

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Scott Noel)	Opinion No. 33A-04WC
)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
)	
Poquettes Construction	)	For: Michael S. Bertrand
	)	Commissioner
)	
	)	State File No. T-15745

APPEARANCES:

Christopher J. McVeigh, Esq., for the Claimant
Richard Windish, Esq., for the Defendant

POST HEARING MOTION REGARDING ATTORNEY FEES

The motion following Opinion No. 33-04, dated August 26, 2004, illuminates considerations not addressed in the hearing decision and asks for reconsideration of the denial of attorney fees. In that opinion, the request for fees was denied because I accepted the defense-proposed calculations for the average weekly wage and rejected all methodologies offered by the claimant. Now, claimant points out that the defense never paid the amounts it proposed as reasonable until after the decision and, in fact, argued for the successful calculation for the first time at the hearing level. Although the defense hearing-level calculations were ultimately accepted, it had been paying a lesser amount. As a result of the hearing decision, claimant is entitled to a 22.9% increase in his compensation rate over what the defense had been paying.

Under 21 V.S.A. § 678 (a), the award of attorney fees to a prevailing claimant is discretionary and an award of costs mandatory. Claimant's itemization shows 35.20 hours worked on this case and necessary costs totaling \$267.63. Had the defense been paying the amount it argued was accurate, no award would be appropriate. However, it is now abundantly clear that claimant would not receive the compensation awarded were it not for the efforts of his attorney, thereby justifying a fee award. Defendant is hereby ordered to pay the claimant the reasonable fee of \$3,168 for 35.2 hours at \$90.00 per hour and necessary costs of \$267.83. In addition, interest at the statutory rate must be computed from the date those payments were due. 21 V.S.A. § 664.

Dated at Montpelier, Vermont this 22nd day of September 2004.

Michael S. Bertrand
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.

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

Scot Noël	)	Opinion No. 33-04WC
)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
)	
Poquettes' Construction and)	
Peerless Insurance Co.	)	For: Michael S. Bertrand
	)	Commissioner
)	
	)	State File No. T-15745

Submitted on written record
Record closed on June 1, 2004

APPEARANCES:

Christopher J. McVeigh, Esq., for the Claimant
Richard Windish, Esq., for the Defendant

ISSUE:

What is the correct calculation of Mr. Noël's average weekly wage?

EXHIBITS:

I: Deposition of Scott Noel
II: Deposition of Neil Poquette
II: Deposition of Michael Poquette

FINDINGS OF FACT:

1. In early October 2002, Neil and Michael Poquette (brothers) approached claimant for help on building projects because their company, Poquettes' Construction Company (Poquettes), was busy at the time. Claimant accepted the offer to work at \$25.00 an hour and to be paid on a 1099 basis.
2. On October 31, 2002, claimant was injured while working with Poquettes when he fell from scaffolding designed and erected by Poquettes' employees at the worksite.

3. Initially, claimant filed a claim against the general liability insurance policy held by Peerless Insurance Company, the workers' compensation and liability insurance carrier for Poquettes. Peerless concluded that claimant was Poquettes' statutory employee under Vermont's workers compensation and, therefore, was entitled to workers' compensation benefits.
4. After claimant's injury, Poquettes hired a full-time worker to replace claimant.
5. On a Form 25 wage form filed with the Department, Peerless identified the claimant's wage rate at \$25.00 per hour.
6. The Tabardel project was one the Poquette brothers passed on to the claimant and for which they took no profit. Claimant billed the job directly to Tabardel and was paid directly by Tabardel.

Work history

7. Claimant's work was that of a carpenter, a trade he learned from his uncles, Neil and Michael Poquette, owners of Poquettes' Construction.
8. Claimant had worked for the Poquettes for 17 years, since 1985, at a pay of \$11.00 to \$12.00 per hour, on a W-2 basis, with benefits. He left that job in May of 2002 to strike out on his own.
9. During the summer of 2002, claimant actively pursued his own business and worked on five jobs. At the time of his injury, however, claimant had no independent jobs in the offing.
10. After returning to work with Poquettes' in October 2002, claimant worked on several jobs, including Ballard, Paya, and Tabardel.
11. Neil Poquette also worked on the Tabardel job.

Average Weekly Wage Calculations

12. Between October 7, 2002 and October 31, 2002, claimant states he worked a total of 140.79 hours. Defendant disagrees with claimant's totals.

Week	Claimant-reported No. of Hours Worked	Defendant-reported No. of Hours Worked
Oct. 7	19.5	19.5
Oct. 14	56.5 (all Tabardel project)	0
Oct. 21	50.25 (18 Tabardel project) McVeigh says 32.25	32.25
Oct. 28 (week of accident)	14.54	14.25
Totals	140.79	66.286

13. Invoices submitted by claimant to Poquettes' Construction support numbers provided by defendant. Claimant's invoice for the week of October 7 covered 19.5 hours. The invoice for the week of October 22 covered 32.25 hours. The invoice for the week of October 28 covered 14.25 hours. Claimant did not invoice Poquettes' Construction for work done the week of October 14. Instead, claimant billed that time directly to Tabardel.
14. For purposes of computing the average weekly wage, we consider the first three weeks only because WC Rule 15.4100 excludes the week of the injury.
15. Peerless's Form 25 calculated claimant's average weekly wage at \$493.74, paying a weekly compensation rate of \$329.15. Peerless has not paid claimant more than this rate to date.
16. The claimant calculated the total hours worked in the first three weeks to be 126.25. The average number of hours worked in those three weeks was 42.08. Therefore, the claimant's average weekly wage was \$1,052.08 and his weekly compensation rate should be \$701.00.

Attorney Fees and Costs

17. Claimant submitted a copy of his fee agreement with his attorney. The itemization showed 35.20 hours worked on this case and necessary costs totaling \$267.63.

CONCLUSIONS OF LAW:

1. The WC rules provide several approaches for calculating average weekly wage. The outcome differs depending on the approach used.
2. In this dispute over the correct calculation of average weekly wage, claimant argues that the wage is \$1,052.08, with a corresponding compensation rate of \$701.00. That calculation is based on a wage of \$25.00 per hour and includes work on the Tabardel project. In contrast, defendant argues that the correct average weekly wage is \$646.87, a figure that excludes the Tabardel project. The compensation rate based on defendant's calculation is \$433.40.
3. Section 650(a) of title 21 provides that:

Average weekly wages shall be computed in such manner as is best calculated to give the average weekly earnings of the worker during the twelve weeks preceding an injury; but where, by reason of the shortness of the time during which the worker has been in the employment, or the casual nature of the employment, or the terms of the employment, it is impracticable to compute the rate of remuneration, average weekly wages of the injured worker may be based on the average weekly earnings during the twelve weeks previous to the injury earned by a person in the same grade employed at the same or similar work by the employer of the injured worker, or if there is no comparable employee, by a person in the same grade employed in the same class of employment and in the same district.

4. The goal in calculating the average weekly wage is to calculate as near as possible the injured worker's probable future earnings loss. See Larson's Workers' Compensation Law, § 93.01 [1] [c] at 93-7.
5. The usual method for calculation is to total the earnings for the twelve weeks prior to the injury, excluding the week of the injury, and then dividing that total by twelve to reach the average weekly wage. WC Rule 15.4100. The compensation rate is generally two thirds of the average weekly wage. 21 V.S.A. § 642.
6. In those instances where a claimant has worked fewer than twelve weeks before an injury and it is impracticable to compute average weekly wage, the wages of a comparable employee may be used. Rule 15.4240. Per Rule 15.4100, the week of the accident is excluded.
7. When an employee has been employed for fewer than four weeks at the time of injury, and no comparable employee is available, the Department will use "the claimant's agreement with the employer as to both expected hours per week and rate of pay . . . to determine the average weekly wage." Rule 15.4240.

8. When an employee has been employed for fewer than four weeks at the time of injury, as in this case, the Department calculates the employee's average weekly wage using the available number of weeks. Rule 15.4240.
9. Claimant has proposed four calculation methods:
 - The Department should add all of claimant's earnings together for the weeks of October 6th, October 13th, and October 21st and divide by three to determine claimant's average weekly wage. Per Rule 15.4100, claimant has excluded from the calculation the week in which he was injured, October 28th. Since each job the claimant worked on during those three weeks were obtained through Poquettes, the work on Tabardel is included. Applying this method of calculating average weekly wage, claimant's average weekly wage is \$1,052.80 and his compensation rate is \$701.39.
 - Because of the unique circumstances presented by this case, the Department should tabulate all of claimant's time with Poquettes for all four weeks and divide the total by four. Under this method, claimant's average weekly wage would be \$878.75 and his weekly compensation rate would be \$585.83.
 - To avoid the problem of having too few weeks for the calculation, the Department can deem claimant's hourly rate as being comparable to Neil and Michael Poquettes' rates of \$28 per hour. Neil Poquette testified that claimant's carpentry skills were comparable to his. Using this approach, claimant's average weekly wage would be \$1220.00 and his compensation rate would be \$752.00.
 - The Department can use the terms of the claimant's contract with the employer to determine his average weekly wage. Rule 15.4240. All parties agree claimant was paid \$25 per hour. Although no specific number of hours per week was defined at the time of his employment, claimant expected full-time work. Claimant maintains that his time sheets prior to his accident substantiate this expectation. Using this methodology, claimant's average weekly wage would be \$1,000 and his average weekly compensation rate would be \$666.66.

10. The defendant, on the other hand, excluded work done on the Tabardel project and calculated the total hours worked in the first three weeks to be 51.75 hours (dropping the hours worked during the week claimant was injured per Rule 15.4100). The average number of hours worked was 25.875. Therefore, the average weekly wage would be \$646.875 and the average weekly compensation rate would be \$426.94. (Note the use of two weeks to calculate the average.)
11. I have considered the five calculation methodologies proposed—four by the claimant and one by the defendant. It appears that resolution of this conflict, then focuses on whether claimant was working full-time for Poquettes and whether the Tabardel job was a Poquettes' job or a job for which claimant was entirely responsible.
12. The first calculation method proposed by the claimant--adding all of claimant's earnings together for the weeks of October 6th, October 13th, and October 21st and dividing by three to determine claimant's average weekly wage—counts the work claimant did on Tabardel as work for the Poquettes. The fact that claimant billed the Tabardel job directly to Tabardel while billing all his Poquettes' projects to the Poquettes supports the defendant's position that the Tabardel project should not be included in the rate calculation. Strengthening that position are claimant's timesheets for Poquettes, which do not include any charges for his Tabardel project work. For purposes of calculating claimant's average weekly wage, then, the Tabardel project must be excluded.
13. Regarding the claimant's second suggestion—that the calculation be based on all four weeks claimant worked--Rule 15.4240 precludes using the week in which the injury occurred in the calculation.
14. Next is claimant's third suggestion—to use the hourly wages the Poquette brothers paid themselves as a comparable wage for the claimant. Since the Poquette brothers were the owners of the business and claimant was working as a carpenter/employee of the owners, their wages cannot be considered comparable. Yet, it would be not be fair to use the wage of the other employees, \$12 per hour, because claimant earned more than twice that amount. Therefore, neither the owners' wages nor the other employees' wages are truly comparable.

15. The claimant's fourth calculation methodology requires acceptance of claimant's contention that he was a full-time employee for Poquettes. Even including the Tabardel job, claimant did not work full-time for the Poquettes. An examination of claimant's time sheets prior to his accident fails to support claimant's contention that he worked full-time for Poquettes. The first week, he worked only 19.5 hours. The second week, he worked over 40 hours; however, the work was done on the Tabardel project. The third week, he worked only 32.25 hours for Poquettes. Further, claimant testified that he did not work a full 40-hour workweek. He was a day trader who would trade stocks in the morning and go to work later in the day. Claimant admitted during his testimony that the Poquettes never promised him full-time employment.
16. These considerations leave the following methodology: exclude the work for Tabardel from the calculation of average weekly wage and base the calculation on the first and third weeks worked. Coincidentally, this is the approach proposed by the defendant.
17. Unfortunately, claimant carried no workers' compensation coverage for his own business. Had he, § 650 would have required determination of his average weekly wage to include the hours he put in for both businesses. "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." Instead, only those hours claimant worked for Poquettes' may be counted.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law:

- Claimant's average weekly rate is determined to be \$646.875. His average weekly compensation rate is \$426.94.
- Claimant's plea for a higher wage is denied.
- Claimant's claim for attorney fees and costs is denied.

Dated at Montpelier, Vermont this ____ day of August 2004.

Michael S. Bertrand
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.