STATE OF VERMONT
DEPARTMENT OF LABOR

Troy Liberty

v.

Town of Richmond

Opinion No. 15-17WC

By: Phyllis Phillips, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. BB-59473

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

Heidi Groff, Esq., for Claimant
Eric Johnson, Esq., for Defendant AIG

ISSUE PRESENTED:

1. As a matter of law, is Claimant entitled to additional temporary disability benefits on the grounds that a material mistake of fact rendered inaccurate the average weekly wage and compensation rate at which such benefits previously were paid?

2. As a matter of law, in ordering Defendant to pay permanent partial disability benefits did the Department incorrectly calculate Claimant's average weekly wage and compensation rate, and if so, what is the appropriate remedy?

EXHIBITS:

Claimant's Exhibit 1:	Wage Statement (Form 25), 3/15/10
Claimant's Exhibit 2:	Agreement for Temporary Total Disability Compensation (Form 21), approved 3/29/10
Claimant's Exhibit 3:	Payroll detail, pay periods ending 9/23/09-3/12/10
Claimant's Exhibit 4:	Email correspondence between Attorney Groff and Peggy Gates, 12/9/15-12/14/15
Claimant's Exhibit 5:	Proposed recalculated wage statement
Claimant's Exhibit 6:	Interim Order of Benefits, April 22, 2016
Claimant's Exhibit 7:	Email correspondence from Attorney Groff, with attached Notice and Application for Hearing (Form 6), 1/14/2016
Claimant's Exhibit 8:	Formal hearing docket referral, 4/22/2016

Defendant's Exhibit A:	Agreement for Temporary Total Disability Compensation (Form 21), approved 3/29/10
Defendant's Exhibit B:	Wage Statement (Form 25), 3/15/10
Defendant's Exhibit C:	Agreement for Temporary Partial Disability Compensation (Form 24), approved 10/5/10
Defendant's Exhibit D:	Employer's Notice of Intention to Discontinue Payments (Form 27), effective 12/24/2015
Defendant's Exhibit E:	Chart of hours worked, sick time paid and gross wages, pay periods ending 9/25/09-3/12/10
Defendant's Exhibit F:	Interim Order of Benefits, April 22, 2016

FINDINGS OF FACT:

The following facts are undisputed:

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

2. At all times relevant to these proceedings, Vermont League of Cities and Towns was Defendant's workers' compensation insurance carrier.

3. On August 1, 2009 Claimant suffered an injury to his left hand while working in the course and scope of his employment for Defendant. Defendant accepted the injury as compensable and began paying workers' compensation benefits accordingly.

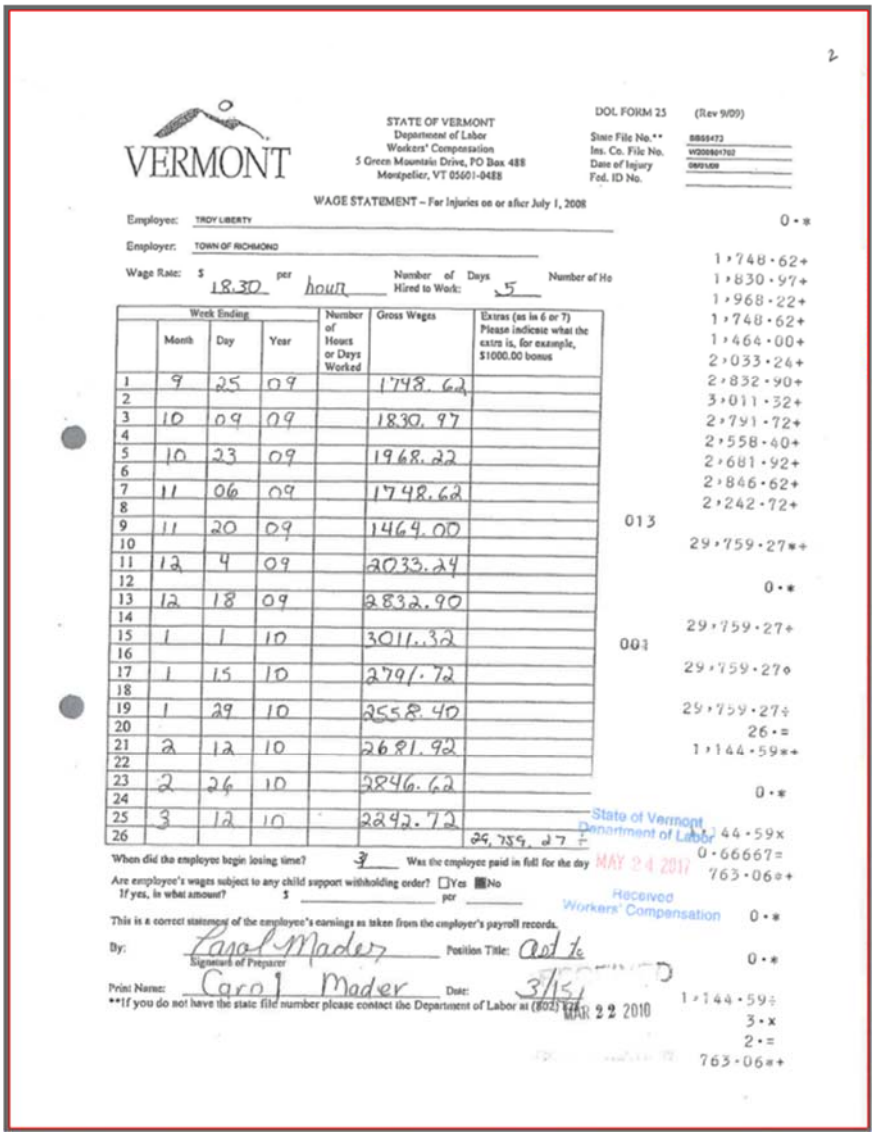
4. Specifically, Defendant began paying temporary total disability (TTD) benefits on March 15, 2010. It did so pursuant to an Agreement for Temporary Total Disability Compensation (Form 21) that the parties executed on March 16, 2010 and March 17, 2010. The Department approved the Agreement on March 29, 2010. *Claimant's Exhibit 2*.

5. At the time that they executed the TTD Agreement, neither Claimant nor Defendant's workers' compensation insurance adjuster had retained legal counsel. Claimant's counsel entered her appearance in April 2010.

6. The approved Agreement recited Claimant's average weekly wage as $1,144.59. This yielded an initial weekly compensation rate of $763.06.[1] *Claimant's Exhibit 2.*

[1] Claimant had two dependent children, and thus qualified for an additional $20.00 per week during the period of his total disability, in accordance with 21 V.S.A. §642. His weekly TTD benefit was therefore $783.06.

7. The Wage Statement (Form 25) that Defendant had submitted, and from which Claimant's average weekly wage and compensation rate had been calculated, recited his gross biweekly wages for the pay periods from 9/25/09 through 3/12/2010 (the 26 weeks prior to his injury) as follows, *Claimant's Exhibit 1*:



VERMONT

STATE OF VERMONT
Department of Labor
Workers' Compensation
5 Green Mountain Drive, PO Box 488
Montpelier, VT 05601-0488

DOL FORM 25 (Rev 9/09)

State File No.** 8868473
Ins. Co. File No. WC00861702
Date of Injury 08/01/09
Fed. ID No.

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

Employee: TROY LIBERTY
Employer: TOWN OF RICHMOND
Wage Rate: $ 18.30 per hour Number of Days Hired to Work: 5 Number of Ho

	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	9	25	09		1748.62	
2						
3	10	09	09		1830.97	
4						
5	10	23	09		1968.22	
6						
7	11	06	09		1748.62	
8						
9	11	20	09		1464.00	
10						
11	12	4	09		2033.24	
12						
13	12	18	09		2832.90	
14						
15	1	1	10		3011.32	
16						
17	1	15	10		2791.72	
18						
19	1	29	10		2558.40	
20						
21	2	12	10		2681.92	
22						
23	2	26	10		2846.62	
24						
25	3	12	10		2292.72	
26					29,759.27 ÷	

When did the employee begin losing time? 3 Was the employee paid in full for the day

Are employee's wages subject to any child support withholding order? ☐Yes ■No
If yes, in what amount? $ _____ per _____

This is a correct statement of the employee's earnings as taken from the employer's payroll records.

By: Carol Mader Position Title: Acct Tc
Signature of Preparer

Print Name: Carol Mader Date: 3/15/
**If you do not have the state file number please contact the Department of Labor at (802)

State of Vermont Department of Labor MAY 24 2017 Received Workers' Compensation

MAR 22 2010

0 • *
1,748.62+
1,830.97+
1,968.22+
1,748.62+
1,464.00+
2,033.24+
2,832.90+
3,011.32+
2,791.72+
2,558.40+
2,681.92+
2,846.62+
2,292.72+
013
29,759.27*+
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001
29,759.27+
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26.=
1,144.59*+
0 • *
1,144.59x
0.66667=
763.06*+
0 • *
0 • *
1,144.59÷
3.x
2.=
763.06*+

8. In completing the Wage Statement, Defendant failed to mark any entries in the column labeled, "Number of hours or days worked." *Claimant's Exhibit 1*.

9. Claimant received TTD benefits in accordance with the approved TTD Agreement from March 15, 2010 until September 24, 2010. Thereafter, he received temporary partial disability (TPD) benefits from September 25, 2010 until December 24, 2015, pursuant to an Agreement for Temporary Partial Disability Compensation (Form 24) that the parties executed on

September 29, 2010. The Department approved the TPD Agreement on October 5, 2010. As with the previously approved TTD Agreement, the TPD Agreement recited Claimant's average weekly wage for the 26 weeks preceding his injury as $1,144.59. *Defendant's Exhibit C.*

10. On December 14, 2015 Defendant filed a Notice of Intention to Discontinue Benefits (Form 27), effective December 24, 2015, on the grounds that Claimant had reached an end medical result. *Defendant's Exhibit D.* As Claimant's counsel and Defendant's adjuster were preparing to enter into an Agreement for Permanent Partial Disability Compensation (Form 22), Claimant obtained a detailed wage printout from Defendant, *Claimant's Exhibit 3*. The printout revealed that three of the biweekly entries on the original Wage Statement – the pay periods ending on November 6th, November 20th and December 4th, 2009 – were for weeks during which Claimant did not work at all. The amounts listed as "gross wages" during those weeks were in fact sick and/or holiday pay, as follows:

    - Pay period ending 11/6/09 – 80 hours sick;
    - Pay period ending 11/20/09 – 72 hours sick; 8 hours holiday;
    - Pay period ending 12/4/09 – 64 hours sick; 16 hours holiday.

11. Were these pay periods excluded from the calculation, Claimant's average weekly wage would be $1,225.67. This would yield an initial weekly compensation rate of $817.53 (plus $20.00 for two dependents, *see* n.1 *supra*). *Claimant's Exhibit 5*.

12. Claimant asserts, and Defendant agrees, that these pay periods should have been excluded from the average weekly wage and compensation rate calculation, in accordance with Vermont's workers' compensation statute and rules. *Claimant's Exhibit 4; see Defendant's Reply to Claimant's Statement of Undisputed Facts* at ¶12; Discussion *infra* at ¶¶2-4.

13. On January 14, 2016 Claimant filed a Notice and Application for Hearing (Form 6), in which he sought to recoup the difference between the temporary disability benefits Defendant paid at the incorrect compensation rate and what it would have paid had the rate been properly calculated. *Claimant's Exhibit 7*.

14. On April 22, 2016, the Department's workers' compensation specialist issued an interim order directing Defendant to pay permanent partial disability (PPD) benefits at the corrected compensation rate, that is, by excluding the six weeks during which Claimant did not work at all (the pay periods ending November 6th, November 20th and December 4th, 2009) from the average weekly wage calculation. *Claimant's Exhibit 6*.

15. In accordance with the specialist's interim order, Defendant paid PPD benefits at the rate of $817.53 per week.

16. In addition to the three biweekly pay periods referenced above, Finding of Fact No. 10 *supra*, during which Claimant did not work at all, there were other pay periods during which he received sick and/or holiday pay, as follows, *Defendant's Exhibit E; Claimant's Exhibit 3*:

- Pay period ending 9/25/09 – $54.90 for 3 hours sick;
- Pay period ending 10/23/09 – $439.20 for 24 hours sick;
- Pay period ending 12/18/09 – $439.20 for 24 hours sick;
- Pay period ending 1/1/10 – $146.40 for 8 hours holiday;
- Pay period ending 1/15/10 – $146.40 for 8 hours holiday;
- Pay period ending 1/29/10 – $146.40 for 8 hours holiday;
- Pay period ending 2/26/10 – $146.40 for 8 hours holiday; $201.30 for 11 hours sick;
- Pay period ending 3/12/10 – $146.40 for 8 hours holiday.

17. Were the above sick and/or holiday leave payments excluded from the calculation (in addition to the leave payments made for the pay periods ending November 6th, November 20th and December 4th, 2009, Finding of Fact No. 10 *supra*), Claimant's average weekly wage would be $1,132.34. This would yield an initial weekly compensation rate of $754.89.

DISCUSSION:

1. 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. Realty of Vermont*, 137 Vt. 425 (1979).

2. The disputed issues in this case revolve around the manner in which an injured worker's average weekly wage and compensation rate are calculated. Vermont's workers' compensation statute, 21 V.S.A. §650(a), provides as follows:

> If during the period of 26 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.

3. Former Workers' Compensation Rule 15.4200, the rule in effect at the time of Claimant's injury,[2] provides further guidance, as follows:

> **15.4200** The following shall not be included when determining the [claimant's] 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;
> >
> > **15.4220** 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 . . .

4. The material facts here are undisputed. In accordance with Workers' Compensation Rule 15.4200, the parties agree that the six weeks during which Claimant did not work at all should have been *excluded* from his average weekly wage and compensation rate calculation, but were not. They further agree that Claimant missed time due to sickness and/or holidays on other occasions as well. However, because these hours did not total at least one-half of his normal week's work, they did not fit within the parameters of Rule 15.4200 and were therefore *included* in the calculation.

5. Where the parties disagree is as to the legal ramifications of each of these facts. As to the first, Claimant asserts that the mistake that resulted in the parties' erroneous average weekly wage and compensation rate calculation was one of fact, and therefore the calculation is subject to modification under former Workers' Compensation Rule 17.0000.[3] Defendant asserts that there was no mistake of fact, and even if there was, the doctrine of laches precludes retroactive modification at this point. With reference to the statute, 21 V.S.A. §650(a), Defendant further asserts that if allowed, any modification must not only exclude the *weeks* during which Claimant was absent due to sickness or holiday, but also any *days* when he did not work for those reasons.

Modification of Agreement on Grounds of Material Mistake of Fact

6. The workers' compensation rules have long recognized the need for finality as a necessary component of any compensation agreement between the parties. Former Rule 17.0000 provides:

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[2] The quoted rule has since been re-codified, in substantially unchanged form, as Workers' Compensation Rule 8.1200, effective August 1, 2015.

[3] Effective August 1, 2015, this rule was re-codified, in essentially the same form, as Workers' Compensation Rules 9.1420 (as to Agreements for Temporary Compensation) and 10.1820 (as to Agreements for Permanent Partial or Permanent Total Disability Compensation).

> Once executed by the parties and approved by the [Workers' Compensation] Division, these [compensation agreements] shall become binding agreements and absent evidence of fraud or material mistake of fact the parties shall be deemed to have waived their right to contest the material portions thereof.

7. Neither party here has alleged fraud as a basis for modification; rather, their focus is solely on the question whether a material mistake of fact caused Claimant's average weekly wage and compensation rate to be calculated erroneously. On this point, Defendant argues that there was no factual mistake – each of the biweekly entries on the employer's Wage Statement, *Claimant's Exhibit 1*, accurately reflected Claimant's earnings for the period. The mistake, Defendant claims, was one of law, stemming from their failure to comprehend the legal consequences of the facts as so recorded.

8. Defendant's analysis fails to account for a critical factual omission, however. The Wage Statement it submitted left blank the column in which the number of hours or days Claimant had worked during each pay period should have been indicated. Had Defendant properly completed the form, three of the entries would have been marked "zero," and the gross wages corresponding to those weeks would have been excluded, as Rule 15.4220 directs. Because they were not, Claimant's total gross wages, average weekly wage and compensation rate were all inaccurately calculated. These were factual errors grounded in incomplete data. They were mutual as well – although either party might have discovered the true facts, neither did. *Betta v. Smith*, 81 A.2d 538, 540 (Pa. 1951), cited with approval in *Berard v. Dolan*, 118 Vt. 116, 119 (1953).

9. I conclude as a matter of law that the erroneous calculation of Claimant's average weekly wage and compensation rate resulted from mutual mistakes of fact, not law. To correct the errors, it is necessary to modify the parties' TTD and TPD Agreements and adjust Claimant's average weekly wage and compensation rate accordingly. *See Maglin v. Tschannerl*, 174 Vt. 39, 45 (2002) (holding that contract rescission is appropriate remedy for mutual mistake of fact).

10. More specifically, I conclude that Claimant's average weekly wage for the 26 weeks preceding his injury should have been $1,225.67, which should have yielded a compensation rate for temporary total disability (including two dependents) of $837.53, and a variable rate for temporary partial disability.

Laches

11. Defendant asserts that the doctrine of laches should bar modification in this case. It argues that Claimant unreasonably delayed asserting his right to additional benefits, and that it has been prejudiced as a result. I disagree.

12. In order for the doctrine of laches to apply, "a party must have 'fail[ed] to assert a right for an unreasonable and unexplained amount of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right.'" *Smiley v. State of Vermont*, 2015 VT 42, ¶33, quoting *GEICO Ins. Co. v. Bernheim*, 2013 VT 77, ¶16 (internal citations omitted). Laches "'involves prejudice, actual or implied, resulting from the delay. It does not arise from delay alone, but from delay that works disadvantage to another.'" *Id.*, quoting *In re McCarty*, 2013 VT 47, ¶15.

13. I acknowledge here that the delay between the Department's approval of the parties' first compensation agreement and Claimant's request that his average weekly wage and compensation rate be recalculated was almost six years. However, until they had occasion to negotiate a new agreement (for permanent partial as opposed to temporary total disability benefits), neither party realized that their prior calculations had been based on incomplete data and were therefore factually incorrect. From that point until the time when Claimant filed his request for relief only a few weeks passed. Under these circumstances, I do not consider the delay to have been either unreasonable or unexplained.

14. Nor has Defendant made any credible showing that it has been prejudiced by Claimant's delay. It claims that it has been "forced . . . to piece together old information," but notably, the payroll records it has now produced were fully available to it at the time it submitted its original Wage Statement. Had it used the information to complete the form correctly the first time, Claimant's average weekly wage and compensation rate likely would have been accurately calculated from the beginning. Any prejudice it now claims was of its own doing, not Claimant's.

15. I conclude that the circumstances of this case do not justify invoking the doctrine of laches as a bar to Claimant's request for modification of his TTD and TPD Agreements and recalculation of his average weekly wage and compensation rate accordingly.

Exclusion of Sick and/or Holiday Pay from Average Weekly Wage and Compensation Rate Calculation

16. If, as I have now concluded, it is necessary to recalculate Claimant's average weekly wage and compensation rate, Defendant asserts that other

errors must be addressed as well. Specifically, it argues that neither sick nor holiday pay qualifies as "wages" under Vermont law; therefore, both the weeks *and* the days for which Claimant received these "benefits" should be excluded from the calculation.

17. The statute, 21 V.S.A. §601(13), defines "wages" broadly, to include "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 or her remuneration." This language "suggests a legislative recognition that the non-monetary benefits that may be part of 'wages' take a variety of forms, and are not limited to board, lodging and fuel." *Haller v. Champlain College*, 2017 VT 86, ¶17.

18. As to what constitutes an "other advantage[]," the Court in *Haller* endorsed three criteria for distinguishing between a fringe benefit that properly can be categorized as "wages" and one that cannot. An employment benefit that is "significant, provides true value to the worker, and is determinable" qualifies as "wages," *id.* at ¶24 (holding that free tuition benefits met the statutory definition); *cf. Lydy v. Trustaff, Inc.*, 2013 VT 44 (holding that employer's contribution to employee's group health insurance premium did not qualify as "wages").

19. An employer who pays its employees for sick or holiday time provides a benefit that meets the *Haller* criteria. The benefit is a readily quantifiable, bargained-for component of the employee's compensation package, which he or she receives directly as remuneration for his or her services. *Id.* at ¶18. It thus meets the definition of "wages," both as described in §601(13) and as interpreted by the Supreme Court.

20. The inquiry does not end there, however. Although sick and holiday pay are properly characterized as "wages" under §601(13), to be included in an injured worker's average weekly wage and compensation rate calculation they must also fit within the parameters of §650(a). The general directive of that section is 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 26 weeks preceding an injury." More specifically germane to the current claim, §650(a) further directs:

> If during the period of 26 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.

21. In accordance with the statutory mandate, Workers' Compensation Rule 15.4200 properly excludes from the average weekly wage and compensation rate calculation (a) 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 15.4210; and (b) any weeks during which he or she did not work at all, Rule 15.4220.[4]

22. Defendant asserts that while Rules 15.4210 and 15.4220 squarely address the question whether the *time* during which an injured worker cannot work is excludable from the average weekly wage calculation, they do not speak to the question whether the *pay* he or she receives is also excludable. According to Defendant's interpretation, all sick or holiday pay is excludable, regardless of whether it was earned during a week when the injured worker missed more than half of his or her normally scheduled hours or hardly any at all.

23. Defendant's analysis ignores an important rule of statutory construction – "the express mention of one thing excludes all others ("*expressio unius est exclusio alterius*"). *See, e.g., R & G Properties, Inc. v. Column Financial, Inc., et al.*, 2008 VT 113, ¶21. It also renders irrelevant the introductory clause to Rule 15.4200, which states that the exclusions mandated by Rules 15.4210 and 15.4220 "shall not be included when determining the gross wages." Expressly excluding two classes of weeks – those during which the injured worker either works for less than half of his or her normally scheduled hours and those during which he or she does not work at all – means that all other classes of weeks are included in the average weekly wage calculation. No other interpretation makes sense.

24. I conclude as a matter of law that only the sick or holiday pay attributable to weeks during which Claimant was unable to work for more than one-half of his normally scheduled hours are properly excludable from his average weekly wage and compensation rate calculation. As this was how the Department's specialist calculated Claimant's permanent partial disability compensation rate, I further conclude that the weekly amounts Defendant was ordered to pay were correctly computed. Defendant has not overpaid any benefits, and is not entitled to any credits, therefore.

Interest, Penalties and Attorney Fees

25. This case presented unusual circumstances. Initially, neither the parties nor the Department recognized the omissions that caused Claimant's average weekly wage and compensation rate to be calculated incorrectly. With that in mind, I conclude that it is appropriate to award interest on the retroactive temporary disability benefits Defendant now owes, but only as of the date of the Department specialist's order, April 22, 2016.

[4] Presumably, the basis for the fewer-than-one-half-of-normal-hours standard is to make the employer's wage reporting requirement more manageable. Without it, the employer would have to report its injured worker's sick time over the course of the preceding 26 weeks in daily or even hourly increments, so that all corresponding sick pay could be excluded from the total gross wages.

26. Similarly, unless Defendant fails to make timely payment in accordance with this ruling, I conclude that it would be inequitable to impose any late payment penalty. Therefore, none is assessed at this time.

27. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his itemized claim.

ORDER:

Claimant's Motion for Summary Judgment is hereby **GRANTED**. Defendant's Motion for Summary Judgment is hereby **DENIED**. Defendant is hereby **ORDERED** to pay:

1. Retroactive temporary disability benefits representing the difference between the temporary disability benefits Defendant paid at the incorrect compensation rate and what it would have paid had the rate been properly calculated based on an average weekly wage of $1,225.67, in accordance with 21 V.S.A. §§642 and 646;

2. Interest on the above amounts dating from April 22, 2016, in accordance with 21 V.S.A. §664; and

3. Attorney fees in amounts to be determined, in accordance with 21 V.S.A. §678(a).

DATED at Montpelier, Vermont this _____ day of _____, 2017.

_____
Lindsay H. Kurrle
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.