STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Kenneth Laumann v. Vermont Dept. of Public Safety	)	State File No. K-05783
Annette Lamarre v. Ethan Allen	)	State File No. R-21098
Robert Wheeler v. Ethan Allen	)	State File No. M-10073
	)	By: Margaret A. Mangan, Hearing Officer
	)	For: R. Tasha Wallis, Commissioner
	)	Opinion No. 02-03WC

Submitted on records and briefs
Record closed on August 19, 2002

APPEARANCES:

Thomas A. Zonay, Esq. for Claimant Kenneth Laumann
Robert Halpert, Esq. for Claimant Robert Wheeler
Keith J. Kasper, for Defendant State of Vermont Department of Public Safety
William J. Blake, Esq. for Defendant Ethan Allen

RULING ON THE DEFENSE MOTION FOR SUMMARY JUDGMENT

Because these three cases present a common issue, they have been consolidated for purpose of this opinion. V.R.A.P. 42(a).

ISSUE:

What is the proper method of calculating cost of living increases on permanency benefits for claimants who have lost no time from work, or who returned to work before they reached medical end result for their work-related accidents?

COMMON FACTS:

1. Each of the named claimants suffered a work-related injury.

2. Two claimants, Laumann and Lamarre, neither received nor were owed temporary total disability benefits because they missed no time from work. Therefore, the defendants determined that the "return to work date" was the day after the work related accidents. The third claimant, Wheeler, received temporary total disability benefits for several months before he returned to work.

3. All three claimants have reached medical end result for their work-related injuries and incurred permanent impairment for which they are entitled to permanent partial disability compensation.

4. Lamarre reached medical end result almost five months after her injury and return to work. For Laumann the time interval was more than three and a half years. Wheeler returned to work almost six months before reaching medical end result.

5. The employers based their calculation for purposes of the PPD on the compensation rate at the time the claimants returned to work, this Department's "old methodology" for such a calculation.

6. This Department has since determined that permanency benefits should be determined by adding annual adjustments to the compensation rate from the date of injury until the date of medical end result, regardless of when a claimant returned to work ("new methodology").

7. Claimants have been paid the undisputed portion of the permanency.

DISCUSSION:

1. Defendants in these cases challenge the Department's change from the old to the new methodology on substantive and procedural grounds. They argue that the old methodology was the correct one, with sound basis in law and long-standing Vermont practice. Next, they argue that the Department violated the Administrative Procedure Act (APA) by not following the rule making process before implementing the change, a step defendants maintain is required even though the old methodology was not adopted through rule-making.

Statutory Basis

2. In support of its position, defendants cite to that portion of the Workers Compensation Act they consider controlling:

> Where the injury results in a partial impairment which is permanent and which does not result in permanent total disability, compensation shall be paid during the period of total disability, as provided in sections 642 and 643 of this title, and ***at the termination of total disability***, the employer shall pay to the injured employee 66 2/3 percent of the average weekly wage, computed as provided in section 650 of this title, subject to the maximum and minimum weekly compensation rates, for a period determined by multiplying the employee's percentage of impairment of the whole person by 330 weeks. The percentage of impairment to the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided in subsection (b) of this section.

21 V.S.A.§ 648(a) (emphasis added).

3. Although § 648 clearly provides that permanent partial disability (PPD) benefits are to be paid at the termination of temporary total disability benefits, it also specifies that PPD be based on the "the employee's percentage of impairment," which cannot be determined until one has reached medical end result.

4. Next, section 650 provides the method of calculating average weekly wage, on which temporary and permanent benefits are based, with the a provision requiring annual adjustments: "Compensation computed pursuant to this section 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." 21 V.S.A.§ 650(d).

5. After rule-making, this Department then adopted the following: "The compensation rate for permanent partial or permanent total disability compensation shall be 2/3rds of the claimant's average weekly wage, taking into account any annual adjustments in compensation rate required by 21 V.S.A. § 650(d) ***from the date of injury***." Rule 15.1000 (emphasis added).

6. Under the "old methodology," once a claimant reaches medical end result and received a permanency rating, permanency benefits were determined by taking 2/3ds of the Claimant's average weekly wage at the time of the injury, then making weekly payments until the total number of weeks were satisfied. If those payments extended beyond the July 1st date for application of annual adjustment, the adjustment was made.

7. Under the "new methodology," once a Claimant reaches medical end result with a permanency rating assigned, the compensation rate for permanency benefits is determined after adding annual adjustments to the average weekly wage from the date of injury to the date of medical end result. A difference in the two methodologies for Claimant Laumann, with three and a half years between return to work and medical end result, is approximately $5,000.00, for the other claimants it is a lesser amount.

8. An accurate interpretation of the methodologies in question must be viewed from the perspective of the entire statutory scheme. When one is injured and disabled, he is entitled to temporary disability benefits, which terminate once the worker successfully returns to work or reaches medical end result. *Coburn v. Frank Doge & Sons*, 165 Vt 529, 532 (1996); § 642; §§ 643, 643(a); Rule 18.0000. If the worker is not disabled, no temporary indemnity benefits are owed, although permanency benefits may be due if the claimant has incurred a permanent impairment. A permanency rating cannot be determined until one has reached medical end result, also called maximal medical improvement, see, § 648(b); American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Ed. at 2, a point in time that could occur before one has returned to work or months or years afterwards.

9. Neither the Act nor the Rules refer to a medical end result date in the context of calculation of compensation benefits. In fact, the operative dates for the calculation of benefits are the date of injury, with the allowance for annual adjustments, see, § 650; Rule 15 and the termination of temporary disability, § 648(a). A date of injury is logically connected to wage benefits due because it reflects what was earned when one was injured. The date of termination of temporary disability is a clearly ascertainable time chosen by the Legislature as the point at which permanent partial benefits are payable. It could have chosen the medical end result date, but did not. Such an interpretation will not be read into the statute now. A medical end result date is an important prerequisite to a permanency determination and to the termination of temporary benefits, but it is not incorporated in the statutory scheme for calculating benefits. Consequently, it cannot be used as the benchmark for determining a compensation rate for permanency.

10. Because the "old methodology" is consistent with the Act and Rules, it must control the calculation of the permanency benefits. However, this conclusion does not operate to reduce any benefits already paid in these or other cases.

11. Consequently it is not necessary to address the APA claim.

ORDER:

Therefore, based on the foregoing, Defendants' Motion for Summary Judgment is GRANTED.

Dated at Montpelier, Vermont this 5th day of January 2003.

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R. Tasha Wallis
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.