STATE OF VERMONT
DEPARTMENT OF LABOR

George Cunningham	Opinion No. 05-25WC
v.	By: Beth A. DeBernardi Administrative Law Judge
Cedar Glen Property Maintenance, Inc.	For: Michael A. Harrington Commissioner
	State File No. SS-61358

RULING ON CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

APPEARANCES:

Robert D. Mabey, Esq., for Claimant
Jennifer L. Meagher, Esq., for Defendant

ISSUE PRESENTED:

> What is the correct method of calculating Claimant's average weekly wage in light of his pay scheme's transitioning to a higher, salary-based wage rate three days prior to his compensable injury?

STIPULATION OF FACTS:

The parties entered into the following Stipulation on November 1, 2024:[1]

1. Claimant is an employee and Defendant is an employer within the meaning of Vermont's Workers' Compensation Act.

2. This is an accepted claim following an April 6, 2023 motor vehicle accident.

3. The Wage Statement (Form 25) documents wages in the 26-week period preceding the date of injury, weeks ending October 8, 2022 through April 1, 2023.

4. On April 3, 2023, three days before the work injury, Claimant's pay scheme transitioned from a rate of $22.00 per hour to an annual salary of $60,000.00, resulting in a higher wage rate.

5. If the weeks prior to the April 3, 2023 raise are included in the calculations, the average weekly wage would be $1,025.40.

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[1] Claimant also asserts that he received a company vehicle and gas card as part of his remuneration. *Claimant's Motion*, at 4, footnote 1. Defendant did not stipulate to this assertion. *Defendant's Opposition and Cross Motion*, at 1, footnote 1. Thus, this ruling does not address whether the value of a company vehicle and gas card should be included in the calculation of Claimant's average weekly wage.

6. If the calculations are based solely on Claimant's increased salaried wages, the average weekly wage would be $1,153.85.

CONCLUSIONS OF LAW:

Summary Judgment Standard

1. To prevail on a summary judgment motion, the moving party must show entitlement to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). Summary judgment is appropriate when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979).

2. The party opposing a summary judgment motion 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, 48 (1990). Where the parties have filed cross motions, each party is entitled to the benefit of all reasonable doubts and inferences when the opposing party's motion is being judged. *Toys, Inc.,* 155 Vt. at 48.

Disability Benefits and Average Weekly Wage

3. The monetary amount of disability benefits under Vermont's Workers' Compensation Act is based on a "compensation rate," which in turn is based on two-thirds of the injured worker's average weekly wage, subject to maximum and minimum amounts and certain adjustments. *See* 21 V.S.A. §§ 642, 645, 646, 648.

4. Claimant here contends that his average weekly wage, and therefore his compensation rate, should be based on the higher salaried wages he began earning the week of his injury. Defendant contends that Claimant's average weekly wage should be based on his wages for the 26 full weeks prior to his injury and should exclude the higher salaried wages he began earning the week of his injury.

Statutory Provisions Relevant to the Calculation of Average Weekly Wage

5. The Vermont Workers' Compensation Act defines "average weekly wages" as the worker's average weekly wages computed under § 650 of the Act. 21 V.S.A. § 601(15).

6. Section 650 provides, in relevant portions, as follows:

   (a)(1) 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. . . .

   (a)(7) 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.

Calculation of Claimant's Average Weekly Wage Pursuant to Section 650(a)(7)

7. Section 650(a)(7) governs the average weekly wage calculation where the worker is regularly employed at a higher wage rate at the time of the injury and is earning "larger regular wages." If the injured worker is not earning larger regular wages at the time of injury, then this section does not apply. Finding larger regular wages is therefore a threshold determination for computing average weekly wage under § 650(a)(7).

8. Claimant's wages here transitioned to a higher wage rate on April 3, 2023, three days prior to his compensable injury, and he began earning larger regular wages. *See Stipulation*, ¶ 4. The parties have stipulated that Claimant's larger regular wages are his salaried wages of $60,000 per year, or $1,153.85 per week.[2] *See* Stipulation, ¶¶ 4, 6.

9. Accordingly, I conclude that, at the time of injury, Claimant was regularly employed at a higher wage rate than formerly during the 26 weeks preceding his injury and with larger regular wages. Therefore, under § 650(a)(7), only his larger wages shall be taken into consideration in computing his average weekly wage.[3] Claimant's average weekly wage computed by this method is $1,153.85.

Applicability of Section 650(a)(1)

10. Defendant contends that the computation of Claimant's average weekly wage is governed by 21 V.S.A. § 650(a)(1), rather than § 650(a)(7). Section 650(a)(1) bases the average weekly wage computation on the "average weekly earnings of the worker during the 26 weeks preceding an injury." The parties have stipulated that Claimant's average weekly wage under this computation method is $1,025.40. *See* Stipulation, ¶ 5.

11. In determining whether Claimant's average weekly wage should be calculated under § 650(a)(1), as Defendant contends, rather than under § 650(a)(7), the following rule of statutory construction articulated by the Vermont Supreme Court is instructive: "When two statutes deal with the same subject matter and one is general and the other is special, the latter must ordinarily be given effect according to its terms." *Bayley v. Harvey*, 111 Vt. 339, 342 (1940); *Appelget v. Baird*, 126 Vt. 503, 507 (1967)("It is the rule that where two statutes may apply to a single circumstance, with conflicting consequences, the general statute must yield to the special."); *see also Smith v. Desautels*, 2008 VT 17, ¶ 17 (applying this canon of statutory construction to the Vermont Workers' Compensation Act).

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[2] The stipulated figure does not take into account Claimant's contention that he received a company vehicle and gas card as part of his remuneration. If he pursues that claim and prevails, his average weekly wage will need to be recalculated as provided in 21 V.S.A. § 601(13).

[3] The application of § 650(a)(7) is straightforward here because Claimant's higher regular wages are a salary. In cases where a worker receives an hourly raise, determination of larger regular wages may require consideration of the agreement between worker and employer as to the expected hours per week. *Cf.* Workers' Compensation Rule 8.1310. If the worker cannot demonstrate that he or she was earning larger regular wages at the time of injury, then § 650(a)(7) does not apply. *See* Conclusion of Law No. 7 *supra.*

12. Here, § 650(a)(1) is the more general provision for computing average weekly wage, basing the calculation on the worker's previous 26 weeks of earnings. Section 650(a)(7) is the more specific provision, providing a basis to calculate average weekly wage in the subset of claims where the injured worker is regularly employed at a higher wage rate at the time of injury. For claims where the worker is regularly employed at a higher wage rate, with larger regular wages, the computation of average weekly wage is governed by the more specific statutory provision set forth in § 650(a)(7).

13. As Claimant here was regularly employed at a higher wage rate and with larger regular wages at the time of his injury, the more specific calculation method set forth in 21 V.S.A. § 650(a)(7) governs the computation of his average weekly wage.

Workers' Compensation Rules Relevant to the Calculation of Average Weekly Wage

14. Turning to the Workers' Compensation Rules, Defendant contends that Claimant's average weekly wage should be calculated as provided in Workers' Compensation Rule 8.1100, which provides, in relevant part, as follows:

> 8.1100 **Gross wages; amounts included**. In order to calculate an injured worker's average weekly wage and compensation rate, the employer or insurance carrier shall first file a Certificate of Dependency and Concurrent Employment (Form 10) and a Wage Statement (Form 25), as required by Rule 3.2000. The Wage Statement shall include the gross wages paid and/or due the injured worker for each of the 26 weeks preceding the injury, *but not including the week of the injury*. 21 V.S.A. §650(a) (emphasis added).

15. Workers' Compensation Rule 8.1200 provides, in relevant part, as follows:

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

16. Finally, Workers' Compensation Rule 8.1300 provides, in relevant part, as follows:

> 8.1300 **Average weekly wage calculation**. An injured worker's average weekly wage shall be determined by dividing the total gross wages, calculated in accordance with Rule 8.1100 above, by the number of weeks qualifying for inclusion in accordance with Rule 8.1200 above. However:
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>> 8.1310 If the injured worker has been employed for fewer than four weeks at the time of his or her injury, or if fewer than four weeks of includable wages remain after the application of Rules 8.1210 and/or 8.1220 above, then his or her average weekly wage shall be based instead on the gross

> wages of a comparable employee working in a similar capacity under like conditions for the 26 weeks prior to the injury. If the wages of a comparable employee cannot be determined, then the injured worker's average weekly wage shall be based instead on his or her agreement with the employer as to both expected hours per week and contract rate of pay. 21 V.S.A. §650(a).

17. Citing Workers' Compensation Rule 8.1100, Defendant contends that the calculation of Claimant's average weekly wage must be based on his Wage Statement (Form 25); it further contends that the Wage Statement must include the wages Claimant earned in the 26 full weeks prior to his injury and exclude the wages he earned the week of the injury.

18. Although the Wage Statement provides the most common method of calculating average weekly wage, it is not the only calculation method. As set forth in Workers' Compensation Rule 8.1300, there are situations where the Wage Statement does not form the basis of the average weekly wage calculation.

19. One such situation is when the injured worker has not worked for the employer for four weeks. *See* Workers' Compensation Rule 8.1310. Another is when the injured worker does not have four weeks of includable wages on the Wage Statement, after excluding the weeks identified in Workers' Compensation Rule 8.1200. *See* Workers' Compensation Rule 8.1310. In such cases, the Workers' Compensation Rules provide alternate methods of average weekly wage calculation that do not rely upon the worker's 26 full weeks of earnings prior to the injury.

20. Here, the wages that Claimant earned in the 26 full weeks prior to his injury must be excluded from the average weekly wage calculation, as those weeks preceded his receipt of higher regular wages at the time of injury. *See* Workers' Compensation Rule 8.1230. With no includable weeks on his Wage Statement, Claimant's average weekly wage is "best calculated" using his larger regular wages. *See* Workers' Compensation Rule 8.1310.

Purpose of the Statute

21. Finally, Defendant points to the purpose and spirit of the workers' compensation statute to support its position. As a remedial statute, the Workers' Compensation Act must be given a liberal construction. *Montgomery v. Brinver Corp*., 142 Vt. 461, 463 (1983); *St. Paul Fire & Marine Ins. Co. v. Surdam*, 156 Vt. 585, 590 (1991). On the other hand, the purpose of the statute is not just to provide an expeditious remedy for employees, but also to provide a system for employers with "a liability which is limited and determinate." *Morrisseau v. Legac*, 123 Vt. 70, 76 (1962). Defendant contends that computing Claimant's average weekly wage based on his higher regular wages would run contrary to statute's limited and determinate nature. Further, it would not be a simple and summary process, as contemplated by 21 V.S.A. § 602(a).

22. I disagree. In this case, using Claimant's higher regular wages results in an average weekly wage that is easily calculated. Further, although his average weekly wage is higher using this method, the employer's liability is still limited and determinate.

23. I acknowledge that there may be workers who receive an increase in their hourly rate during the week of injury, but for whom we cannot determine their expected hours per week. However, that situation does not make the application of § 650(a)(7) unlimited or indeterminate. Rather, if the worker cannot establish his or her higher regular wages, then § 650(a)(7) does not apply. *See* Conclusion of Law No. 7 *supra*.

24. Finally, as set forth above, § 650(a)(7) bases a worker's average weekly wage on the higher regular wages being earned at the time of injury. This provision recognizes that indemnity benefits are intended to replace the wages that the injured worker likely would have earned if he or she had not suffered a workplace injury. *See, e.g., McKenzie Gallo v. Costco Wholesale Corp*., Opinion No. 19-20WC (November 22, 2020); *cf. Hill v. Agri-Mark, Inc*., Opinion No. 03-24WC (March 29, 2024), *aff'd*, 2025 VT 3 (wages from concurrent employment that had ended prior to the work injury are not included in the average weekly wage calculation; this exclusion reflects the statutory purpose of replacing just the wages that the worker would likely have earned absent the injury).

25. Claimant here likely would have continued to earn his higher salary had he not sustained injuries in a work-related motor vehicle accident three days after his wages transitioned to the higher salary basis. Thus, basing his average weekly wage on his higher regular wages fulfills the statutory purpose.

26. In short, where a worker's larger regular wages may be determined, basing the average weekly wage calculation on the larger regular wages is required by 21 V.S.A. § 650(a)(7), even if the worker did not start earning the larger regular wages until the week of the injury, as is the case here.

ORDER:

Based on the foregoing, Claimant's Motion for Partial Summary Judgment is hereby **GRANTED**, and Defendant's Cross Motion for Partial Summary Judgment is hereby **DENIED**. Defendant is hereby **ORDERED** to use Claimant's larger regular wages in the computation of his average weekly wage.

DATED at Montpelier, Vermont this 8 day of April 2025.

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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.