

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Timothy Birchmore

Opinion No. 40-11WC

v.

By: Phyllis Phillips, Esq.
Hearing Officer

The McKernon Group

For: Anne M. Noonan
Commissioner

State File No. Y-62516

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Timothy Birchmore, *pro se*
Keith Kasper, Esq., for Defendant

ISSUE PRESENTED:

Is Claimant entitled to a July 1, 2010 cost of living adjustment for temporary total disability benefits that were reinstated effective January 6, 2011?

FINDINGS OF FACT:

The following facts are undisputed:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.
2. As a result of a compensable work-related accident that occurred on or about March 15, 2007 Claimant suffered a collapsed lung, fractured ribs and fractured vertebra.
3. As a consequence of Claimant's injuries, Defendant paid medical, temporary total and/or temporary partial disability benefits from March 15, 2007 through January 30, 2010.
4. On February 23, 2010 Defendant paid Claimant permanent partial disability benefits referable to his compensable injuries in a lump sum.
5. Claimant had returned to work and was not receiving workers' compensation disability benefits as of July 1, 2010.

6. On January 6, 2011 Claimant again began receiving temporary total disability benefits causally related to his compensable 2007 injury.
7. Defendant did not apply the July 1, 2010 cost of living adjustment to the temporary total disability benefits it began paying on January 6, 2011 on the grounds that Claimant had not been out of work on July 1, 2010.
8. Following an informal conference on August 11, 2011 the Department's Workers' Compensation Specialist advised that Defendant must apply the July 1, 2010 cost of living adjustment to Claimant's reinstated temporary total disability benefits.
9. Claimant since has advised the Department that he does not wish to participate actively in the formal hearing process, and instead will await the Commissioner's final determination on the issue.

DISCUSSION:

1. Defendant presents a purely legal issue for determination – whether a worker who is not receiving disability benefits on July 1st is entitled to a cost of living adjustment for that year when such benefits subsequently are reinstated. As the material facts are not disputed, summary judgment is an appropriate vehicle for resolving this issue. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996).
2. Vermont's Workers' Compensation statute, 21 V.S.A. §650(d), specifically mandates that the compensation rate at which disability benefits are paid be adjusted annually, as follows:

Compensation computed pursuant to [§650] shall be adjusted annually on July 1, so that such compensation continues to bear the same percentage relationship to the average weekly wage in the state as computed under this chapter as it did at the time of injury.

3. Workers' Compensation Rule 16.2000 provides further guidance:

Pursuant to 21 V.S.A. §650(d), annually on or before July 1 the commissioner shall announce the annual change in compensation rate and new minimum and maximum rates for the coming fiscal year. Any claimant *receiving* temporary total, temporary partial, permanent total or permanent partial disability compensation on July 1 shall be entitled to an increase in his or her compensation rate in accordance therewith
(Emphasis added).

4. The plain language of Rule 16.2000 thus mandates that only those claimants who are *receiving* disability benefits on July 1st are entitled to a cost of living adjustment for that year. *Bollhardt v. Mace Security International, Inc.*, Opinion No. 51-04WC (December 17, 2004), cited with approval in *V.S. v. Kennametal*, Opinion No. 19-07WC (August 2, 2007).

5. As Claimant was not receiving any disability benefits on July 1, 2010 he was not entitled to a cost of living adjustment when benefits subsequently were reinstated on January 6, 2011.

ORDER:

Defendant's Motion for Summary Judgment is **GRANTED**.

DATED at Montpelier, Vermont this 28th day of November 2011.

Anne M. Noonan
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.