

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Joe Knoff)	Opinion No. 39-05WC
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
Joe Knoff Illuminating)	
)	For: Patricica A. McDonald
)	Commissioner
)	
)	State File No. P-16619

**RULING ON CLAIMANT'S DEMAND FOR REINSTATEMENT OF TEMPORARY
TOTAL DISABILITY PAYMENTS**

Joe Knoff, Pro se
William J. Blake, Esq. for the Defendant

ISSUE:

1. Prior to claimant's April 2003-claimed period of disability, did he earn wages that would justify reinstatement of temporary total disability benefits?
2. Is the defendant entitled to a credit?

FINDINGS OF FACT:

1. For 15 years claimant was a self-employed owner and operator of "Illuminating Consulting Service and Supply" (ICSS). In February 2000, claimant suffered neck pain while working at a job site for ICSS.
2. Pursuant to a worker's compensation claim filed by the claimant, with an average weekly wage of \$3,790, the carrier at the time agreed to pay the maximum benefit temporary total disability (TTD) rate, beginning in February 2000 and ending with an approved Form 27 on March 28, 2001.
3. During this period of time, claimant continued to process replacement lighting orders as well as bringing in money in the form of outstanding accounts receivables after TTD started. However, the claimant only worked in a very limited capacity during this time. Claimant also stated that due to his neck injury and his company being a sole proprietorship, ICSS had to decline various projects. Claimant did not declare these earnings to the carrier during the payment of TTD benefits.
4. In the March 28, 2001 Form 27 filed by defendant, the department concluded that claimant had reached a Medical End Result, as determined by Dr. Johansson. Claimant

did not challenge the approved form 27. The carrier then began to pay Permanent Partial Disability (PPD) benefits pursuant to a 15% whole person impairment rating.

5. Claimant, having a desire to return to work in a self employed capacity, made business plans to start up his own e-commerce business. Claimant claims to be the driving force behind the e commerce site. Claimant has acknowledged that up to now the website is not fully operational, nor has it made any sales. Plaintiff requires more funds in order to have the website fully operating.
6. On May 21 2001, in order to fund this business plan, claimant entered into an agreement with carrier, where the carrier paid claimant a settlement of \$100,000 through an approved Form 14. This was in exchange for claimant's agreeing to release carrier from any present or future Vocational Rehabilitation claim. Claimant spent part of this settlement on personal bills such as his child's college tuition, car payments and his mortgage.
7. In July 2002, claimant sold ICSS. The purchase and sale agreement was conditioned on the continuation of the company producing \$2,170 per month. Claimant and buyer also agreed that claimant would receive 25% of gross profits of the business from the new owner, and for claimant to continue with the company as a consultant, with a minimal level of participation. During fiscal year 2003, claimant did not report the sale of ICSS as income, nor did he report the 25% gross profits as income.
8. Claimant alleged that in April 2003 he began to experience a recurrence of his neck pain and requested the carrier to reinstate TTD payments. Carrier agreed to voluntarily pay the disability benefits without prejudice. The carrier paid claimant the maximum rate from April 23, 2003 until September 2004. During this second period of TTD, carrier paid to claimant approximately \$63,700 in benefits.
9. In September 2004, carrier filed a Form 27, which the department approved. The form terminated TTD payments to the claimant on two grounds: first, the claimant had reached a medical end result in 2001 and had remained at a medical end result since then; second, because claimant had not earned any wages in the preceding 12 weeks of the April 2003 claim, he was not entitled to temporary total disability benefits.
10. On May 25 2005, claimant filed an amendment to his 2003 and 2004 tax returns. Regarding the 2004 return, claimant noted that "income was claimed as interest and it should have been claimed as earned income subject to social security tax."

CONCLUSIONS OF LAW

1. The limited issue before us is based on Mr. Knoff's claim for TTD and necessarily involves the amount of claimant's wages within the twelve weeks preceding the April 2003 alleged recurrence of the claimant's pre-existing work injury. The medical aspect regarding a recurrence or aggravation of claimant's work injury is not at issue in this ruling.

2. Temporary total benefits are awarded as wage replacement for the injured employee during the period of disability. *Plante v. Slalom Skiwear Inc.* Opinion No. 19-95WV (1995) quoting *Orvis v. Hutchins*, 123 Vt. 18 (1962). Under 21 V.S.A §650(a), temporary total disability payments are based on the wages that an employee earns during the twelve weeks preceding a period of disability. The burden of proof at the outset is on claimant to establish such facts as are essential to recovery. *Kelley's Dependents v. Hoosac Lumber Co.* 95 Vt. 50 (1921).
3. To compute an average wage to replace, the employee must have been earning wages. With no earned wages, there are no wages to replace, and he should not receive TTD “wage replacement” benefits. See *Plante*, supra. When computing an average weekly wage for the purposes of entitlement to disability benefits, profits from a business are not the equivalent of wages, and are no substitute for wages. *Hotaling v. St Johnsbury Trucking Co.* 153 Vt. 581 (1990). The Commissioner may scrutinize the sole proprietorship to determine if the profits are the functional equivalent of wages. *Id.* (citing *Lafleur v. Hartford Ins. Co.*, 449 So. 2d 725, 729 (La. 1984)). But in general, profits from a business are not the equivalent of wages, and are no substitute for wages for purposes of establishing an average wage. *Id.*
4. Claimant argues that the amount received from the sale and purchase agreement of his company should be counted as eligible income in order to reinstate TTD benefits. Claimant considers this income because, as per the 2002 purchase agreement, in exchange for 25% of gross profits, claimant would continue in a “consulting” capacity with ICSS, using his expertise to ensure that the business stays afloat in the years subsequent to the sale. Essentially, claimant argues that he is being paid for his consulting work.
5. However, the money received from the buyer cannot be considered as wages. In *Hotaling*, the court noted regarding a finding by the commissioner of “business profits” that “with his injury, his own business was the only gainful work available to him and that he performed work solely out of a necessity to keep the business going.” *Hotaling*, 153 Vt. at 585. Although on its face the facts indicate a traditional wage earning relationship, claimant only maintains a bare-minimal consulting presence with the company, essential only to the survival of the company claimant founded. Under *Hotaling*, the amounts claimant in the present case changed to income in the May 2005 tax amendments are to be considered business profits and not income. Therefore this amount is excluded from the computation of the average weekly wage.

6. Even if the claimant could establish the company profits as wages, he would not meet the burden of proof with regard to a showing of lost wages because he has not established that he has ever lost those profits due to the reoccurrence of his disability in April 2003. Claimant cannot receive both a wage and total disability benefits at the same time. *See Kiser v. National Life Insurance Co.* Opinion No. 38-96WC (1996). The only “wages” that claimant claimed to have lost were the profits he was receiving after the sale of his company. Claimant revised both his 2003 and 2004 tax returns to show that the 25% profits from his former business were actually “earned income” throughout 2003-2004. These amendments clearly show that claimant was receiving the 25% profit as income past the date of the alleged reoccurrence of his disability in April 2003. Because the claimant did not lose what he wants this Department to find were wages, he is not entitled to any “wage loss” benefits.
7. Although the claimant was not entitled to TTD benefits between April 2003 and September 2004, the defendant’s carrier agreed to pay the maximum rate throughout this period without prejudice.
8. “Payments made by an employer or his insurer to an injured worker during the period of his disability...which, by the provisions of this chapter, were not due and payable when made, may, subject to the approval of the commissioner, be deducted from the amount to be paid as compensation.” 21 V.S.A §651. Defendant voluntarily and without prejudice paid the claimant wage loss benefits at a period of time claimant was not experiencing any loss of wages. As concluded previously, the claimant has failed to establish the loss of any wages while he collected TTD benefits between April 2003 and September 2004. Therefore, defendant is entitled the credit it seeks, for the wage loss benefits paid to claimant during that time, \$63,700, against any future compensation.
9. In addition to the credit requested for the TTD payments between April 2003-September 2004, the defendant also requests a credit for the amount the claimant failed to declare to the carrier for the sales and accounts receivables he continued to process between February 2000 and March 2001. However, these earnings cannot count as “wages.” As stated previously, a company’s profits cannot be considered as income. The defendant acted within a very limited capacity when processing the replacement lighting orders. During the initial payments of TTD benefits, the claimant had to decline various projects, and only continued to process the lighting orders as “residual” ongoing business necessary to sustain the survival of his company. Furthermore, most of these account receivables had existed prior to the February 2000 injuries, and were not earned during the initial payment of TTD benefits. Therefore under *Hotaling*, these sales cannot be construed as income, and defendant is not entitled to a credit in the amount of these earnings.

ORDER:

Therefore, based on the foregoing findings and conclusions:

1. Claimant's claim for temporary total disability benefits after April 2003 is DENIED.
2. Defendant's request for a credit toward future benefits based on payments made after April 2003 is GRANTED.

Dated at Montpelier, Vermont this 12th day of July 2005.

Patricia A. McDonald
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.