STATE OF VERMONT
DEPARTMENT OF LABOR

Casey Arman

v.

Vermont Mutual Insurance

Opinion No. 03-23WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. MM-50689

RULING ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

APPEARANCES:

Craig A. Jarvis, Esq., for Claimant
Jennifer Meagher, Esq., for Defendant

ISSUE PRESENTED:

What is Claimant's Average Weekly Wage?

EXHIBITS:

Claimant's Statement of Undisputed Material Fact

Defendant's Statement of Undisputed Material Fact

Claimant's Exhibit 1:	"Statement of the Injured Employee" Form on Defendant's insurer's letterhead, filled out by Claimant, signed August 2, 2019
Claimant's Exhibit 2:	Letter from Jeffrey Haddock, MD addressed "To Whom It May Concern," signed July 20, 2021
Claimant's Exhibit 3:	Letter from Denise Durant, MD addressed "To Whom It May Concern," signed April 12, 2022
Claimant's Exhibit 4:	Wage Statement (Form 25) dated July 19, 2021
Defendant's Exhibit A:	Explanation of Review
Defendant's Exhibit B:	Medical records
Defendant's Exhibit C:	Denial of Workers' Compensation Benefits by Employer or Carrier (Form 2) signed August 9, 2021
Defendant's Exhibit D:	Email correspondence between counsel and the Department
Defendant's Exhibit E:	Email correspondence between counsel and the Department
Defendant's Exhibit F:	Email correspondence between counsel and the Department
Defendant's Exhibit G:	Letter from Defendant to Claimant dated December 22, 2021 regarding pay and benefits, including profit sharing

BACKGROUND:

There is no genuine issue as to the following facts:

1. Claimant alleges that he began experiencing bilateral peripheral neuropathy in his upper extremities in July 2019 due to activities that he performed in the course of his employment with Defendant. He filed a First Report of Injury on July 16, 2019. He asserts that this condition caused a disability from work beginning approximately two years later, relying on a July 20, 2021 letter from his treating physician, Jeffrey Haddock, MD.

2. Although Defendant initially paid some medical benefits relating to this claim, it subsequently filed a denial of medical and temporary disability benefits. As to the timing of symptom onset, diagnosis, and resulting levels of disability, Defendant leaves Claimant to his burden of proof.

3. The primary legal dispute presented in these cross-motions concerns the computation of Claimant's average weekly wage ("AWW") for the purpose of computing any temporary disability benefits to which Claimant may be entitled.

4. There are two Wage Statements (Forms 25) in the record. The first reflects the 26-week period prior to the onset of Claimant's alleged work injury, up through the week ending July 20, 2019. The second reflects the 26-week period preceding the date of his alleged disability from work, up through the week ending July 27, 2021. Both Wage Statements reflect an annual bonus followed by a raise in regular pay.

5. The following details from the 2021 Wage Statement are relevant to calculating his AWW for the purpose of temporary disability benefits:

    a. On February 5, 2021, Claimant received a profit-sharing bonus of $6,393.03.

    b. After February 27, 2021, Claimant received a raise of $49.46 every two weeks, such that his regular biweekly wages increased from $1,648.47 to $1,697.93.

    c. On or about July 3, 2021, Claimant received a spot bonus of $50.00.

6. Claimant's bonuses result from a profit-sharing arrangement under which Defendant customarily pays its employees in February based upon the prior calendar year's eligible earnings. To the extent Claimant "earned" these bonuses, the respective February profit sharing payouts were earned outside the 26 weeks preceding the 2019 alleged date of injury and 2021 alleged disability.

7. The Department's specialist assigned to this case calculated Claimant's initial AWW as follows:

    a. For the period covered by the 2019 Wage Statement, she calculated his AWW as $800.23, with a resulting compensation rate of $533.75.

b. For the period covered by the 2021 Wage Statement, she determined that if Claimant proves entitlement to temporary total disability (TTD) benefits beginning July 20, 2021, then his AWW would be $851.47, with TTD compensation at the rate of $567.93.

8. The specialist's calculations excluded the bonuses that Claimant received before his raises, and only counted the wages that he earned in the weeks after those raises.

9. After Claimant's counsel expressed his disagreement with this calculation, the specialist confirmed that after receiving internal guidance, the "[w]eeks cannot be used preceding a raise, if the raise happened after a bonus—the bonus is not included." *See* Defendant's Exhibit F.

10. If all of Claimant's earnings are included in the average weekly wage computation, including his bonuses and pre-raise regular wages, his average weekly wage for the period reflected on the 2021 Wage Statement would be $1,091.07, making his compensation rate for TTD purposes equal to $727.38 per week.

11. Claimant contends that the larger figures should be used in computing the amount of any TTD benefits, while Defendant contends that the Department's specialist's calculations are correct.

ANALYSIS:

1. Summary judgment is proper when "there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, after giving the benefit of all reasonable doubts and inferences to the opposing party." *State v. Delaney*, 157 Vt. 247, 252 (1991). To prevail on a motion for summary judgment, the facts must be "clear, undisputed or unrefuted." *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979); *A.M. v. Laraway Youth and Family Services*, Opinion No. 43-08WC (October 30, 2008).

2. The monetary amount of disability benefits under Vermont's Workers' Compensation Act is based on a "compensation rate," which is in turn based on two-thirds of the injured worker's AWW, subject to maximum and minimum amounts as well as certain adjustments. *See* 21 V.S.A. §§ 642, 644, 646, 648; Workers' Compensation Rule 8.0000 *et seq*.

Statutory Provisions Relevant to Computing the AWW

3. The Act provides in relevant part as follows with respect to the computation of a worker's AWW:

> 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.
> …

> In any event, if a worker at the time of the injury is regularly employed at a higher wage rate or in a higher grade of work than formerly during the 26 weeks preceding the injury and with larger regular wages, only the larger wages shall be taken into consideration in computing the worker's average weekly wages.

21 V.S.A § 650(a).

4. Additionally, the Act defines "wages" as follows:

> "Wages" includes bonuses and the market value of board, lodging, fuel, and other advantages that can be estimated in money and that the employee receives from the employer as a part of his or her remuneration; but does not include any sum paid by the employer to his or her employee to cover any special expenses entailed on the employee by the nature of his or her employment.

21 V.S.A. § 601(13).

The Disputed Provision in Workers' Compensation Rule 8

5. Pursuant to its authority to resolve questions arising under the Act[1] and promulgate administrative rules consistent with it,[2] the Department has codified its process for computing an injured worker's AWW pursuant to Section 650(a), *supra*, in Workers' Compensation Rule 8.0000 *et seq*. ("Rule 8").

6. The following portion of that Rule is the subject of controversy here:

> 8.1200 Total gross wages; weeks excluded. In determining the injured worker's total gross wages, the following weeks shall not be included:
>
> …
>
> 8.1230 ***Any weeks preceding a raise***, promotion and/or transfer ***as a result of which the injured worker was paid and/or due larger regular wages***. 21 V.S.A. §650(a). (emphasis added)

Claimant's Argument that Rule 8, and the Specialist's Application of it here, Violated the Act

7. In this case, there is no question that the specialist's calculation of Claimant's AWW was consistent with Rule 8: she excluded Claimant's profit-sharing bonus when computing his AWW because that bonus occurred during a week before Claimant received a raise, and that raise resulted in larger regular wages.

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[1] 21 V.S.A. § 606 ("Questions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of the Commissioner, shall be determined, except as otherwise provided, by the Commissioner.").

[2] 21 V.S.A. § 602(a) ("All process and procedure under the provisions of this chapter shall be as summary and simple as reasonably may be. The Commissioner may make rules not inconsistent with such provisions for carrying out the same and shall cause to be printed and furnished, free of charge, to any employer or employee such forms as he or she deems necessary to facilitate or promote the efficient administration of such provisions.").

8. However, Claimant argues that this application of Rule 8 was inconsistent with the Act, specifically the last sentence of Section 650(a), *supra*:

> …if a worker at the time of the injury is regularly employed at a higher wage rate or in a higher grade of work than formerly during the 26 weeks preceding the injury and with ***larger regular wages***, only the ***larger wages*** shall be taken into consideration in computing the worker's average weekly wages.
>
> *Id.* (emphasis added).

9. As Claimant reads that provision, the placement of the word "regular" in the first clause, but not the second, means that the word "regular" only modifies "wages" in the first clause, and not in the second. He contends that his bonus in February 2021 constituted a "larger wage," even if it was not a larger "regular" wage and that the week in which he received it must be included when computing his AWW. He argues that the Legislature could have written the word "regular" in both clauses if it intended that word to modify "wages" in both locations.

10. Claimant also argues that excluding bonuses before a raise is inconsistent with the remedial purposes of the Workers' Compensation Act[3] and leads to absurd results by incentivizing employers to artificially deflate their employees' AWW for workers' compensation purposes by always timing bonuses immediately before raises, such as by granting a $10,000.00 bonus followed by a $0.01 per week raise.

11. Based on these arguments, Claimant submits that whenever an injured worker receives a raise during the 26-week period relevant to calculating the AWW, Section 650(a) requires two calculations: (1) one average that includes the weeks prior to a raise; and (2) one average that only includes the weeks after the raise. He contends that the correct AWW is the higher of these two figures.

Rule 8, and the Specialist's Application of it Here, Complied with the Act

12. When interpreting a statute, the primary objective is to carry out the intent of the Legislature. *State v. Richland*, 2015 VT 126, ¶ 6. Where the statute's meaning is readily apparent, there is no need to consult the canons of statutory construction. In cases where there is doubt or ambiguity, however, Vermont courts "discern legislative intent by considering the statute as a whole, reading integral parts of the statutory scheme together." *Heffernan v. Harbeson*, 2004 VT 98, ¶ 7. Thus, one must look "not only at the letter of a statute but also at its reason and spirit to avoid results that are irrational or unreasonable." *Id.* (cits. & punct. omitted).

13. Additionally, in the case of statutes subject to administration by an executive branch agency, it is the "usual and frequent function" of administrative rules to "fill in details, regularize procedures and spell out performance in areas where the statute is indefinite or uncertain so long as the substantive requirements are not compromised." *Petition of*

[3] *E.g. In re Chatham Woods Holdings, LLC*, 2008 VT 70.

Allied Power & Light Co., 132 Vt. 354, 360 (1974). Thus, an "administrative rule does not violate its enabling statute so long as the substantive requirements of the statute are not compromised by its language." *In re Agency of Admin., State Bldgs. Div.*, 141 Vt. 68, 81 (1982).

The Letter of the Law

14. With respect to the "letter" of Section 655(a), the Legislature admittedly could have drafted the last sentence more clearly. However, I do not read this sentence the same way that Claimant does.

15. The first clause of the sentence in question establishes a context: a situation like this one where an injured worker has received a raise that results in "larger regular wages." The second clause says what happens ***within*** that context: only the "larger wages" count in calculating the AWW. I find that the second clause reads most naturally when interpreted within the context of the first. The only "larger wages" raised as relevant in that context are the "larger regular wages." Nothing in the statute suggests that where an employee receives a raise, any wages from before that raise must be included when computing the AWW.

16. While courts generally presume that where the Legislature includes particular language in one section of a statute but omits in another, it does so on purpose, *see Russello v. United States*, 464 U.S. 12, 23 (1983), I am not convinced that the Legislature "omitted" anything from the second clause of the sentence at issue here. Rather than "omitting" another instance of the word "regular," it appears to have simply not reiterated an adjective that would have been redundant in context.

17. This is not to suggest that Claimant's proposed interpretation is grammatically nonsensical. However, he has not persuaded me that his reading is the only sensical interpretation. Because the last sentence of Section 655(a) affords at least one interpretation different from the one Claimant proposes, it is at least ambiguous, making it an ideal subject for administrative rules to clarify. Workers' Compensation Rule 8 does just that, by specifying what weeks are excluded in computing the AWW. *Cf. Allied Power & Light*, *supra*, 132 Vt. 354 at 360. Moreover, for the reasons below, that Rule furthers the purposes and spirit of the Act.

The Spirit of the Law

18. With respect to Claimant's arguments about the spirit of Section 650(a), Claimant accurately notes that the Act has historically been construed liberally to effectuate its humane and remedial purposes. However, the Supreme Court has also repeatedly held that the Act "serves the dual purposes of providing an expeditious remedy for injured employees independent of proof of fault, and of offering employers a liability which is limited and determinate." *See Lydy v. Trustaff/Wausau Ins. Co.*, 2013 VT 44, ¶ 19. Moreover, the Act provides that processes under it should be as "simple and summary" as practicable. 21 V.S.A. § 602(a).

19. The purpose of Section 655(a) is 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." *See Wetherby v. Donald P. Blake, Jr*., Opinion No. 02-16WC (March 2, 2016) (cits. & punct. omitted). That does not necessarily mean granting the Claimant the most money possible.[4] However, the exclusion of pre-raise weeks from the AWW calculation often works to the injured worker's economic advantage by excluding weeks at a lower regular wage rate. Rule 8, and the specialist's application of it in this case, reflect a fair approximation of Claimant's pre-injury economic situation and the level of lost earnings that he would suffer if his injury disabled him from work. That is all the statute calls for.

20. Additionally, Claimant's proposal of running multiple calculations to compute an average each time an injured worker receives a bonus and then a raise would inject unnecessary complexity into a process that is intended to be as simple and straightforward as possible. *See* 21 V.S.A. § 662. Nothing in the text of the statute purports to require or even contemplate this as a possibility.

21. Finally, I find Claimant's argument that excluding pre-raise bonuses from AWW calculations may incentivize employer trickery by strategically timed bonuses unpersuasive. No employer is required to award bonuses. Employers are free to pay their employees in any manner consistent with state and federal wage and hour laws. While the timing of any bonuses and raises that an employer issues may have consequences for the computation of an employee's AWW if an employee is injured, the Workers' Compensation Act is not designed to legislate an ideal system of economic incentives for employers to pay wages in any particular manner. Instead, it is designed to compensate workers fairly for injuries suffered as a result of their employment based on whatever remuneration scheme happened to be in place at the time. The mere possibility of an unintended economic incentive does not mean that Rule 8 violates the Act.

Conclusion

22. For the reasons above, I conclude that the specialist's computation of Claimant's AWW was correct under Rule 8, that Rule 8 represents a valid exercise of the Department's rulemaking authority to clarify the statutory ambiguity in Section 650(a), and that the Department's exclusion of Claimant's pre-raise bonuses in computing Claimant's AWW was consistent with the purposes of the Act.

[4] *Cf. Pawley v. Booska Movers*, Opinion No. 02-14WC (February 19, 2014) (rejecting injured worker's proposed method of calculating AWW by excluding weeks where he performed tasks that were paid at a lower wage rate: "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. 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.").

ORDER:

Claimant's Motion for Partial Summary Judgment is **DENIED**, and Defendant's Motion for Partial Summary Judgment is **GRANTED**. Claimant's AWW for the period covered by the 2019 Wage statement was $800.23, and his AWW for the period covered by the 2021 Wage Statement was $851.47.

DATED at Montpelier, Vermont this 7th of February 2023.

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Michael A. Harrington
Commissioner