STATE OF VERMONT
DEPARTMENT OF LABOR

James Pawley

v.

Booska Movers/Zurich North America and York Risk Services Group

Opinion No. 02-14WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File Nos. CC-52769 and DD-00576

OPINION AND ORDER

Hearing held in Montpelier, Vermont on November 13, 2013
Record closed on December 16, 2013

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
David Berman, Esq., for Defendant Zurich North America
Erin Gilmore, Esq., for Defendant York Risk Services Group

ISSUES PRESENTED:

1. What is the appropriate average weekly wage upon which to base an award of indemnity benefits to Claimant, either on account of his August 30, 2010 work injury and/or on account of his August 5, 2011 work injury?

2. To what temporary partial disability benefits, if any, is Claimant entitled on account of his August 30, 2010 work injury?

3. To what temporary partial disability benefits, if any, is Claimant entitled on account of his August 5, 2011 work injury?

4. Does the maximum weekly compensation cap on temporary total disability benefits apply as well to temporary partial disability benefits?

EXHIBITS:

Joint Exhibit I: Medical records
Joint Exhibit II: Transactions by Payroll Item, August 30, 2010 through November 30, 2012

Claimant's Exhibit 1: Wage statement (Form 25), 4/23/12

CLAIM:

Temporary partial disability benefits from February 6, 2011 through April 10, 2011 and from December 18, 2011 through February 12, 2012, pursuant to 21 V.S.A. §646

Interest, costs and attorney fees pursuant to 21 V.S.A. §§664 and 678

FINDINGS OF FACT:

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

2. Judicial notice is taken of all relevant forms and correspondence contained in the Department's file relating to this claim.

3. Claimant has worked for Defendant Booska Movers (Booska) since 2003. He began as a laborer, then graduated successively to local driver, straight truck interstate driver and, since 2008, tractor-trailer interstate driver.

4. Even as an interstate tractor-trailer driver, Claimant's duties include both long-haul trips and local, in-state deliveries. A long-haul trip typically consists of numerous individual jobs, and to complete all of them the driver might be on the road for as long as two or three weeks. Long-haul trips are assigned to interstate drivers according to a seniority-based rotation. Compensation is commission-based, with the driver receiving a percentage of the line haul upon completion of each job.

5. If no long-haul jobs are available, and/or if Booska's business needs require it, interstate drivers may be assigned local moves instead. They are compensated for this work on an hourly basis, and as a consequence these jobs are far less lucrative than long-haul assignments. In Claimant's case, at an hourly rate of between $16.00 and $17.00, the difference in pay between long-haul and local work is substantial. For this reason, though he acknowledged that his regular job duties include both types of assignments, he much prefers long-haul assignments.

6. Booska pays its drivers on a weekly basis. The pay period runs from Wednesday to Tuesday. Paychecks are issued every Friday, and include all wages earned, for both completed long-haul jobs and local deliveries, during the most recent pay period.

Claimant's August 2010 Work-Related Injury

7. On August 30, 2010 Claimant was in the midst of a long-haul trip when he began to experience pain and swelling in his left calf. Upon his return to Vermont, he sought treatment and was diagnosed with a deep vein thrombosis (DVT), or blood clot, in his lower leg. Defendant Zurich North America (Zurich) was Booska's workers' compensation insurance carrier at the time; it accepted Claimant's injury as compensable and paid workers' compensation benefits accordingly.

8. As treatment for his DVT, Claimant was placed on a six-month regimen of warfarin, an anticoagulant, or blood thinning, medication. The goal of such treatment is both to stop existing clots from growing larger and to prevent new ones from forming. Without such treatment, the risk is that a clot will move to the lungs and cause a pulmonary embolism, which can be life-threatening.

9. In addition to prescribing warfarin, in order to further reduce his risk of future DVTs, Claimant's treating providers (primarily Steven Rolleri, a nurse practitioner, and later Dr. Zakai, both at the Fletcher Allen Health Care thrombosis clinic) strongly encouraged him to wear compression stockings during the day and, while truck driving, to stop every two hours and walk around for approximately ten minutes. Aside from these recommendations, Claimant's providers did not restrict him in any way from continuing to work as a truck driver, on either long-haul or local assignments.

10. Claimant credibly testified that between August 30, 2010 and early February 2011, treatment for his work-related DVT did not in any way affect the manner in which he was assigned trucking jobs, whether long-haul or local. The contemporaneous medical records reflect that during this time he was able to continue working full time and without any difficulties.

11. According to Claimant's recollection, he completed his six-month course of warfarin in early February 2011. At that point, he testified, his doctors advised him to stay close to the area so that if he experienced any problems as a result of discontinuing his blood thinners they would be able to retest and treat him expeditiously. Claimant recalled that he was given a note to that effect by his doctor, which he in turn gave to Booska's interstate dispatcher. As a consequence, according to Claimant he was assigned only local deliveries for some ten weeks thereafter, until mid-April 2011 when his doctor released him to return to interstate driving.

12. The contemporaneous medical records tell a different story. As to when Claimant discontinued warfarin, I find that this likely occurred not in early February 2011 as he alleged, but rather on February 28, 2011, as reported in the summary of his April 8, 2011 thrombosis clinic follow-up visit.[1] Assuming Claimant began taking warfarin shortly after first seeking medical treatment in early September 2010, this date would have been consistent with a six-month course, as his treating providers had prescribed. Reports of blood work done on February 9th and again on February 15, 2011 provide further corroboration, as both indicate that Claimant was still taking Coumadin (the brand name for warfarin) as of those dates.[2]

[1] Joint Exhibit I, p. 000125.

[2] Joint Exhibit I, pp. 000091 and 000097.

13. Nor do the contemporaneous medical records offer any corroboration for Claimant's assertion that he was restricted to local driving only between early February and April 2011. Specifically:

- At his December 28, 2010 follow-up visit to the thrombosis clinic, Claimant was advised to anticipate a full complement of blood work and imaging studies in March 2011, that is, after completing his six-month course of warfarin.[3] At that point, the office note reflects, recommendations would be made regarding whether to continue anticoagulant medications for the long term or not. No mention was made of any anticipated work restrictions in the interim.

- As noted above, Claimant underwent two blood draws to test his iron count in mid-February 2011, but was not otherwise evaluated or treated at the thrombosis clinic at any time during the month; nor is there any record of a note from his treatment providers restricting him to local driving during this time.

- The medical note from Claimant's final follow-up visit on April 8, 2011 makes no mention of any prior restriction to local driving; to the contrary, in it Dr. Zakai reports that, as previously recommended, Claimant was driving with his compression garment, stopping every two to four hours and doing leg pumps while in cruise control, all modifications that implicate long-haul rather than local driving.

14. Claimant relies on Booska's payroll records (Joint Exhibit II) to corroborate his assertion that he was restricted to local job assignments only between February 6th and April 10th, 2011. The largest weekly paycheck he received during this period was for $688.00, which is far less than what he typically received for a long-haul assignment. Furthermore, many of the payroll entries reflect two amounts combined and paid via the same check number, which according to the testimony of Booska's general manager, Adam Booska, indicates payment for a local job rather than a long-haul one. Thus, though the evidence is not entirely clear, I find that Claimant likely did not undertake any long-haul jobs during this period.

15. As for the reasons why this occurred, Mr. Booska credibly testified that the peak season for long-haul movers is from May through October, and that typically there is more local work to be done from January through March.[4] I find from this credible evidence that the fact Claimant did not receive any long-haul job assignments between February and April 2011 most likely was due to Booska's business needs rather than any injury-related medical limitation.

[3] The report of these lab studies confirms that as of March 18, 2011 Claimant was no longer on Coumadin. Joint Exhibit I, p. 000107.

[4] This assertion is borne out as well by the payroll records for the following year, which indicate that from January through March 2012 Claimant undertook substantially more local runs than long-haul ones.

16. Having completed his six-month course of anticoagulant medication, in April 2011 Dr. Zakai considered whether to maintain Claimant on long-term warfarin. He concluded that it would be difficult for Claimant to do so, given his profession as a long-haul driver. Instead, he recommended that Claimant travel with a supply of Lovenox, (an injectable anticoagulant), and that he contact the thrombosis clinic and/or seek medical attention immediately if he experienced symptoms indicative of either another DVT or a pulmonary embolism. In addition, Dr. Zakai encouraged Claimant to continue to adhere to the previous recommendations he had been given – wearing his compression garment while driving, stopping periodically to walk around and doing leg pumps while in cruise control – with a follow-up evaluation in one year's time.

17. Between April and August 2011 Claimant undertook both long-haul and local job assignments without incident.

Claimant's August 2011 Work-Related Injury

18. On August 5, 2011 Claimant returned to Vermont after a long-haul trip complaining of a one-week history of chest pain and shortness of breath. Upon informing his supervisor, he was sent first to Booska's preferred provider and then immediately to the hospital emergency room, where he was diagnosed with bilateral pulmonary emboli and admitted overnight for anticoagulation. Defendant York Risk Services Group (York) was Booska's workers' compensation insurance carrier at the time of this event.[5]

19. On August 10, 2011 Claimant presented to Dr. Zakai for follow-up. Noting that Claimant had not been fully compliant with his prior recommendations, Dr. Zakai impressed upon him how close he had come to a potentially fatal event. Given his condition, Dr. Zakai determined that it would not be prudent for him to continue working. When ordered by the Department to do so, York commenced paying temporary total disability benefits accordingly.

20. Claimant remained totally disabled from working until at least December 16, 2011. On that date, Emily Parenteau, a nurse practitioner at the thrombosis clinic, released him to return to work full duty, with the proviso that if he found himself unable to keep up, a more graduated return would be implemented.

21. Claimant credibly testified that after being released by Ms. Parenteau, he returned to work for Booska for one day, December 18, 2011. Thereafter, Adam Booska informed him that he needed a written release from his doctor, which he procured from Dr. Zakai on December 21, 2011. The release clearly indicated that Claimant was able to work with no physical activity restrictions.

[5] York has disputed its responsibility for this event, on the grounds that it represents a recurrence for which Zurich should remain liable. It has paid benefits pursuant to the Department's interim order. The aggravation/recurrence issue has been referred to arbitration pursuant to 21 V.S.A. §662(e), and therefore is not before me now.

22. Claimant acknowledged that notwithstanding Dr. Zakai's full-duty release, after December 18, 2011 he elected to take unused vacation time through the end of the year, as otherwise he would have lost it. I find that he thus removed himself from Booska's work force for the period from December 19, 2011 through January 1, 2012 for reasons unrelated to his work injury.

23. Claimant testified that he could not resume interstate driving until he underwent a Department of Transportation physical and obtained an updated Medical Examiner's Certificate. Mr. Booska corroborated this testimony. According to the medical records, the required certificate was issued on December 30, 2011 with an expiration date of December 30, 2012. Other than a requirement that he drive with corrective lenses, the certificate did not restrict Claimant in any way on account of either his DVTs or his use of anticoagulant medication.

24. With both his doctor's full duty release and the necessary Medical Examiner's Certificate in hand, I find that as of December 30, 2011 Claimant was fully able to resume interstate driving.

25. Although a January 27, 2012 thrombosis clinic record reports that, according to Claimant, Booska had been restricting him to local deliveries only, in his formal hearing testimony Claimant could not recall whether this was accurate or not. In contrast, Mr. Booska credibly testified that as soon as Claimant was medically cleared to return to work full duty, he put him back into the long-haul rotation. It being the slow time of year, no interstate work was available, however. I find that for this reason, and not on account of his work-related DVTs, from January 2, 2012 through mid-February 2012 Claimant was assigned only local delivery jobs.

Average Weekly Wage Referable to Claimant's August 30, 2010 Work Injury

26. Mr. Booska submitted the following Wage Statement (Form 25) for the 26 weeks preceding Claimant's August 30, 2010 work-related DVT:[6]

[6] According to Mr. Booska's credible testimony, he used a zero in the "Number of Hours or Days Worked" column to connote long-haul jobs; because these were paid on a commission basis, the company did not keep track of the number of hours required to complete them. With the exception of Week 2, the amounts stated in the "Extras" column were simply transferred over from the "Gross Wages" column; they do not represent additional payments made.

WAGE STATEMENT – For Injuries on or after July 1, 2008

Employee: James Pawley Social Security No: 530943765

Employer: BOOSKA MOVERS INC.

Wage Rate: $ 16.00 per hr. Number of Days Hired to Work: 5-6 Number of Hours Hired to Work: 40-50

	Week Ending			Number of Hours or Days Worked	Gross Wages	Extras (as in 6 or 7) Please indicate what the extra is, for example, $1000.00 bonus
	Month	Day	Year			
1	8	27	10	30	480.00	
2	8	20	10	17	272.00	3,867.24
3	8	13	10	0	3,256.36	3,256.36
4	8	6	10	0	3792.60	3792.60
5	7	30	10	0	4,761.14	4761.14
6	7	23	10	17	272.00	
7	7	16	10	0	2,033.69	2,033.69
8	7	9	10	8	128.00	
9	7	2	10	0	6126.76	6126.76
10	6	25	10	22	352.00	
11	6	11	10	0	3040.00	3,040.00
12	6	4	10	20½	328	
13	6	4	10	0	2433.60	2,433.60
14	5	28	10	0	761.74	761.74
15	5	28	10	12	192.00	
16	5	22	10	12	192.00	
17	5	21	10	0	3004.37	3,004.37
18	5	14	10		1687.93	1687.93
19	5	7	10		5,329.78	5,329.78
20	5	7	10	7½	56.00	
21	4	30	10	38.75	620.00	
22	4	23	10	38.75	620.00	
23	4	16	10	55	1000.00	
24	4	9	10	57.50	1074.00	
25	4	2	10	46½	796.00	
26	3	26	10	42.50	724.00	

INSTRUCTIONS:
Read Carefully

1. Enter GROSS wages of employee for 26 weeks before date of accident (NOT take home pay).
2. Do not include the week of the accident.
3. Leave blank those weeks where the employee had claimed absences for which he/she was not paid for more than ½ of a work week.
4. Leave blank those weeks when you had reduced operations or a shutdown of the plant for which he/she was not paid for more than ½ of a work week.
5. Do not enter those weeks where an employee was on vacation for more than ½ of a work week.
6. If room, board, lodging or other "extras" (electricity, fuel, etc.) are provided in addition to monetary wages, break it down into a weekly value, include and describe this income in column marked "EXTRAS." This includes tips if not included in gross wages.
7. Include any bonuses and commissions paid to the employee in addition to wages in the column marked "EXTRAS."
8. Enter the dates when your normal work week ends (just the date a check is given to the employee) and the number of hours or days worked.

When did the employee begin losing time? 8/30 Was the employee paid in full for the day of the accident? Yes

Are employee's wages subject to any child support withholding order? ☒ Yes ☐ No per week

27. Although the wage statement purports to reflect 26 weeks of wages, upon closer inspection it contains only 22. This is because, though recorded separately, weeks 12 and 13, 14 and 15, 16 and 17 and 19 and 20 all actually reflect both local and long-haul wages paid in the same week.

28. Combining the weeks that should not have been stated separately, the proper recitation of Claimant's weekly wages is as follows:

#	Week Ending	Number of Hours or Days Worked	Gross Wages
1	8/27/10	30	480.00
2	8/20/10	17 + 0	272.00 + 2,867.24
3	8/13/10	0	3,256.36
4	8/6/10	0	3,392.60
5	7/30/10	0	4,761.14
6	7/23/10	17	272.00
7	7/16/10	0	2,033.69
8	7/9/10	8	128.00
9	7/2/10	0	6,126.26
10	6/25/10	22	352.00
11	6/11/10	0	3,040.00
12	6/4/10	20.5 + 0	328.00 + 2,433.60
13	5/28/10	0 + 12	761.34 + 192.00
14	5/21/10	12 + 0	192.00 + 3,004.37
15	5/14/10	0	1,687.83
16	5/7/10	0 + 3.5	5,329.78+ 56.00
17	4/30/10	38.75	620.00
18	4/23/10	38.75	620.00
19	4/16/10	55	1,000.00
20	4/9/10	53.5	1,034.00
21	4/2/10	46.5	796.00
22	3/26/10	43.5	724.00

29. From these entries, weeks 6 and 8 must be disregarded, as the hours stated were less than one-half of Claimant's normal workweek. The wages paid over the remaining 20 weeks total $45,360.21, which yields an average weekly wage of $2,268.01.

Average Weekly Wage Referable to Claimant's August 5, 2011 Work Injury

30. Mr. Booska submitted the following Wage Statement (Form 25) for the 26 weeks preceding Claimant's August 5, 2011 work-related DVT:

WAGE STATEMENT – For Injuries on or after July 1, 2008

Employee: James Pawley Social Security No.: 530943765

Employer: BOOSKA MOVERS INC.

Wage Rate: $ 17 per hr Number of Days Hired to Work: 5-6 Number of Hours Hired to Work: 40-50

	Week Ending Month	Day	Year	Number of Hours or Days Worked	Gross Wages	Extras (as in 6 or 7) Please indicate what the extra is, for example, $1000.00 bonus
1	7	29	11		754,77	Commission
2	7	22	11		1309,25	11
3	7	15	11	13	221,50	
4	7	8	11	42,75	718,25	
5	7	1	11		4792,08	Commission
6	6	24	11		4654,27	11
7	6	17	11	3	4800	
8	6	17	11		3846,93	Commission
9	6	10	11		5770,39	11
10	6	3	11	24	3600	
11	5	27	11		3217,28	
12	5	20	11	10	1609	
13	5	13	11		1544,20	
14	5	6	11		407,86	Commission
15	4	29	11		3183,67	11
16	4	22	11		4699,98	11
17	4	15	11	22,5	360,00	
18	4	15	11		603,07	11
19	4	8	11		600,00	11
20	4	1	11	41,75	682,00	
21	3	25	11	29½	472	
22	3	18	11	36	576	
23	3	11	11	35	560	
24	3	4	11	42	688	
25	2	25	11	30	480	
26	2	18	11	30,25	484	

INSTRUCTIONS: Read Carefully

1. Enter GROSS wages of employee for 26 weeks before date of accident (NOT take home pay).
2. Do not include the week of the accident.
3. Leave blank those weeks where the employee had excused absences for which he/she was not paid for more than ½ of a work week.
4. Leave blank those weeks where you had reduced operations or a shutdown of the plant for which he/she was not paid for more than ½ of a work week.
5. Do not enter those weeks where an employee was on vacation for more than ½ of a work week.
6. If room, board, lodging or other "extras" (electricity, fuel, etc.) are provided in addition to monetary wages, break it down into a weekly value, include and describe this income in column marked "EXTRAS." This includes tips if not included in gross wages.
7. Include any bonuses and commissions paid to the employee in addition to wages in the column marked "EXTRAS."
8. Enter the dates when your normal work week ends (not the date a check is given to the employee) and the number of hours or days worked.

When did the employee begin losing time? 8/10/11 Was the employee paid in full for the day of the accident? Yes

31. In this wage statement as well, Mr. Booska separately recorded the wages paid for local and long-haul jobs undertaken during the same week. To correct the error, weeks 7 and 8 and 17 and 18 should have been combined.

32. In addition, comparing the wages stated on the wage statement with those reflected in Booska's payroll records (Joint Exhibit II) reveals the following omissions:

- The wages reportedly paid in week 3 (the week ending July 15, 2011) should have included an additional $1,203.16 paid for long-haul jobs;

- The wages reportedly paid in week 13 (the week ending May 13, 2011) were actually paid on May 20, 2011, and therefore should have been combined with the wages reported for week 12;

- The wages actually paid for the week ending May 13, 2011 ($3,467.83) were omitted;

- The wages paid in week 19 (the week ending April 8, 2011) were for local delivery assignments, and therefore should have reflected 37.5 hours worked.

33. With these errors corrected, the proper recitation of Claimant's weekly wages is as follows:

#	Week Ending	Number of Hours or Days Worked	Gross Wages
1	7/29/11	0	7,541.77
2	7/22/11	0	1,309.25
3	7/15/11	13 + 0	221.00 + 1,203.16
4	7/8/11	42.25	718.25
5	7/1/11	0	4,792.00
6	6/24/11	0	4,654.27
7	6/17/11	3 + 0	48.00 + 3,846.93
8	6/10/11	0	5,770.39
9	6/3/11	24	384.00
10	5/27/11	0	3,317.28
11	5/20/11	10 + 0	160.00 + 1,544.20
12	5/13/11	0	3,467.83
13	5/6/11	0	407.86
14	4/29/11	0	3,183.67
15	4/22/11	0	4,699.98
16	4/15/11	22.5 + 0	360.00 + 603.07
17	4/8/11	37.5	600.00
18	4/1/11	41.75	682.00
19	3/25/11	29.5	472.00
20	3/18/11	36	576.00
21	3/11/11	35	560.00
22	3/4/11	42	688.00
23	2/25/11	30	480.00
24	2/18/11	30.25	484.00
25	2/11/11	29.5	472.00
26	2/4/11	?	456.83[7]

[7] The wages stated for weeks 25 and 26 are derived from Booska's payroll records (Joint Exhibit II), as these were not included on the Wage Statement. It is unclear whether the wages paid for week 26 were for local or long-haul jobs; if local, assuming Claimant's hourly rate at the time of $16.00, they would have represented approximately 28.55 hours.

34. The wages paid over the 26 weeks stated total $53,703.74, which yields an average weekly wage of $2,065.53.

Claimant's Claim for Temporary Partial Disability Benefits Referable to his August 30, 2010 Work Injury

35. Claimant seeks temporary partial disability benefits referable to his August 30, 2010 DVT for the period from February 6, 2011 through April 15, 2011. According to Booska's payroll records, he was paid the following wages during these weeks:

Week Ending	Gross Wages Paid
2/11/11	472.00
2/18/11	484.00
2/25/11	480.00
3/4/11	688.00
3/11/11	560.00
3/18/11	576.00
3/25/11	472.00
4/1/11	682.00
4/8/11	600.00
4/15/11	963.07

Claimant's Claim for Temporary Partial Disability Benefits Referable to his August 5, 2011 Work Injury

36. Claimant seeks temporary partial disability benefits referable to his August 5, 2011 DVT for the period from December 18, 2011 through February 12, 2012. According to Booska's payroll records, he was paid the following wages during these weeks:

Week Ending	Gross Wages Paid
12/23/11	150.00
12/30/11	0
1/6/12	263.50
1/13/12	599.25
1/20/12	718.25
1/27/12	807.50
2/3/12	686.38
2/10/12	658.75
2/17/12	671.50

CONCLUSIONS OF LAW:

1. 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 or she 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).

2. Claimant here seeks compensation for separate periods of alleged temporary partial disability following each of his work-related DVTs. The disputed issues raised by his claim involve the proper computation of his average weekly wage as well as his entitlement to indemnity benefits for any portion of the periods identified.

Average Weekly Wage Calculation

3. Average weekly wages are calculated in accordance with 21 V.S.A. §650(a), which states as follows:

> Average weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the 26 weeks preceding an injury . . . .

4. Workers' Compensation Rule 15.4000 provides further guidance:

> **15.4100** The Wage Statement (Form 25) shall be filed and will include the wages paid and/or due the claimant for each of the [26] weeks preceding the injury not including the week of the injury.
>
> . . .
>
> **15.4200** The following shall not be included when determining the gross wages:
>
> > **15.4210** Any week(s) during which the claimant worked and/or was paid for fewer than one-half of his or her normally scheduled hours.

5. Claimant raises two issues with respect to the proper calculation of his average weekly wage. First, he argues that because his "primary position" was as a long-haul driver, only those wages, and not the hourly wages attributable to his local delivery work, should be included in computing his average wage. Second, he asserts that the average weekly wage calculation should include the long-haul wages he was paid in the week of his August 30, 2010 injury, as those earnings most likely reflect jobs that were completed in the preceding week.

6. In support of his position on these issues, Claimant cites both to the language of §650(a) and to the Supreme Court's oft-quoted instruction that the Workers' Compensation Act is to be "liberally construed" in favor of injured workers. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Surdam,* 156 Vt. 585, 590 (1991); *Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983). According to his interpretation, a liberal construction of the statute's requirement that average weekly wages be computed in such manner as is "best calculated" to represent the injured worker's average weekly earnings requires a "flexible" approach. Not coincidentally, the flexibility for which he advocates here would cause higher paying weeks to replace lower paying ones, thus significantly inflating his average weekly wage.

7. I can find neither factual nor legal support for Claimant's argument as to the first issue he has raised. Factually, the undisputed evidence establishes that Claimant's regular job duties include both long-haul and local work. It is true, as Mr. Booska testified, that Claimant was hired primarily for long-haul work. It is also true, as Claimant testified, that because long-haul work pays more, he much prefers it over local work. Neither of these facts changes the bottom line in any respect, however. As Mr. Booska and Claimant each acknowledged, he was hired to perform both functions, and his average weekly wage appropriately reflects that. Nothing in either the statute or the rule permits any other interpretation. Wages are wages, no matter how earned.

8. Nor is there legal support for Claimant's assertion that the wages he was paid during the week of his injury should be included in his average weekly wage calculation. Certainly a relationship exists between work that is performed (and completed) and wages that are paid, but both statute and rule look to the latter event as the operative one, not the former. The statute references "earnings," which Merriam-Webster defines as "money received as wages or gained as profit." The rule refers to wages "paid and/or due," which according to the parties' employment contract in this case did not occur until the Friday following the immediately preceding Wednesday-to-Tuesday pay period. Under either phrasing, the wages Claimant seeks to include fell in the week of his injury, not the week before. By the plain language of both statute and rule they are excluded from the average wage calculation.

9. "While the [Workers'] Compensation Act is to be construed liberally to accomplish the humane purpose for which it was passed, a liberal construction does not mean an unreasonable or unwarranted construction." *Herbert v. Layman*, 125 Vt. 481, 485-86 (1966), cited with approval in *King v. Snide*, 144 Vt. 395, 404 (1984). The purpose of the act, which represents a public policy compromise between employees and employers, *Gerrish v. Savard*, 169 Vt. 468, 470 (1999) is not only to provide injured workers with an expeditious, no-fault remedy, but also to provide employers with limited and determinate liability. *Kittell v. Vermont Weatherboard, Inc.*, 138 Vt. 439, 441 (1980). Though asserted under the guise of flexibility, the arguments Claimant has put forth to support his claim for a higher average weekly wage would require me to interpret the statute in whichever way results in the maximum recovery to the injured worker.[8] In a system intended to balance the interests of both employees and employers, I do not consider that construing the statute liberally mandates such an obvious bias.

10. Consistent with Finding of Fact Nos. 29 and 34 *supra*, I conclude that the average weekly wage referable to Claimant's August 30, 2010 work injury is $2,268.01, and that the average weekly wage referable to his August 5, 2011 work injury is $2,065.53.

Temporary Partial Disability Benefits Referable to Claimant's August 30, 2010 Work Injury

11. Temporary disability benefits are awarded on the basis of an injured worker's incapacity for work. *Bishop v. Town of Barre*, 140 Vt. 564 (1982). Unlike permanency benefits, which are intended to compensate for a probable future reduction in earning power, temporary disability benefits are designed to counteract the injured worker's immediate or present loss of wages during the period of physical recovery. *Orvis v. Hutchins*, 123 Vt. 18, 22 (1962). Once the worker either regains full earning power or reaches an end medical result, his entitlement to temporary disability benefits, whether total or partial, ends. *Id.* at 24; 21 V.S.A. §§643 and 647.

12. Claimant's claim for temporary partial disability benefits for the period from February 6, 2011 through April 10, 2011 rests on his assertion that he was medically precluded on account of his August 30, 2010 DVT from undertaking any long-haul jobs during those weeks. As I have already found, Finding of Fact No. 13 *supra*, the medical evidence provides no support for this assertion. As a result, the most essential component of temporary partial disability – a showing that the injured worker's reduced earnings were due to reduced earning power rather than other factors – is lacking. *See, e.g., Knoff v. Josef Knoff Illuminating*, Opinion No. 25-12WC (October 15, 2012) (insufficient support found for higher compensation rate where reduced average weekly wage was due to personal choices or economic factors rather than injury-related sequellae); *Griggs v. New Generation Communications*, Opinion No. 30-10WC (October 1, 2010) (same). For that reason, I conclude that Claimant has not proven his entitlement to temporary partial disability benefits for any of the weeks claimed during this period.

[8] I presume that had Claimant been hired "primarily" as a local driver rather than a long-haul one, he would not now be advocating for exclusion of his long-haul wages from the average weekly wage calculation. Similarly, I presume that had the wages he was paid in the week of his injury been lower, he would not be advocating that they be included in place of another, higher paid week.

Temporary Partial Disability Benefits Referable to Claimant's August 5, 2011 Work Injury

13. Claimant's claim for temporary partial disability benefits for the period from December 18, 2011 through February 12, 2012 also lacks the necessary factual support. The more credible evidence establishes that, after successfully returning to work for one day on December 18, 2011, Claimant voluntarily removed himself from the workforce from December 19, 2011 through January 1, 2012 so as to make use of accumulated annual leave time. His reduced earnings during that period resulted not from any injury-related disability, but rather from his own personal choice, therefore. For that reason, no temporary partial disability benefits are owed.

14. Similarly, the more credible evidence establishes that Claimant's reduced earnings from January 2, 2012 through February 12, 2012 also were not caused by any injury-related disability, but rather resulted from fluctuations in Booska's business needs and the scarcity of long-haul jobs during the winter months. Again, therefore, the necessary causal link between the work injury and the period of reduced earnings is lacking. I thus conclude that no temporary partial disability benefits are owed for this period either.

Maximum Cap on Temporary Partial Disability Benefits

15. In their briefs, the parties have raised a final disputed issue – whether temporary partial disability benefits payable under 21 V.S.A. §646 are subject to the same maximum weekly cap as is applied under §642 to temporary total disability benefits. Having concluded that Claimant is not entitled to temporary partial disability benefits for either of the periods under consideration, it is not essential that I address this issue. However, should Claimant appeal and prevail, many of the weeks claimed will exceed the cap, and for that reason it is instructive to clarify the Department's position.

16. The temporary total disability section of the statute, §642, reads as follows:

> Where the injury causes total disability for work, during such disability . . . 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*.[9] [Emphasis supplied].

[9] The maximum and minimum weekly compensation amounts are determined annually on July 1st. 21 V.S.A. §§601(18) and (19).

17. The temporary partial disability section, §646, makes no mention of either the maximum or minimum weekly compensation. It reads:

> Where the disability for work resulting from an injury is partial, during the disability . . . the employer shall pay the injured employee a weekly compensation equal to two-thirds of the difference between his or her average weekly wage before the injury and the average weekly wage which he or she is able to earn thereafter.

18. The temporary total disability section of the statute thus includes specific language to effectuate a cap on weekly benefits, while the temporary partial disability section does not. "Where the Legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the Legislature did so advisedly." *In re Munson Earth Moving Corp.*, 169 Vt. 455, 465 (1999)); *see also, Archer v. Department of Employment Security*, 133 Vt. 279, 281 (1975) (court "not at liberty to read into the statute provisions which the legislature did not see fit to incorporate"), quoted with approval in *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 223 (2000). Given the plain language of both sections, I cannot discern a basis for concluding that the Legislature intended anything other than what it said – that temporary total disability benefits are capped, but temporary partial disability benefits are not.

19. Defendants argue that unless the cap is presumed to apply to both types of benefits, a claimant who is only partially disabled from working would be able to receive more in weekly compensation payments than one who is totally disabled, a result they characterize as illogical. I disagree. There is nothing illogical about encouraging an injured worker to return to work as soon as he or she is medically cleared to do so, in whatever limited initial capacity is deemed appropriate. Using temporary partial disability benefits to help subsidize a claimant's return to part-time work is an essential strategy in the workers' compensation arena, to the benefit of employees and employers alike. *See* "Best Practices for Employers," www.labor.vermont.gov/Businesses/Workers' Compensation. Were there a cap on temporary partial disability benefits, high wage earners in particular would face a disincentive to returning to work, because doing so would yield no additional financial reward than remaining at home. I doubt the Legislature would condone such a result.

20. Consistent with both the plain language of the statute and the Legislature's presumed intent, I conclude that temporary partial disability benefits are not subject to the maximum weekly cap applicable to temporary total disability benefits.

Summary

21. For the reasons stated above, I conclude that Claimant has failed to establish his entitlement to temporary partial disability benefits for either of the periods claimed.

22. As Claimant has failed to prevail on his claim for benefits, he is not entitled to an award of costs or attorney fees.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claim for temporary partial disability benefits for the period from February 6, 2011 through April 10, 2011 and/or for the period from December 18, 2011 through February 12, 2012 is hereby **DENIED**.

Dated at Montpelier, Vermont this 19th day of February 2014.

_____
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.