STATE OF VERMONT
DEPARTMENT OF LABOR

Johanna Donovan

v.

AMN Healthcare

Opinion No. 12-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. Z-57862

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

David Mickenberg, Esq. for Claimant
William Blake, Esq. for Defendant

ISSUE:

Is it appropriate to include Claimant's monthly housing allowance in calculating her average weekly wage and compensation rate for permanent partial disability benefits?

FINDINGS OF FACT:

The following facts are not disputed:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was her employer as those terms are defined in Vermont's Workers' Compensation Act.

2. On November 23, 2007 Claimant injured her neck and back in the course and scope of her employment for Defendant. Defendant accepted her injury as compensable and paid medical benefits accordingly.

3. Claimant did not lose any time from work as a consequence of her injury and therefore no temporary disability benefits were paid.

4. The parties agree that as a consequence of her injury Claimant suffered a 6 percent whole person permanent impairment referable to her spine. This represents a compromise between Dr. Johansson's 5 percent impairment rating and Dr. Bucksbaum's 7 percent rating.

5. Claimant's average weekly wage for the twelve weeks preceding her injury was $1,102.72. In addition, she received a housing allowance of $1,800.00 per month.

DISCUSSION:

1. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The nonmoving party is entitled to all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 242 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).

2. The disputed issue here is whether Claimant's monthly housing allowance should be included in calculating her average weekly wage for the purposes of determining her compensation rate for permanent partial disability benefits. Claimant argues that it should. Defendant asserts that because Claimant never was deprived of her housing allowance, to include it in her compensation rate would result in an inappropriate windfall.

3. Vermont's workers' compensation statute differentiates between two general types of compensable wage loss – temporary and permanent. *Bishop v. Town of Barre*, 140 Vt. 564 (1982); *Orvis v. Hutchins*, 123 Vt. 18, 22 (1962). Temporary disability benefits compensate an injured worker for his or her "temporary incapacity during the healing period." *Orvis, supra* at 22. Their purpose is to replace the worker's present loss of earning power, if any, during the period between the injury and final recovery. *Bishop, supra* at 571.

4. Permanent disability benefits compensate for a different time frame – the future, not the present. Permanency benefits are calculated solely on the basis of physical impairment, and are paid regardless of whether the injured worker's present earning power has diminished in any way as a result of the injury. *Bishop, supra*. Rather, the injury's effect on the worker's future earning capacity is conclusively presumed. *Id.* at 573; *Orvis, supra* at 22.

5. The statute provides the same mechanism for calculating the compensation rate for both temporary total and permanent partial disability benefits – sixty-six and two-thirds percent of the injured worker's average weekly wage for the twelve weeks preceding his or her injury. 21 V.S.A. §650(a).[1]

6. The statute also defines what constitutes "wages" for the purposes of calculating a claimant's compensation rate. The term specifically includes "the market value of board [and] lodging . . . which the employee receives from the employer as a part of his remuneration . . . ." 21 V.S.A. §601(13).

[1] Section 650(a) has since been amended, and now requires that the average weekly wage calculation be based on the claimant's earnings for the 26 weeks preceding his or her injury. The amendment did not become effective until after the current claim arose.

7. Although the statute does not distinguish between calculating the compensation rate for temporary as opposed to permanent disability benefits, the workers' compensation rules do. Rule 15.4130 provides generally that the fair market value of any room or board provided to the claimant by the employer is includable in the average weekly wage and compensation rate calculation. However, it then notes the following exception:

> If the claimant continues to receive any of these benefits [including room or board] during the period of temporary total disability, the value of that benefit shall not be included in calculating the compensation rate.

8. This exception is in keeping with the statutory distinction between temporary and permanent disability benefits. A claimant who continues to receive room and board from the employer even during a period of temporary total disability has not suffered any present loss of that element of his or her wages. At least in that regard, therefore, there is nothing yet to replace.

9. When it comes to permanency, however, it is no longer relevant whether the claimant did or did not continue to receive room and board during the healing period. Rather, his or her future wage loss is conclusively presumed. *Bishop, supra.* The value of room and board being an appropriate component of the worker's pre-injury wages, it must now be factored into the compensation rate calculation.

10. Defendant cites to *Laumann v. Department of Public Safety,* 2004 VT 60, in support of its argument that factoring the housing allowance into the calculation of Claimant's compensation rate for permanency benefits will result in an impermissible windfall to her. The circumstances of that case are distinguishable from those presented here.

11. In *Laumann*, the Supreme Court considered whether it was appropriate to apply cost of living adjustments to the claimants' permanency awards for periods during which they already had returned to work. The Court noted the legislature's intent to connect permanency compensation "to wages and annual adjustments that would have been due while the claimant was injured." *Id. at ¶14.* Once the claimants returned to work, however, they received both their salaries and whatever annual adjustments their employers paid thereafter. They were not deprived of any cost of living increases, and therefore to add an additional cost of living adjustment, covering those same periods, to their permanency awards would have resulted in a double benefit. *Id.* at ¶15.

12. A cost of living adjustment is the statute's way of ensuring that an injured worker's compensation rate keeps pace with the wage increases that the employer presumably would have paid following the injury. 21 V.S.A. §650(d). In contrast, a housing allowance is an element of wages actually paid as a part of the employee's remuneration. 21 V.S.A. §601(13). The two are qualitatively different, and therefore merit different treatment.

13. I conclude that it is appropriate to include Claimant's housing allowance in calculating her average weekly wage for the purposes of determining her compensation rate for permanent partial disability benefits. Excluding the allowance would artificially deflate the total amount of Claimant's presumed loss of future earning power, and thus impermissibly diminish the value of her permanency award.

ORDER:

Defendant's Motion for Summary Judgment is hereby **DENIED**. Claimant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's average weekly wage for the purposes of determining her compensation rate for permanent partial disability benefits shall include the monthly housing allowances she received during the 12 weeks preceding her injury.

DATED at Montpelier, Vermont this 26th day of May 2011.

_____
Anne M. Noonan
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.