STATE OF VERMONT
DEPARTMENT OF LABOR

Ehren Hill

v.

Agri-Mark, Inc.

Opinion No. 03-24WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. PP-60579

RULING ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT[1]

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
David A. Grebe, Esq., for Defendant

ISSUES PRESENTED:

1. Is Workers' Compensation Rule 8.1500's provision concerning concurrent employment a valid exercise of the Department's rulemaking authority in implementing 21 V.S.A. § 650(a)?

2. What is Claimant's average weekly wage ("AWW")?

EXHIBITS:

Claimant's Statement of Undisputed Material Facts ("CSUMF")

Claimant's Exhibit 1: Independent Medical Evaluation ("IME") Report of William F. Boucher, MD

Claimant's Exhibit 2: Wage Statement (Form 25) and Payroll Records from Meeting House Furniture Restoration

Claimant's Exhibit 3: Email Correspondence and Wage Statement (Form 25) from Black Back Pub

[1] The parties did not formally style the instant dispute as cross-motions for partial summary judgment. Claimant moved for summary judgment as to the computation of his AWW and the validity of the Department's relevant rule, with a Statement of Undisputed Material Facts ("CSUMF"). Defendant filed a brief in opposition to Claimant's motion, which included Defendant's own Statement of Undisputed Material Facts ("DSUMF"), did not respond to CSUMF, and requested that judgment be entered in Defendant's favor as a matter of law. Claimant filed a reply brief which did not respond to DSUMF. Both parties have requested entry of judgment in their favor as a matter of law based on undisputed facts, and the parties are in substantial agreement as to the key facts. The resolution of the disputed issue in the instant motions only concerns a discrete legal issue and would not fully resolve this entire case. For these reasons, I treat the filings before me as cross-motions for partial summary judgment. *See generally* V. R. Civ. P. 56.

Claimant's Exhibit 4: Medical Records from Copley Hospital

Claimant's Exhibit 5: Multiple Letters and Email Correspondence between Claimant's Counsel and Department of Labor Specialist I

Claimant's Exhibit 6: Notice and Application for Hearing (Form 6)

Defendant's Statement of Undisputed Material Facts ("DSUMF")

BACKGROUND:

There is no genuine issue as to the following material facts:

1. As of March 10, 2021, Claimant was Defendant's employee. On that date, he suffered a hernia in the course of his employment with Defendant. (*See* CSUMF 1-2; DSUMF 1).

2. Although Defendant initially disputed Claimant's workers' compensation claim, it hired William Boucher, M.D. to evaluate Claimant, and Dr. Boucher found Claimant's hernia causally related to his work for Defendant. (CSUMF 4; Claimant's Exhibit 1). Defendant thereafter accepted liability.

3. Sometime after his injury but before October 8, 2021, Claimant voluntarily left his employment with Defendant. (*See* CSUMF 5-6; DSUMF 1, 4, 7).

4. Sometime in March 2021, but after his March 10 injury, Claimant began working at Meeting House Furniture Restoration, where he continued working until September 9, 2021. (CSUMF 7; Claimant's Exhibit 2; DSUMF 5).

5. In July 2021, while also working for Meeting House Furniture Restoration, Claimant began working at Black Back Pub in Waterbury, Vermont. He worked both that job and at Meeting House Furniture Restoration until he left his employment with Meeting House on September 9, 2021. (CSUMF 8, Claimant's Exhibit 3; DSUMF 6).

6. Claimant continued working at Black Back Pub until October 8, 2021, when he underwent hernia surgery related to the injury he sustained while working for Defendant in March 2021.[2] The parties agree that he was disabled from work as of October 8, 2021 as a result of his hernia surgery, and there is no suggestion that he was disabled from work at any earlier time relevant to this case.

7. Claimant returned to work at Black Back Pub after recovering from that surgery. (CSUMF 9; Claimant's Exhibit 4). There is no evidence or contention that he left his employment with Meeting House because of his workplace injury.

[2] CSUMF 9 identifies this date as October 8, 2022. This appears to be a scrivener's error. *See* Clamiant's Exhibit 4 (postoperative report dated October 8, 2021).

8. The disputed issue in this case concerns the calculation of Claimant's AWW. Based on the twenty-six weeks preceding October 8, 2021, which was the undisputed date of onset of his disability from work, his AWW for his employment with Black Back Pub was $847.90. (CSUMF 10; Claimant's Exhibit 2).

9. For those same twenty-six weeks, his AWW for his employment with Meeting House was $647.82. (CSUMF 11; Claimant's Exhibit 3).

10. If his wages from both Meeting House and Black Back Pub were combined, his average weekly wages from both jobs would be $1,495.72. (CSUMF 11).

11. Claimant asserts that his combined earnings from both Black Back Pub and Meeting House should be included in his AWW. (CSUMF 13). At the informal level before the Department, this contention generated several rounds of correspondence between Claimant's counsel and the Department's Specialist I, who ultimately determined that Claimant's wages from Meeting House should not be included in his AWW because he was no longer employed there on the date of his disability. At Claimant's request, this matter was referred to the formal hearing docket. (CSUMF 14-15; Claimant's Exhibits 5-6; DSUMF 10-11). The instant cross-motions followed.

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.

Statutory Provisions and Administrative Rules Governing the AWW

2. Vermont's Workers' Compensation Act provides in relevant part as follows regarding the computation of an injured worker's AWW:

> (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 […]. If the injured employee is employed in the concurrent service of more than one insured[3] employer or self-insurer the total earnings from the several insured employers and self-insurers shall be combined in determining the

[3] The parties' submissions do not state whether Claimant's work at either the Meeting House or at Black Back Pub was "insured employment" as would be required for Claimant's earnings from both jobs to be aggregated under 21 V.S.A. § 650(a). Because I conclude that Claimant would not be entitled to aggregate his wages anyway, *see infra* at Conclusions of Law 19-26, any questions about the insured or self-insured status of these employers is not material to the outcome of these cross-motions.

> employee's average weekly wages, but insurance liability shall be exclusively upon the employer in whose employ the injury occurred.

21 V.S.A. § 650(a).

3. In implementing that statute, the Department adopted the following administrative rule for concurrent employment:

> If an injured worker is regularly employed by two or more insured employers ***at the time of his or her injury (or, in claims in which the disability does not occur concurrently with the injury, at the time of his or her disability)***, a separate wage statement shall be obtained from each employer, and the injured worker's compensation rate shall be based on the combined average weekly wage from all employers. 21 V.S.A. §650(a).

Workers' Compensation Rule 8.1500 (emphasis added).

The Parties' Contentions

Claimant's Contention that Rule 8.1500's Concurrent Employment Provisions are Invalid as Contravening Section 650(a) of the Statute

4. Claimant contends that Rule 8.1500 exceeds the statutory authority under 21 V.S.A. § 650(a) because the rule provides for concurrent wages to be combined only if a worker was employed by more than one insured employer "***at the time of***" his injury or disability, while the statute does not contain such express limitation.

5. He contends that the rule therefore imposes a limitation that the legislature could have created but did not, and that the Department's creation of this limitation contravenes the general principle that the entire workers' compensation scheme is remedial in nature and should be construed to benefit injured workers.[4] For this reason, he contends the bolded and underlined text in the above quotation of Rule 8.1500 should be declared invalid.

6. As applied to this case, Claimant contends that because he was working for both Black Back Pub and Meeting House Furniture Restoration during significant portions of the twenty-six-week period preceding the date on which his injury became disabling due to surgery, Section 650(a) mandates that his earnings from both jobs should be combined in determining his AWW, even though he was only working at one of them when his injury became disabling.

Defendant's Contention that Rule 8.1500 is Consistent with the Statutory Text and Legislative Purposes of Temporary Disability Benefits

7. Defendant disagrees with Claimant's analysis on both textual and policy grounds.

[4] *See, e.g., Lydy v. Trustaff/Wausau Ins. Co.*, 2013 VT 44, ¶ 19.

8. Textually, Defendant emphasizes that Section 650(a)'s provision concerning concurrent employment is written in the present tense: "If the injured employee ***is employed*** in the concurrent service of more than one insured employer or self-insurer the total earnings from the several insured employers and self-insurers shall be combined in determining the employee's average weekly wages, but insurance liability shall be exclusively upon the employer in whose employ the injury occurred." *See id.* (emphasis added).

9. Defendant argues that the use of the present tense, "is employed," rather than the past "was employed," demonstrates the legislature's intent to include only employers who actively employed the injured worker at the time that indemnity benefits became due. Thus, Defendant argues that Rule 8.1500's provision that wages from concurrent employers should only be combined for AWW purposes if the employee was working for both employers on the date of injury or disability merely accounts for the grammatical structure of the statutory language.

10. As to policy, Defendant argues that the purpose of temporary disability benefits is to fairly replace the anticipated wages of the injured worker while they are disabled. *See, e.g., Gallo v. Costco Wholesale Corporation*, Opinion No. 19-20WC (November 22, 2020) ("Generally, an injured worker is entitled to temporary total disability benefits where the injury causes total disability for work. Such benefits are designed to replace the wages that an injured worker likely would be earning had the work injury not occurred.") (cits. & punct. omitted).

11. Because Claimant was not working for Meeting House when he became disabled from work, Defendant argues that including his wages from that employer does not serve the goal of replacing his wages from that job, as there are no wages from that job to replace.

Rule 18.1500 Is a Valid Exercise of the Department's Administrative Rulemaking Authority

The Scope of the Department's Rulemaking Authority

12. The Workers' Compensation Act provides that "[a]ll process and procedure under the provisions of this chapter shall be as summary and simple as reasonably may be" and that "[t]he Commissioner may make rules ***not inconsistent*** with such provisions for carrying out the same ...." 21 V.S.A. § 602(a) (emphasis added).

13. The Department's rulemaking authority is "limited to such powers as are conferred upon [it] by express legislative grant, or such as arise therefrom by implication as incidental and necessary to the full exercise of the powers granted." *De Gray v. Miller Bros. Const. Co.*, 106 Vt. 259, 173 (1934). However, upon passage, administrative rules "enjoy a presumption of validity and are valid if they are ***reasonably related to the purposes*** of the enabling act." *Miller v. IBM*, 163 Vt. 396, 399 (1995) (emphasis added) (holding that administrative rule placing a cap on attorneys' fees was valid because it was reasonably related to the purpose of avoiding unnecessary expense in the enforcement or defense of claims). Administrative rules are thus "presumed valid, based in part on the acceptance of the construction of a statute by an administrative agency that implements it absent

compelling indication of error." *Smiley v. State*, 2015 VT 42, ¶ 27 (2015) (cits. & punct. omitted).

The Martin *Case and the Improvidently Rejected Vanity Plate*

14. Claimant relies heavily upon *Martin v. Department of Motor Vehicles*, 2003 VT 14, in support of his contention that Rule 18.1500's limitations of the inclusion of concurrent employment in the AWW is invalid because it conflicts with Section 650(a). In *Martin*, an individual applied for a license plate with the text "IRISH" or, alternatively, "IRISH1." Although she had successfully applied for and received several Irish-themed vanity plates from the Department of Motor Vehicles ("DMV"), on this occasion, the DMV denied her request, citing its authority to reject vanity plates that may be offensive or confusing.

15. At the time, the relevant statute provided that the DMV "shall issue" vanity plates "at the request of the registrant of any motor vehicle," except as otherwise provided. *Id.* (citing then-applicable version of 23 V.S.A. § 304(b)(1)). The statute provided further that vanity plates "shall be issued" in any combination of seven or less numbers and letters that do not duplicate or resemble a regular-issue plate, but that the Commissioner "may refuse to honor any [vanity plate] request that might be offensive or confusing to the general public." *See id.* (citing then-applicable version of 23 V.S.A. 304(d)).[5]

16. Relying on that statute, the DMV had adopted a rule implementing a nonexhaustive list of license plate types that it would not issue, including "combinations of letters, or numbers that refer, in any language, to a race, religion, color, deity, ethnic heritage, gender, sexual orientation, disability status, or political affiliation." *See id.*, fn. 2. In subsequent administrative and judicial appeals, the DMV relied upon this rule in support of its rejection of the "IRISH" vanity plate.

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[5] The relevant portion of that statute now provides that the Commissioner of Motor Vehicles "may revoke any plate described in this subsection and shall not issue plates with combinations of letters or numbers that objectively, in any language:

> (1) are vulgar, scatological, or obscene, or constitute racial or ethnic epithets;
> (2) connote breast, genitalia, pubic area, or buttocks or relate to sexual or eliminatory functions;
> (3) refer to any intoxicant or drug; to the use, nonuse, distribution, or sale of an intoxicant or drug; or to a user, nonuser, or purveyor of an intoxicant or drug;
> (4) refer to gender, gender identity, sexual orientation, or disability status;
> (5) suggest a government or governmental agency;
> (6) suggest a privilege not given by law in this State; or
> (7) form a slang term, abbreviation, phonetic spelling, or mirror image of a word described in subdivisions (1) through (6) of this subsection.

23 V.S.A. § 304(d).

17. The Vermont Supreme Court ultimately found that the DMV's rule exceeded its statutory authority, noting that under the then-applicable statute, "the applicant gets what she wants unless the Commissioner, in her discretion, determines that the request would be offensive or confusing and hence incompatible with the official state function served by license plates." *Id.* The central problem with the DMV's rule was that it permitted the rejection of requests that were themselves not offensive if they fit within "designated categories that include words with the potential to offend." *Id.* Thus, "IRISH" was not refused because it was offensive, but because it referred to an ethnic heritage, a topic that might also include offensive ethnic slurs. This rejection of a non-offensive vanity plate thus conflicted with the statutory mandate that the DMV "shall issue" vanity plates unless it determines that they are offensive or confusing.[6]

18. Analogizing to *Martin*, Claimant argues that Workers' Compensation Rule 8.1500 substantively narrows the set of concurrent employments that are included in AWW calculations while the enabling statute contains no such limitations, and that Rule 8.1500's limitations on concurrent employment must therefore be stricken. For the reasons below, I find this argument unpersuasive.

Rule 8.1500 Reflects the Department's Choice of the "Best" Way to Compute AWW

19. Section 650(a) is not structurally analogous to the vanity plate statute at issue in *Martin*, as it does not set forth a mandate that the Department take a specific action (like issuing vanity plates that conform to length and character limitations) subject to discretionary exceptions (like being offensive or confusing). Instead, its first sentence begins with intrinsically discretionary language that leaves the precise formula for AWW computation up to the Department's expertise and judgment: AWW must 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." *Id.* (emphasis added).

20. Nothing in the Workers' Compensation Act sets forth the specific goals in relation to which "best calculated" should be evaluated. Section 650(a) also leaves critical dates undefined.[7] Specifically relevant here, that statute provides that "[i]f the injured employee ***is employed*** in the concurrent service of more than one insured employer or self-insurer the total earnings from the several insured employers and self-insurers shall

[6] The Court noted that no one contended that "IRISH" was confusing. *See id.*, fn. 3.

[7] For instance, the statute does not define the date of injury for the purposes its 26-week lookback period for cases, such as this one, where the date of the original injury gives rise to a subsequent period of disability. It is Workers' Compensation Rule 2.1520 that defines the "date of injury" for the purposes of AWW calculations in such instances as "the date(s) on which the injury becomes disabling." *See id.* Thus, it is also a result of rulemaking, not legislative fiat, that October 8, 2021, rather than March 10, 2021, serves as the undisputed endpoint for Claimant's AWW lookback period.

be combined in determining the employee's average weekly wages," but it does not specify a date on which the employee must be employed for this combined wage provision to apply.

21. I am not convinced of Defendant's contention that the use of the present tense "***is***" necessarily means that the legislature ***must*** have intended for this provision to apply when the injured worker was employed by multiple employers on the date of injury or date of disability. It would be equally consistent with the statutory text to say that the combined wage provision applies if the employee was concurrently employed at any time during the 26-week lookback period. However, Defendant's interpretation is one of at least two grammatically coherent readings of that sentence. Selecting the appropriate interpretation from multiple possibilities is squarely within the purpose and bounds of administrative rulemaking.[8] Rule 8.1500's selection of one of these interpretations is "not inconsistent" with the statutory text. *Cf.* 21 V.S.A. §§ 602(a); 650(a).

22. Defendant also accurately characterizes the purpose of temporary indemnity benefits as replacing the wages that an employee would have earned but for his or her disability. *See Duffy v. Sisler Builders, Inc.*, Opinion No. 20-13WC (August 28, 2013) (holding that "temporary total disability benefits are designed to replace the wages an injured worker *likely would be earning* had his or her work injury not occurred.").

23. Section 8.1500's specification of the time period during which an employee must be concurrently employed by multiple employers reflects this purpose. It helps ensure that wage replacement benefits are only replacing wages that the employee likely would have earned but for a workplace injury and subsequent disability.

24. Rule 8.1500 therefore reflects the Department's effort to select the ***"best"*** manner of computing an injured worker's AWW. I conclude that it is "reasonably related to the purposes of the enabling act." *See Miller, supra* at 399. As such, it is a valid exercise of the Department's rulemaking authority, consistent with its enabling statute, and I apply it in this case.

25. Claimant was only working for one employer, Black Back Pub, as of October 8, 2021, the undisputed date on which his workplace injury became disabling. There is no contention that he was disabled, whether from a workplace injury or otherwise, when he left his employment with Meeting House one month earlier. Accordingly, only his wages from Black Back Pub count for the computation of his AWW, and his AWW from Black

[8] *See, e.g.*, *Shires Housing, Inc. v. Brown*, 2017 VT 60, ¶ 9 ("…where a statute is silent or ambiguous and an agency charged with enforcing the statute has interpreted it, this Court will defer to the agency interpretation of the statute within its area of expertise.").

Back Pub for the 26-week period preceding October 8, 2021 was $847.90. *See* Background, ¶¶ 5-8.

26. Therefore, Claimant's AWW for the purposes of computing his temporary disability benefits is $847.90.

ORDER:

Claimant's Motion for Partial Summary Judgment is **DENIED**, and Defendant's Motion for Partial Summary Judgment is **GRANTED** as to the computation of Claimant's AWW. That figure is $847.90.

DATED at Montpelier, Vermont this 29th of March 2024.

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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.