

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Jody Parks

v.

Norwich University

Opinion No. 07-21WC

By: Beth A. DeBernardi  
Administrative Law Judge

For: Michael A. Harrington  
Commissioner

State File No. MM-50308

**RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

**APPEARANCES:**

Patrick L. Biggam, Esq., for Claimant  
Jennifer K. Moore, Esq., for Defendant

**ISSUE PRESENTED:**

Which minimum compensation rate applies to Claimant's claim: the one in effect on the date of injury or the one in effect on the date of disability?

**EXHIBITS:**

Claimant's Statement of Undisputed Facts  
Defendant's Statement of Undisputed Facts

Defendant's Exhibit A: Notice and Application for Hearing (Form 6) filed July 1, 2020  
Defendant's Exhibit B: Minimum and Maximum Compensation Rates: Annual Change

**FINDINGS OF FACT:**

*The following facts are undisputed:*

1. On June 26, 2019, Claimant sustained a work-related injury. *See* First Report of Injury (Form 1); *Defendant's Statement of Undisputed Facts (Defendant's Statement)*, ¶ 1; *Claimant's Statement of Undisputed Facts (Claimant's Statement)*, ¶ 1.
2. On July 1, 2019, Claimant was first disabled from work due to his injury. *See* Agreement for Temporary Compensation (Form 32); *Defendant's Statement*, ¶ 2; *Claimant's Statement*, ¶ 2.
3. The minimum compensation rate on June 26, 2019 was \$437.00, and the minimum compensation rate on July 1, 2019 was \$451.00. *See* Exhibit B; *Defendant's Statement*, ¶¶ 3-4; *Claimant's Statement*, ¶¶ 3-4.

4. Defendant prepared an Agreement for Temporary Compensation (Form 32), reflecting its agreement to pay temporary disability benefits calculated at the minimum compensation rate as of the date of injury. The parties filed the Agreement with the Department on October 2, 2019. *See* Form 32; *Defendant's Statement*, ¶ 5; *Claimant's Statement*, ¶ 5.
5. The Department's specialist did not approve the Agreement as filed. Rather, she changed it to reflect a minimum compensation rate of \$451.00, the rate in effect as of July 1, 2019, when Claimant first became disabled from his work injury. She then approved the Agreement, as amended. *See* Form 32; *Defendant's Statement*, ¶ 5; *Claimant's Statement*, ¶ 6.
6. The specialist emailed the approved Agreement to the parties on October 15, 2019. On October 18, 2019, Defendant emailed the specialist seeking clarification, since its adjuster thought that the date of injury, rather than the date of disability, governed the minimum compensation rate. *See* Exhibit A; *Claimant's Statement*, ¶ 7.
7. Another Department specialist replied to Defendant on October 18, 2019 by email. She advised that, based on prior discussions with the Director of Workers' Compensation & Safety, the minimum rate in effect on the date of disability, not the date of injury, was the applicable one. *See* Exhibit A; *Defendant's Statement*, ¶ 5; *Claimant's Statement*, ¶ 8.
8. Defendant complied with the approved Agreement and paid Claimant's temporary disability benefits at the minimum rate in effect on his date of disability. *Claimant's Statement*, ¶ 9.
9. Claimant retained legal counsel on March 18, 2020, and Defendant retained legal counsel on April 30, 2020. *Claimant's Statement*, ¶¶ 10-11.
10. On July 1, 2020, Defendant filed a Notice and Application for Hearing (Form 6) seeking to challenge the Department's application of the minimum compensation rate in effect on the date of Claimant's disability. *See* Form 6; *Claimant's Statement*, ¶ 13.
11. An informal conference was held on August 26, 2020, during which the specialist concluded that the applicable minimum compensation rate was the rate in effect on the date of disability. At the parties' request, she referred the issue to the formal hearing docket for determination. *See* Specialist's August 26, 2020 formal hearing referral memorandum; *Claimant's Statement*, ¶ 12.

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

1. The parties present a purely legal issue for determination – whether a worker who is injured on June 26, but who is not disabled from work until July 1, is entitled to the minimum compensation rate in effect on the date of injury or the date of disability. As the material facts are not disputed, summary judgment is an appropriate vehicle for

resolving this issue. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).

*The Applicable Minimum Compensation Rate*

2. Vermont’s Workers’ Compensation statute, 21 V.S.A. § 642(a), provides in pertinent part as follows:

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 added).

3. Before August 1, 2015, neither the workers’ compensation statute nor the rules included a definition of “date of injury” for the purpose of calculating an injured worker’s average weekly wage and temporary disability compensation rate. *See V.S. v. Kennametal, Inc.*, Opinion No. 19-07WC (August 2, 2007), Conclusion of Law No. 4. Faced with determining the date of injury for purposes of calculating an injured worker’s average weekly wage and temporary disability benefits, the Commissioner held that the “date of injury” in this context is different from the “date of injury” in the statute of limitations context. In the context of calculating an average weekly wage, the date of injury is the date on which the injury becomes disabling. *Id.*, citing *Plante v. Slalom Skiwear, Inc.*, Opinion No. 19-95WC (May 24, 1995) (interpreting the date of injury for the purpose of computing average weekly wage and temporary disability benefits as the date on which the injury becomes disabling).
4. Subsequently, on August 1, 2015, the Department’s interpretation was codified in the Workers’ Compensation Rules. Rule 2.1500 includes the following provision:

2.1500 “Date of injury” means:

2.1510. For purposes of filing a claim and statute of limitations, the point in time when the injury, and its relationship to employment, is reasonably discoverable and apparent.

2.1520. For purposes of calculating average weekly wage pursuant to 21 V.S.A. § 650(a) when there are one or more periods of disability, the date(s) on which the injury becomes disabling.

5. Although Rule 2.1520 does not specifically reference the minimum compensation rate, the calculation of average weekly wage is a necessary component of determining that an injured worker is entitled to the minimum compensation rate. Thus, by necessary

implication, I conclude that the applicable minimum rate here is the one that was in effect on the date when Claimant's injury became disabling.

6. Not only is this conclusion in accord with the Department's prior case law and required by Rule 2.1520, but it is also in keeping with the statute's remedial nature. *See Montgomery v. Brinver Corp.*, 142 Vt. 461, 463 (1983), citing *Herbert v. Layman*, 125 Vt. 481, 485-85 (1966); *St. Paul Fire and Marine Ins. Co. v. Surdam*, 156 Vt. 585 (1991). The injured workers to whom the minimum compensation rate applies are generally low wage earners, who are often financially vulnerable. Thus, the benevolent objective of the workers' compensation statute also supports the conclusion that Claimant should receive the higher minimum compensation rate in effect on the date of his disability.

*Retroactivity of Statutory Amendments Not Applicable to the Parties' Dispute*

7. Defendant contends that the right to compensation is governed by the law in effect on the date of injury and that the law changed on July 1, 2019, when the higher minimum compensation rate went into effect. It characterizes the rate increase as a substantive change in the law that cannot be applied retroactively to Claimant's claim.
8. The Workers' Compensation Act provides for an annual adjustment of compensation rates according to a formula set forth in the statute. *See* 21 V.S.A. § 650(d). Rule 8.2000 provides that the Commissioner shall calculate the adjustments, including the adjusted minimum compensation rate, by July 1 of each year. Thus, the Department simply performs a ministerial calculation once a year, based on the formula already set forth in the statute. I therefore conclude that the July 1, 2019 increase in the minimum compensation rate is not a substantive change in the law that is being applied retroactively to the payment of Claimant's temporary disability benefits.

**ORDER:**

Defendant's Motion for Summary Judgment is **DENIED**. Claimant's Motion for Summary Judgment is **GRANTED**. As a matter of law, Claimant's compensation rate shall be based on the minimum compensation rate in effect as of the date of his disability.

**DATED** at Montpelier, Vermont this 23<sup>rd</sup> day of March 2021.

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Michael A. Harrington  
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.