendant's Exhibit 4: 5/29/06 – 12/19/06 Off Duty Report  
Defendant's Exhibit 5: 1/2/06 – 5/25/06 ShopVue Absence Calendar  
Defendant's Exhibit 6: 4/3/07 Pay History from Adjuster Coco  
Defendant's Exhibit 7: 4/10/07 Payment Information from Adjuster Coco  
Defendant's Exhibit A: Form 25 for 7/25/05 – 10/17/04  
Defendant's Exhibit B: Form 25 for 10/8/04 – 12/17/04  
Defendant's Exhibit C: Form 25 for 11/7/04 – 1/23/05  
Defendant's Exhibit D: Form 25 for 4/17/05 – 7/17/05  
Defendant's Exhibit E: Form 25 for 4/23/06 – 7/9/06  
Defendant's Exhibit F: Form 25 for 8/13/06 – 10/29/06

**FINDINGS OF FACT:**

1. Claimant is an employee within the meaning of the Vermont Workers' Compensation Act (the "Act"). Claimant has worked for Defendant since 1989.
2. Defendant is an employer within the meaning of the Act.
3. In June of 2004, Claimant experienced right arm pain while participating in a company 5S program, which involved cleaning, upgrading, and performing maintenance on her work area. Claimant contends she hit her shoulder while cleaning her machine. After this event, Claimant did not see any doctors and continued to work. There is no evidence of an accident report from the summer of 2004.
4. Claimant asserts that she experienced swelling, redness, and increased pain in her right arm in October of 2004. Claimant was out of work October 18-20 for her right arm pain. She visited Dr. Ajamie on October 20. He diagnosed her with tennis elbow and probable mild carpal tunnel syndrome and gave her a cortisone injection. Dr. Ajamie noted that Claimant's condition did not arise out of her employment. He returned Claimant to work with no restrictions on October 21.
5. Claimant was out of work December 23, 2004 for a visit with Dr. Kraus. Dr. Kraus diagnosed Claimant with some shoulder impingement as well as the previously diagnosed tennis elbow. Dr. Kraus did not relate Claimant's right arm problems to her employment. Dr. Kraus provided Claimant with an out of work note for the December 23 appointment.
6. An accident report for Claimant's right shoulder and elbow pain was completed on December 27, 2004. The report stated that it had not been determined whether Claimant's right arm pain was work related.

7. Claimant went out of work for shoulder pain December 29-30, 2004. She saw Dr. Kraus on December 30. Dr. Kraus again put Claimant back to work but restricted her to light duty.
8. A January 4, 2005 x-ray of Claimant's right shoulder revealed no abnormalities.
9. Dr. Kraus clarified her December 30, 2004 note on January 6, 2005 to state that the company should check with Claimant's physical therapist, Ben McCormack, regarding Claimant's specific work restrictions. The January note also excused Claimant from work for the December 29-30, 2004 absences.
10. Claimant saw Dr. Haas on January 6, 2005 for an independent evaluation requested by the company. Dr. Haas found several aspects of Claimant's presentation to be inconsistent with a finding that Claimant's shoulder pain was caused by her job, but he reserved his final report on causation until an analysis of Claimant's workstation was performed.
11. On January 21, 2005, Defendant filed a Form 25 for Claimant's December 23, 2004 right shoulder and elbow pain. The Form 25 cited December 23, 2004 as the only date on which Claimant missed work for right shoulder and elbow pain and December 27, 2004 as the first date on which Claimant reported her right arm pain to her supervisor.
12. An ergonomic job site evaluation was performed by physical therapist Ben McCormack on January 25, 2005. Mr. McCormack indicated that while Claimant's job does not lend itself to elevated risk at the shoulders, he did note elevated risk at both elbows. Specifically, Mr. McCormack found elevated risk at the right elbow due to certain of Claimant's job duties, including sustained poor grasping of a micrometer as well as forceful gripping of a T-handled wrench. Mr. McCormack concluded that Claimant's tennis elbow was more likely than not related to her work.
13. Claimant saw Dr. Gagnon on January 25, 2005. Dr. Gagnon ordered an MRI, which was taken on February 3, 2005 and showed a right rotator cuff tear. On February 9, 2005 Dr. Gagnon indicated that Claimant needed surgery to repair the tear. Dr. Gagnon put Claimant out of work until after the surgery scheduled for March 2, 2005. However, on February 15, 2005 Dr. Gagnon indicated that he did not feel Claimant's rotator cuff tear was related to her job activities.
14. Defendant filed a Form 2 on February 24, 2005. Defendant asserted that neither the right shoulder rotator cuff tear nor the right tennis elbow were causally related to Claimant's work. Defendant cited Dr. Gagnon's notes and the January 25, 2005 ergonomic study to support its denial.
15. Claimant testified that Dr. Gagnon would not perform the scheduled rotator cuff surgery because of the Form 2 denial filed by the Carrier and Claimant's lack of insurance coverage. Thus, Claimant attempted to return to work March 3, 2005, but the company sent her home pending further evaluation.

16. On March 9, 2005, after having reviewed Ben McCormack's ergonomic evaluation, Dr. Haas supplemented his January 6, 2005 evaluation and concluded that Claimant's shoulder problems were not caused by her employment but that her tennis elbow likely was.
17. A March 15, 2005 Sickness and Accident form filled out by Dr. Gagnon for Claimant restated his belief that the rotator cuff tear did not arise out of Claimant's employment.
18. At Claimant's request, Dr. Gagnon returned her to work March 28, 2005 with no restrictions.
19. On March 31, 2005 the company sent a letter to Dr. McArthur requesting that he evaluate Claimant's fitness for duty.
20. On April 6, 2005, Dr. Howard performed an evaluation of Claimant and determined that her shoulder problems were related to both a previous work injury and the repetitive nature of her work. Dr. Howard returned Claimant to work April 7, 2005 with restrictions and a requirement that she be able to rest her right arm.
21. In response to the company's March 31 letter, Dr. McArthur returned Claimant to work full duty on April 11, 2005.
22. Claimant was out of work from January 26, 2005 through April 11, 2005. Claimant returned to work April 12, 2005.
23. Claimant was out of work again from July 15, 2005 through August 1, 2005 (on which date she worked a half day). There are three doctor's notes from St. Johnsbury Family Health Center between July 14 and 26, 2005. First, there is an undated note stating that Claimant was off work from July 14 through August 1 for her torn rotator cuff. Next, there is a July 15 note returning Claimant to work July 25. Finally, there is a note dated July 26 returning Claimant to work August 1. There is also an August 2 note from Cathleen Besch, RNCS, which put Claimant out of work until further notice.
24. On September 26, 2005, Dr. Gagnon indicated that, as a result of further examination of Claimant's records, including review of Dr. Howard's evaluation and a description of Claimant's job, his medical opinion was that her shoulder injury more likely than not occurred as a result of her job duties.
25. A note from Dr. Ajamie dated October 20, 2005 returned Claimant to work October 24, and she worked from October 24 to October 28. Claimant was back out of work beginning October 31. Claimant saw Dr. Ajamie for her right shoulder on November 2. Dr. Ajamie returned Claimant to work December 1 if light duty work was available.
26. A November 4, 2005 letter to the parties from Workers' Compensation Specialist Julie Heath indicates that Defendant's attorney advised Defendant to voluntarily accept liability for the shoulder injury, including the recommended shoulder surgery and related indemnity. Specialist Heath also indicated that she found the elbow condition to be work-related so that the Defendant should pay all medicals related to the elbow.

27. On November 16, 2005, Defendant filed a Form 25 for Claimant's period of disability beginning January 26, 2005 related to her right rotator cuff tear.
28. Dr. Gagnon performed a rotator cuff tear repair surgery on November 21, 2005.
29. Dr. Gagnon returned Claimant to work with restrictions March 21, 2006, with full duty work appropriate by May 21, 2006. However, on May 8, 2006 Dr. Gagnon placed Claimant at medical end result and released her to full duty work with no restrictions.
30. On May 25, 2006, Defendant submitted two Form 25s for Claimant's October 2004 period of disability related to her tennis elbow and her July 2005 period of disability related to her right rotator cuff tear. On May 26, 2006, Defendant submitted another Form 25 for Claimant's period of disability beginning January 26, 2005 related to her right rotator cuff tear. On June 19, 2006, Defendant submitted a revised Form 25 for Claimant's period of disability beginning January 26, 2005.
31. Claimant was out of work again July 10 to July 17, 2006 for her right elbow. A July 11 doctor's note excused Claimant from work July 10 through July 18 and stated that she could return to work if she could avoid repetitive motion with her right arm for one month. Claimant returned to work July 18, 2006.
32. Claimant took a vacation day August 1, 2006 and returned to the doctor, requesting that she be released to full duty work without restrictions. An August 1 doctor's note allowed Claimant to return to work with no restrictions.
33. On August 12, 2006, Defendant filed another Form 25 for Claimant's July 2006 period of disability related to her right elbow condition.
34. On October 11, 2006, Defendant again filed Form 25s for Claimant's October 2004 and July 2005 periods of disability.
35. Claimant saw Dr. Ajamie November 2, 2006. Dr. Ajamie placed Claimant out of work from November 2 to November 30. Dr. Ajamie's note did not explain whether he was placing Claimant out of work for her right shoulder or her right elbow.
36. Claimant had excused absences from November 20 to November 22, 2006. A November 22 note from Dr. Howard allowed Claimant to return to work November 22 but stated that she must be able to rest her right arm.
37. Defendant filed a second Form 2 on November 28, 2006. Defendant denied Claimant's shoulder injury because it had not received clarification or medical reports from Dr. Ajamie as to the nature and extent of Claimant's shoulder injury. Defendant noted that Dr. Ajamie's November 2 out of work note did not discuss the cause of Claimant's injury or whether it was work related.

38. On December 19, 2006, Dr. Ajamie clarified his November 2 note to explain that he had excused Claimant from work November 2 through November 28 for her right elbow. Dr. Ajamie returned Claimant to light duty work November 29.
39. Claimant was out December 4 because the company had no light duty work available.
40. Claimant was only out for two days in January of 2007. A January 10 note from Dr. Howard indicated that Claimant could return to work January 11 but must be able to rest her right arm.
41. A Functional Capacity Evaluation was performed on January 31, 2007. The therapist concluded that the Claimant's physical capabilities were compatible with her job.
42. On February 9, 2007, Dr. Howard released Claimant back to work February 12 with no restrictions. He also indicated that Claimant had reached maximum medical improvement.
43. Claimant returned to full duty work after the FCE and has been working ever since.
44. On April 10, 2007, Defendant submitted a Form 25 for Claimant's November 2006 period of disability related to her right elbow. On April 18, 2007, Defendant submitted revised Form 25s for Claimant's July 2006 and November 2006 periods of disability.
45. From October 2003 through September 2004, Claimant's hourly wage was \$14.41; from October 2004 through September 2005, Claimant's hourly wage was \$14.81; from October 2005 through September 2006, Claimant's hourly wage was \$15.33; and beginning October 2006, Claimant's hourly wage was \$15.79.

#### **CONCLUSIONS OF LAW:**

1. In workers' compensation cases, the Claimant has the burden of establishing all facts essential to supporting the claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 Vt. 161 (1963). The Claimant must establish with 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). The Claimant must create 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. *Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941).

## Date of Injury

2. 21 V.S.A. § 656 (b) states that “[t]he date of injury [or] . . . injurious exposure shall be the point in time when the injury . . . and its relationship to the employment is reasonably discoverable and apparent.” Similarly, Workers’ Compensation Rule 3.0540 establishes that “[t]he date of injury, recurrence or aggravation shall be the point in time when the injury, recurrence or aggravation and its relationship to the employment is reasonably discoverable and apparent.” Further, in *Hartman v. Ouellette*, 146 Vt. 443, 447 (1985), the Vermont Supreme Court set forth that “the ‘date of injury’ for purposes of giving notice and filing a claim pursuant to 21 V.S.A. § 656 . . . is the point in time when an injury becomes reasonably discoverable and apparent.” Finally, in *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 219 (2000) (citing *Hartman*, 146 Vt. at 447), the Court reiterated that “for purposes of the notice and claim provisions of § 656, and for purposes of the . . . statute of limitations, the date of injury ‘is the point in time when an injury becomes reasonably discoverable and apparent.’”
3. However, the above rules are not controlling here, as the issue in this case has to do with determining the date of injury for purposes of calculating average weekly wage and temporary total disability and not for purposes of tolling the statute of limitations.
4. While there is no codified rule regarding determining the date of injury for purposes of calculating average weekly wage and temporary total disability, the Department has addressed the issue in its case law. In *Plante v. Slalom Skiwear, Inc.*, Opinion No. 19-95WC, the Department stated that, in cases concerning computation of temporary total disability benefits, it “interprets the date of injury as the date on which the injury becomes disabling.” In *Plante*, the Department determined such date to be the date on which the Claimant had surgery. In *Hepburn v. Concrete Professionals, Inc.*, Opinion No. 16-03WC, the Department reiterated its holding in *Plante* that “the twelve-week period [used to calculate average weekly wage] should [be] from the date of the injury or ‘the date upon which the injury became disabling.’”
5. Claimant argues that her date of injury was October 20, 2004. However, when Claimant visited Dr. Ajamie on October 20 he found no associated injury and explicitly noted that Claimant’s right arm pain did not arise out of her employment. Moreover, Claimant returned to work on October 21 and there is no evidence of a related accident report. Therefore, although Claimant was out of work from October 18 to October 20, 2004, her return to work October 21 and her failure to complete an accident report indicate that her right arm pain was not disabling at that time. Therefore, October 20, 2004 was not the date on which Claimant’s injury became disabling.

6. The next possible date of injury is in December of 2004, which Defendant argues as an alternative to a January 26, 2005 date of injury. Claimant was out of work December 23, 2004 for a visit with Dr. Kraus, who did not relate Claimant's right arm problems to her employment and returned her to work with no restrictions that same day. However, the following Monday, December 27, 2004, an accident report was completed. Claimant saw Dr. Kraus again December 30 and Dr. Kraus still did not link Claimant's condition with her employment; however, Dr. Kraus did restrict Claimant to light duty work. The December 27, 2004 accident report and the fact that Claimant was restricted to light duty work after December 30, 2004 support a finding that her injury was disabling as of December 30, 2004. Even though Dr. Kraus did not relate Claimant's right arm pain to her work as of December 30, 2004, and even though Claimant was able to return to work thereafter, the fact that Claimant was unable to perform certain of her work duties means that as of December 30, 2004 Claimant's injury was disabling. Hence, December 30, 2004 shall be used as Claimant's date of injury for purposes of calculating average weekly wage and temporary total disability.
7. However, because Claimant was not absent for more than three consecutive days, she was not eligible for temporary total disability compensation as of December 30, 2004. *See* 21 V.S.A. § 642 ("Where the injury causes total disability for work, during such disability, *but not including the first three days*, the day of the accident to be counted as the first day, unless the employee received full wages for that day, the employer shall pay the injured employee a weekly compensation equal to two-thirds of the employee's average weekly wages, but not more than the maximum nor less than the minimum weekly compensation") (emphasis supplied).
8. Since Claimant's date of injury for purposes of calculating her average weekly wage was December 30, 2004, the Department will not address Defendant's argument that Claimant's date of injury was January 26, 2005, except to note that the fact that Claimant was out of work after January 26, 2005 until April 11, 2005 would mandate a finding that by January 26, 2005 Claimant's injury was disabling.

#### Average Weekly Wage

9. 21 V.S.A. § 650 (a) states that "[a]verage weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the 12 weeks preceding an injury." However, § 650 (b) says that "[i]f during the period of 12 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." Also, § 650 (c) states that "[w]hen temporary disability . . . does not occur in a continuous period but occurs in separate intervals each resulting from the original injury, compensation shall be adjusted for each recurrence of disability to reflect any increases in wages or benefits prevailing at that time." Finally, § 650 (d) states that "[c]ompensation computed pursuant to this section shall be adjusted annually on July 1, so that such compensation continues to bear the same percentage relationship to the average weekly wage in the state as computed under this chapter as it did at the time of the injury."

10. Workers' Compensation Rule 15.2000 states that the compensation rate for temporary total disability is "2/3rds of [the claimant's] average weekly wage." Rule 15.4000 explains that in order "[t]o determine the claimant's average weekly wage . . . the total gross wages, as reported by the employer on the Wage Statement (Form 25), is divided by the number of weeks used to determine the total gross wages." Rule 15.4110 mandates the inclusion of overtime earnings in the Form 25. However, Rule 15.4200 excludes from consideration "any week(s) during which the claimant worked and/or was paid for fewer than one-half of his or her normally scheduled hours" and "any week(s) during which the claimant did not work at all, regardless of whether or not he or she was paid for this time off." Finally, Rule 16.2000 states that "annually on or before July 1 the [C]ommissioner shall announce the annual change in compensation rate and new minimum and maximum rates for the coming fiscal year" and that "[a]ny claimant receiving temporary . . . disability compensation on July 1 shall be entitled to an increase in his or her compensation rate in accordance therewith, PROVIDED THAT in no event may a claimant's compensation rate for temporary total disability exceed his or her average weekly wage or his or her weekly net income."
11. Claimant has not presented evidence or made an argument regarding what average weekly wage and compensation rate she is entitled to for each of her periods of disability. Moreover, she has capitulated to Defendant's Form 25s.
12. Defendant has not made an argument regarding what average weekly wage and compensation rate Claimant is entitled to for her period of disability beginning January 26, 2005 if December 30, 2004 is used as the date of injury. Defendant argues that Claimant's average weekly wage and compensation rate for the period of disability beginning July 15, 2005 should be \$608.92 and \$405.95 respectively. Defendant calculates Claimant's average weekly wage and compensation rate for the period of disability beginning July 10, 2006 to be \$755.24 and \$503.49 respectively. Finally, Defendant argues that for the period of disability beginning November 2, 2006 Claimant's average weekly wage and compensation rate would be \$692.26 and \$461.51 respectively; however, since the \$461.51 compensation rate is lower than the previous \$503.49 compensation rate, Defendant admits that Claimant's compensation rate for the November 2006 period of disability should be the same as for the July 2006 period of disability.
13. According to § 650 (c), "a compensation rate adjustment is to be made with separate periods of disability only when there is an increase in wages. . . . [N]o adjustment for a diminution in wages can be made." *Bollhardt v. Mace Security International*, Opinion No. 51-04WC. Therefore, Defendant was correct when it adjusted Claimant's average weekly wage and compensation rate based on her yearly October 1 raises. Similarly, Defendant was correct when it maintained Claimant's July 2006 compensation rate for her November 2006 period of disability because the November 2006 compensation rate would have been lower than the July 2006 compensation rate.

14. Moreover, according to § 650 (d) and Rule 16.2000, “July 1 adjustments apply to those ‘receiving temporary [disability] compensation’” on July 1 of the year in question. *Bollhardt v. Mace Security International*, Opinion No. 51-04WC (emphasis in original). Since none of Claimant’s periods of disability covered July 1 of 2005 or 2006, Claimant’s compensation is not subject to COLA adjustments.
15. Having reviewed the Form 25s submitted by the Defendant, the Department finds the following to be Claimant’s average weekly wages and compensation rates (as well as explanations therefor) for the periods of disability in question:

Period of Disability: 1/26/05 - 4/11/05		
Hourly Rate: \$14.81		
Overtime Rate: \$22.22		
Week Ending	Hours Worked	Gross Wages
12/26/04	24	\$355.44
12/19/04	40	\$592.40
12/12/04	32	\$473.92
12/5/04	40	\$592.40
11/28/04	24	\$355.44
11/21/04	30.5	\$451.71
Week Ending	Hours Worked	Gross Wages
11/14/04	33.45	\$495.39
11/7/04	40	\$592.40
10/31/04	To Be Determined	To Be Determined
10/24/04	To Be Determined	To Be Determined
10/17/04	40	\$592.40
10/10/04	40	\$592.40
Average Weekly Wage: To Be Determined		
Compensation Rate: To Be Determined		

Defendant has not submitted a proper Form 25 or calculations of Claimant’s average weekly wage and compensation rate using a December 30, 2004 date of injury. Defendant’s Exhibit C is based on a January 26, 2005 date of injury and only goes back to November 7, 2004. Defendant’s Exhibit A is based on an October 20, 2004 date of injury and provides the hours worked and gross wages for the weeks ending October 17, 2004 and October 10, 2004. Defendant’s Exhibit B appears to be based on a December 23, 2004 date of injury but uses biweekly figures for Claimant’s hours worked and gross wages, so that the Department cannot glean Claimant’s hours worked and gross wages for the weeks ending October 31, 2004 and October 24, 2004. The parties need to agree on Claimant’s hours worked and gross wages for these weeks in order to properly calculate Claimant’s average weekly wage and compensation rate for her period of disability beginning January 26, 2005.

Periods of Disability: 7/15/05 - 8/1/05; 8/2/05 - 10/24/05; 10/31/05 - 5/8/06		
Hourly Rate: \$14.81		
Overtime Rate: \$22.22		
Week Ending	Hours Worked	Gross Wages
7/10/05	0 (8 holiday; 32 vacation)	N/A
7/3/05	37.7	\$558.34
6/26/05	40	\$592.40
6/19/05	41.2	\$619.06
6/12/05	36	\$533.16
6/5/05	16 (8 holiday; 16 vacation)	N/A
5/29/05	52	\$859.04
5/22/05	40	\$592.40
5/15/05	40	\$592.40
5/8/05	40	\$592.40
5/1/05	48	\$770.16
4/24/05	40.1	\$594.62
Average Weekly Wage: \$630.40		
Compensation Rate: \$420.27		

The Department has declined to adjust Claimant's average weekly wage and compensation rate for her October 31, 2005 through May 9, 2006 period of disability based on her October 1, 2005 \$.52 wage increase, as the time between the August 2, 2005 to October 24, 2005 and the October 31, 2005 through May 9, 2006 periods of disability was ephemeral.

Period of Disability: 7/10/06 - 7/17/06		
Hourly Rate: \$15.33		
Overtime Rate: 23.00		
Week Ending	Hours Worked	Gross Wages
7/9/06	40.3 + 8 holiday	\$742.74
7/2/06	40	\$613.20
6/25/06	16.73 (16 vacation)	N/A
6/18/06	24 + 16 vacation	\$613.20
6/11/06	24.1 + 8 personal	\$492.09
6/4/06	43.45 + 8 holiday	\$815.19
5/28/06	26 + 8 personal + 8 vacation	\$643.86
5/21/06	45.9 + 8 vacation	\$871.54
5/14/06	40.4	\$622.40
5/7/06	0 (40 workers' comp)	N/A
4/30/06	0 (40 workers' comp)	N/A
4/23/06	0 (40 workers' comp)	N/A
Average Weekly Wage: \$676.78		
Compensation Rate: \$451.18		

Period of Disability: 11/2/06 forward		
Hourly Rate: \$15.33 through 10/1/06; \$15.79 after 10/1/06		
Overtime Rate: \$23.00 through 10/1/06; \$23.69 after 10/1/06		
Week Ending	Hours Worked	Gross Wages
10/29/06	37.98	\$599.70
10/22/06	28 + 4 personal	\$505.28
10/15/06	0 (40 sick)	N/A
10/8/06	1.27 (32 sick)	N/A
10/1/06	43.73	\$698.99
9/24/06	35.77 + 8 vacation	\$670.99
9/17/06	8 (32 vacation)	N/A
9/10/06	20 + 12 vacation + 8 holiday	\$613.20
9/3/06	32 + 8 vacation	\$613.20
8/27/06	20 + 20 vacation	\$613.20
8/20/06	40	\$613.20
8/13/06	24 + 16 vacation	\$613.20
Average Weekly Wage: \$615.66		
Compensation Rate: \$410.44		
But since lower than last period of disability, compensation rate = \$451.18		

### Mileage

16. Workers' Compensation Rule 12.2100 indicates that an injured worker required to travel for treatment shall be paid "[m]ileage beyond the distance normally traveled to the workplace, at the current rate in effect for classified employees of the State of Vermont."
17. As noted above, Claimant has the burden of establishing all facts essential to supporting her claim. *Goodwin*, 123 Vt. at 166.
18. In *Dain v. AIHRS*, Opinion No. 85-95WC, the claimant was denied mileage reimbursement for failure to provide a reasonable explanation for the amount of mileage claimed. Similarly, in *Frederick v. Metromail Corporation*, Opinion No. 25-97WC, the claimant was denied mileage reimbursement because she had not demonstrated that her travel was reasonable and necessary.
19. Claimant has introduced three mileage reimbursement forms and has indicated the dates on which the doctors in question were visited; however, her calculations are imprecise and abstruse. Therefore, Claimant has not met her burden with regard to further mileage reimbursement.

### Medical Bills

20. Claimant has also failed to prove that there are any unpaid medical bills. As Defendant noted, the Carrier testified that there are no pending medical bills. Moreover, Defendant explained that the 2004 MRI for which Claimant was seeking payment was paid on May 14, 2007.

### **ORDER:**

Based on the foregoing findings of fact and conclusions of law:

1. Claimant's date of injury was December 30, 2005.
2. Claimant's average weekly wage and compensation rate for the January 26, 2005 to April 11, 2005 period of disability is to be determined by the parties based on the above date of injury. Claimant's average weekly wage and compensation rate for the July 15, 2005 through May 8, 2006 periods of disability are \$630.40 and \$420.27 respectively; Claimant's average weekly wage and compensation rate for the July 10, 2006 to July 17, 2006 period of disability are \$676.78 and \$451.18 respectively; and Claimant's compensation rate for her periods of disability from November 2, 2006 forward is \$451.18.
3. The Carrier is ordered to adjust the claim in accordance with the above.

DATED at Montpelier, Vermont this 2<sup>nd</sup> day of August 2007.

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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.