STATE OF VERMONT
DEPARTMENT OF LABOR

Ryan Wetherby

v.

Donald P. Blake, Jr.

Opinion No. 02-16WC

By: Phyllis Phillips, Esq.
Administrative Law Judge

For: Anne M. Noonan
Commissioner

State File No. EE-65426

RULING ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
William Blake, Esq., for Defendant

ISSUE PRESENTED:

Did Defendant's calculation of Claimant's average weekly wage and compensation rate in accordance with Workers' Compensation Rule 15.4240 violate the parameters of 21 V.S.A. §650(a)?

EXHIBITS:

Claimant's Exhibit 1: Wage Statement (Form 25)

Defendant's Exhibit A: Wage Statement (Form 25)
Defendant's Exhibit B: Proposed Workers' Compensation Rules

FINDINGS OF FACT:

The following facts are undisputed:

1. Claimant filed the pending workers' compensation claim alleging a lower back injury arising out of a June 24, 2013 work-related accident.

2. Defendant's workers' compensation insurance carrier, Acadia Insurance Company ("Acadia"), accepted the claim as compensable.

3. Claimant began working for Defendant in May 2013. He was hired at a wage of $11.00 per hour for a five-day, 40-hour workweek.

4. At the time of his injury, Claimant had worked for Defendant for a total of six weeks, during which he earned the following gross wages:

Week Ending	**Hours Worked**	**Gross Wages**
5/19/2013	33	$363.00
5/26/2013	40	$440.00
6/2/2013	23	$253.00
6/9/2013	35	$385.00
6/16/2013	33.5	$368.50
6/23/2013	41	$456.50

5. Using this information, Defendant calculated Claimant's average weekly wage at $377.26, which yielded a weekly compensation rate of $339.91.

6. In calculating Claimant's average weekly wage, neither Defendant nor Acadia considered the wages of a comparable employee, whether in Defendant's employ or otherwise, during the 26 weeks preceding Claimant's injury.

DISCUSSION:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (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. Heritage Realty of Vermont*, 137 Vt. 425 (1979).

2. The question of law presented here is whether Defendant's determination of Claimant's average weekly wage and compensation rate, which was calculated in accordance with Workers' Compensation Rule 15.4240, violated the parameters of 21 V.S.A. §650(a).

3. Vermont's workers' compensation statute, 21 V.S.A. §650(a), establishes the following procedure for calculating an injured worker's average weekly wage:

> 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; but where, by reason of the shortness of the time during which the worker has been in the employment, . . . it is impracticable to compute the rate of remuneration, average weekly wages of the injured worker may be based on the average weekly earnings during the 26 weeks previous to the injury earned by a person in the same grade employed at the same or similar work by the employer of the injured worker; or if there is no comparable employee, by a person in the same grade employed in the same class of employment and in the same district.

4. Workers' Compensation Rule 15.4240 provides more specific guidance as to the circumstances under which an injured worker's average weekly wage should be based on a comparable employee's wages rather than his or her own, as follows:

> If the claimant has been employed for fewer than 4 weeks at the time of his or her injury, such that by the reason of the shortness of the time during which he/she has been in the employment it is impracticable to compute his or her average weekly wage in accordance with subsections **15.4210** and **15.4220** above,[1] then the gross wages of a comparable employee working in a similar capacity under like conditions for the twelve weeks prior to the injury shall be used instead. If wages of a comparable employee are not available, the claimant's agreement with the employer as to both expected hours per week and rate of pay shall be used to determine the average weekly wage.

5. Defendant here asserts that because Claimant had been employed for more than four weeks at the time of his injury, the rule's "comparable employee" computation mechanism was not triggered. Therefore, it argues, notwithstanding that Claimant had only six weeks of actual wages it was appropriate to use these as the basis for its average weekly wage calculation. Claimant argues in response that by imposing what he describes as an "arbitrary" four-week trigger, Rule 15.4240 impermissibly shrinks the sample size for calculating an injured worker's average wages to a level that is so far below what the statute contemplates as to be contrary to its plain language and purpose.

[1] Rule 15.4210 excludes from the average weekly wage calculation any weeks during which the injured worker worked and/or was paid for fewer than one-half of his or her normally scheduled hours. Rule 15.4220 excludes any weeks during which he or she did not work at all.

6. Claimant's argument presumes that §650(a) mandates a 26-week sample size, but the statute's plain language is not to that effect. The primary directive of §650(a) is to compute average weekly wages in whatever manner is "best calculated" to approximate the injured worker's average earnings during the preceding 26 weeks. Twenty-six weeks merely defines the period to be covered by the approximation; it is not itself the unit of measurement.

7. I acknowledge that in most cases, the best way to approximate an injured worker's average earnings during the 26 weeks preceding an injury is by reference to the wages he or she actually earned during that period. This is not always the case, however. Including weeks during which the worker was ill for a number of days, for example, or vacation weeks during which he or she did not work at all, would skew the average downward. This in turn would artificially depress the compensation rate, and thus deprive the injured worker of fair and adequate weekly compensation for his or her current and future wage loss. *Bishop v. Town of Barre*, 140 Vt. 564 (1982).

8. Notwithstanding that the resulting calculation is based on an average of something less than 26 weeks' worth of wages, it is exactly for this reason that Workers' Compensation Rule 15.4200 excludes multi-day sick leave and vacation weeks from consideration.[2] Contrary to Claimant's assertion, the language of §650(a) encourages rather than precludes this.

9. The rule specifically at issue in this case, Rule 15.4240, addresses a slightly different circumstance – the one in which the injured worker has only recently been hired and therefore has at least four, but fewer than 26 weeks' worth of wages from which to calculate average earnings. With specific reference to the language of §650(a), the rule thus identifies four weeks as the tipping point between employment that is so short as to be an "impracticable" basis for computing the injured worker's average weekly wage, and employment that, though relatively brief, provides a sufficient sample from which to accurately approximate his or her rate of remuneration.

10. According to Claimant's reading of the statute, the first clause of §650(a) – "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" – only applies to workers who have been employed for at least 26 weeks; for all other workers, the wages of a "comparable employee" must be used instead. But this interpretation ignores the statute's specific language in two important respects. First, it gives no meaning to the requirement that the computation be conducted "in such manner as is best calculated" to yield an accurate 26-week average. Second, it ignores the discretionary nature of the "comparative employee" analysis, which, the statute states, "may" form the basis

[2] *See* n.1 *supra*. In addition, Rule 15.4230 excludes any weeks preceding a promotion or transfer as a result of which the injured worker was receiving higher regular wages.

of the average wage calculation for recently-employed injured workers, but is not required to.

11. Considering the language of the statute as actually written, Rule 15.4240 is not at odds with the legislature's directive, does not conflict with its intent, and fits well within the Commissioner's rule-making authority. *Cf. Martin v. State of Vermont*, 175 Vt. 80 (2003) (administratively adopted regulation invalidated where it exceeded governing statute's authorization). I thus reject Claimant's challenge to its validity.

12. I also reject Claimant's claim that in light of the recent amendment to §650(a), the four-week trigger mandated by Rule 15.4240 for using an injured worker's actual wages rather than those of a "comparable employee" is no longer rationally based.

13. Some history is required to fully appreciate this argument. Prior to 2008, §650(a) had long established twelve weeks as the basis for calculating average wages. Similarly, Workers' Compensation Rule 15(e) (the predecessor to Rule 15.4240) had long established four weeks as the minimum sample size for using actual rather than comparable wages. Claimant asserts that when the statute was amended in 2008 to expand the average wage calculation from twelve to 26 weeks, the rule's minimum sample size should have expanded proportionately, from four weeks to 8.5 weeks.

14. Again, Claimant misconstrues both the plain language of §650(a) and its intent. True, the 2008 amendment expanded the relevant period during which an injured worker's average earnings should be approximated, from twelve to 26 weeks. However, the legislature left intact the statute's primary goal, which remains to compute average weekly wages "in such manner as is best calculated" to yield a fair estimate of the worker's pre-injury rate of remuneration. To accomplish this result, the legislature also left intact the discretionary nature of the alternative, "comparable employee" basis for computing average weekly wages.

15. In evaluating the current rule against the amended statute, the only inquiry is whether four weeks is still an appropriate sample size from which to extrapolate a pattern of weekly earnings. I conclude that it is. It is not so small as to be an impracticable means of computing even a recently-employed worker's rate of remuneration, and it is likely to be as accurate a method as using a comparable employee's average wages would be, if not more so. It thus remains consistent with both the language and intent of §650(a).[3]

[3] Presumably, the Legislative Committee on Administrative Rules would concur with this analysis. By approving the most recent version of the Workers' Compensation Rules (effective August 1, 2015), which maintains the four-week sample size, the Committee thereby determined that the provision is rationally based, consistent with the legislature's intent and appropriately promulgated. *See* 3 V.S.A. §842(b)(1)-(3).

16. Having determined that Rule 15.4240 is consistent with the statute, rationally based and validly promulgated, I conclude as a matter of law that Defendant's calculation of Claimant's average weekly wage consistent with its terms was appropriate.

ORDER:

Defendant's Motion for Partial Summary Judgment is hereby **GRANTED**.

DATED at Montpelier, Vermont this ____ day of _____, 2016.

_____
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.