**STATE OF VERMONT**
**DEPARTMENT OF LABOR**

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| Felix Lomami Lama | Opinion No. 14-23WC |
| v. | By: Stephen W. Brown<br>Administrative Law Judge |
| University of Vermont Medical Center | For: Michael A. Harrington<br>Commissioner |
| | State File No. RR-62914 |

## RULING ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

**APPEARANCES**:

Jeffrey T. Dickson, Esq., for Claimant
Jennifer K. Moore, Esq., for Defendant

**ISSUE PRESENTED**:

What is Claimant's Average Weekly Wage ("AWW")?

**EXHIBITS**:

Claimant's Statement of Undisputed Fact

Defendant's Response to Claimant's Statement of Undisputed Fact and Statement of Additional Undisputed Material Facts

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| Claimant's Exhibit 1: | Medical Records dated April 29, 2022 |
| Claimant's Exhibit 2: | Employer First Report of Injury (Form 1) |
| Claimant's Exhibit 3: | Interim Order of Benefits dated June 24, 2022 |
| Claimant's Exhibit 4: | Wage Statement (Form 25) dated May 6, 2022 |
| Claimant's Exhibit 5: | Payroll Records |
| Claimant's Exhibit 6: | Two Wage Statements (Forms 25) dated June 29, 2022 |
| Claimant's Exhibit 7: | Email Correspondence Between Counsel |
| Claimant's Exhibit 8: | Timecard Reports |
| Claimant's Exhibit 9: | Undated Wage Statement (Form 25) prepared by Claimant's Counsel |
| Defendant's Exhibit A: | Email Correspondence Between Counsel |
| Defendant's Exhibit B: | Email Correspondence Between Counsel with Draft Wage Statement (Form 25) |

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| Defendant's Exhibit C: | Email Correspondence Between Counsel and Department's Specialist I with Draft Wage Statement (Form 25) |
| Defendant's Exhibit D: | Email Correspondence from Department's Specialist II with Referral to Formal Hearing Docket |
| Defendant's Exhibit E: | Calendar |
| Defendant's Exhibit F: | Undated Wage Statement (Form 25) Prepared by Defendant's Counsel |

**BACKGROUND:**

Except as noted, there is no genuine issue as to the following material facts:

1. On April 28, 2022, Claimant injured his right shoulder while lifting a large container of linen during his work as a housekeeper for the University of Vermont Medical Center. Although Defendant initially denied liability for this claim, the Department issued an Interim Order on June 24, 2022, requiring Defendant to pay Claimant indemnity and medical benefits.

2. On May 6, 2022, Defendant filed a Wage Statement (Form 25) with the Department (Claimant's Exhibit 4), showing that during the 26 weeks preceding Claimant's injury, he earned two $1,000.00 bonuses, one $3,137.26 bonus, and at least three pay periods during which he was paid for more than eight hours of overtime in the two-week pay period.[1]

3. Effective March 21, 2022, Claimant received a raise in his hourly rate, from $17.65 to $19.48 for regular hours and from $19.95 to $21.78 for weekend hours.

4. On or about June 29, 2022, Defendant filed two[2] additional Wage Statements (*see* Claimant's Exhibit 6) to reflect Claimant's wages only after his March 2022 raise.

5. After his March 2022 raise, Claimant did not earn any additional bonuses and only worked a "nominal amount" of overtime. *See* Claimant's Statement of Undisputed Fact No. 7.[3]

[1] Although Defendant acknowledges that it filed this Wage Statement and that it reflects the bonuses Claimant received during that period, it denies that it accurately reflects the number of hours Claimant actually worked. *See* Defendant's Response to Claimant's Statement of Undisputed Material Fact No. 4.

[2] These additional Wage Statements reflect different amounts of gross wages for the pay period ending April 17, 2022. Defendant acknowledges that one of these statements (Claimant's Exhibit 6, p. 2) contains a typographical error and denies the factual accuracy of the data in that Wage Statement. *See* Defendant's Response to Claimant's Statement of Undisputed Material Fact No. 7.

[3] Following Claimant's raise, the parties' attorneys engaged in much email dialogue concerning the proper computation of Claimant's AWW, including annotated multiple draft Wage Statements. Some of this correspondence included the Department's Specialist I, who annotated some draft Wage Statements. (*See, e.g.*, Defendant's Exhibits B and C). I do not find that the parties' respective positions during this dialogue, or the contents of their draft Wage Statements, material to the current cross-motions.

6. On June 30, 2022, the Department's Specialist I assigned to this claim advised the parties pursuant to Workers' Compensation Rule 8.1230, when an injured worker receives a raise, "… ONLY those higher wages shall be used to calculate the AWW[.]" (Defendant's Exhibit A).

7. In addition to the Wage Statements above, counsel for both parties have prepared Wage Statements for the purpose of clarifying each party's position in these Cross Motions. (*See* Claimant's Exhibit 9 and Defendant's Exhibit F).

8. Defendant disputes the accuracy of the Wage Statement that Claimant has submitted in support of his Motion, noting discrepancies between Claimant's Wage Statement (Claimant's Exhibit 9) and his timecards and payroll records (Claimant's Exhibits 5 and 8). Defendant also contends that Claimant's Wage Statement fails to account for all the weeks relevant to determining his AWW.

9. Defendant's attorney drafted a Wage Statement for the purposes of these cross motions (Defendants' Exhibit F). This Statement is different from the Wage Statements that it filed with the Department while this matter was pending at the informal level. *See generally* Defendant's Statement of Additional Undisputed Facts, Nos. 20-26.

10. As of the time of Claimant's Motion, Defendant was paying Claimant indemnity benefits based upon an AWW of $798.21. It calculated this figure by averaging Claimant's gross earnings of $3,991.05 during the five-week period between his raise on March 12, 2022 and the week ending April 24, 2022.[4] This sum was based on the Wage Statement filed with the Department on June 29, 2022. *See* Defendant's Statement of Additional Undisputed Material Facts Nos. 21-23; Defendant's Motion, p. 8; Claimant's Exhibit 6. Defendant advocates in its cross-motion that this amount, $798.21, is Claimant's correct AWW.[5]

11. Claimant argues that the full twenty-six-week period preceding his injury, including all weeks preceding his raise, would result in an AWW of approximately $982.18. *See* Claimant's Statement of Undisputed Material Fact No. 12.

[4] $3,991.05 ÷ 5 weeks = $798.21.

[5] Confusingly, the sum of Claimant's earnings during those same five weeks reflected in the Wage Statement Defendant's counsel prepared in support of its motion is $3,986.05, which would result in an AWW of $797.21, or $1.00 per week less than Defendant's official position in its Motion. (*See* Defendant's Exhibit F). Upon review of the record, this discrepancy results from a $5.00 difference in the recorded values for the week ending April 3, 2022 in those two Wage Statements. *Cf.* Defendant's Exhibit F with Claimant's Exhibit 6, p. 1. Claimant's payroll records (Claimant's Exhibit 5) show that his gross wages that week were $1,606.70, consistent with the value reflected on the June 29, 2022 Wage Statement. Defendant's official position in its Motion, *i.e.*, that Claimant's AWW based on the five-week period between Claimant's wage raise and his injury was $798.21, has support from the payroll records that Claimant has submitted with his motion and with the Wage Statement. The lower figure in Defendant's Wage Statement prepared in support of its Motion appears to be a typographical error.

**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). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.

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 and 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).

*Workers' Compensation Rule 8*

5. Pursuant to its authority to resolve questions arising under the Act[6] and promulgate administrative rules consistent with it,[7] 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 portions of that Rule are relevant here:

> 8.1200 Total gross wages; weeks excluded. In determining the injured worker's total gross wages, the following weeks shall not be included:
> …
> ***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).

7. Claimant contends that this Rule, by excluding the weeks prior to his raise, reflects an impermissible interpretation of the Act by contravening Subsection 601(13), which includes bonuses within the definition of "wages," and the last sentence of Subsection 650(a)'s provision that "only the larger wages" be included when a worker is employed at more than one wage rate during the statutory 26-week lookback period.

8. In support of these arguments, Claimant advances substantially identical arguments to those that the Department has considered and rejected in *Arman v. Vermont Mutual Insurance Co.*, Opinion No. 03-23WC (February 7, 2023).[8]

9. Like the claimant in *Arman,* Claimant here contends that the grammatical structure of Section 650(a) compels the Department to "compare the full 26 week average weekly wages with the post-raise average weekly wages, and to use the larger of the two figures," (Claimant's Motion at 7), that excluding pre-raise bonuses from the computation of a workers' AWW runs counter to the remedial purposes of the Act, and that doing so would lead to absurd results by incentivizing employers to award bonuses immediately before implementing raises.

10. As to the grammatical structure of the final sentence of Subsection 650(a), the Department held as follows in *Arman*:

> 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

[6] 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.").

[7] 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] Claimant's Motion was filed before *Arman* was decided.

> 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.

*Id.*, Analysis, ¶ 15.

11. As to Claimant's arguments concerning the legislative purposes of the Act, the Department held as follows in *Arman*:

> 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. 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 […] reflect[s] 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.

*Id.*, Analysis, ¶ 19 (footnote omitted).

12. As to Claimant's argument that the Act requires two separate calculations, with and without bonuses, and choosing the higher of the resulting averages, the Department in *Arman* held as follows:

> 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.

*Id.*, Analysis, ¶ 20.

13. Finally, as to Claimant's argument that excluding bonuses preceding a raise would lead to perverse incentives by employers, the Department previously held as follows:

> 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.

*Id.*, Analysis, ¶ 21.

*Resolution of the Parties' Cross Motions*

14. I see no reason to diverge from the Department's analysis in *Arman*. Thus, as in *Arman*, Claimant's AWW in this case shall be calculated in accordance with Rule 8, and only the weeks after his raise may be included in the average. Accordingly, Claimant's Motion for Partial Summary Judgment is **DENIED**.

15. As to Defendant's Motion, which seeks to establish a specific AWW figure as a matter of law, the unusually large number of competing Wage Statements in evidence for a small number of weeks in question, combined with factual disputes concerning their correlation to payroll records and timecards, comes close to creating a genuine issue of material fact as to which Wage Statement is accurate.

16. Fortunately, the payroll records themselves supply sufficient raw data to filter out the noise of tabulating that data. For the workweeks following Claimant's raise on March 12, 2022 but preceding his workplace injury on April 28, 2022, the payroll records show that Claimant earned gross wages of $3,991.05. There is no evidence tending to undercut the reliability of those records. Thus, I conclude that there is no genuine basis to find a different total figure for Claimant's gross wages during that period. That figure, divided by five workweeks, yields an AWW of $798.21. That is the figure Defendant has been using to compute the temporary disability benefits it has paid in compliance with the Department's interim order. Defendant's Motion is therefore **GRANTED**.

**ORDER**

Based on the foregoing, Claimant's Motion for Partial Summary Judgment is **DENIED** and Defendant's Cross-Motion for Partial Summary Judgment is **GRANTED**. Claimant's AWW for the purpose of computing his workers' compensation benefits is $798.21.

**DATED** at Montpelier, Vermont this 21st of August 2023.

Dustin Degree on behalf of: Michael A. Harrington
Commissioner