

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

William Boyd

Opinion No. 13-15WC

v.

By: Jane Woodruff, Esq.  
Hearing Officer

Kennametal, Inc.

For: Anne M. Noonan  
Commissioner

State File No. S-14574

**RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT**

**APPEARANCES:**

Ronald Fox, Esq., for Claimant  
Marion Ferguson, Esq., for Defendant

Mailed  
State of Vermont

JUN 17 2015

Department of Labor  
Workers' Compensation

**ISSUE PRESENTED:**

Is Claimant entitled to cost of living adjustments for the intervening years comprising the period covered by a lump sum payment for permanent total disability benefits when those payments resume after the initial 330-week period?

**EXHIBITS:**

Claimant's Exhibit 1:	Agreement for Temporary Total Disability Compensation (Form 21), June 7, 2002
Claimant's Exhibit 2:	Employer's Notice of Intention to Discontinue Benefits (Form 27), May 18, 2008
Claimant's Exhibit 3:	Letter from Dr. Upton, March 12, 2008
Claimant's Exhibit 4:	Letter from Attorney Morgan (with attached payment printout), January 11, 2011
Claimant's Exhibit 5:	Notice and Application for Hearing (Form 6), April 1, 2009
Claimant's Exhibit 6:	<i>Boyd v. Kennametal, Inc.</i> , Opinion No. 33-10WC (November 15, 2010)
Claimant's Exhibit 7:	<i>Boyd v. Kennametal, Inc.</i> , Opinion No. 33S-10WC (December 29, 2010)
Claimant's Exhibit 8:	Claimant's Motion for a lump sum payment, November 18, 2010
Claimant's Exhibit 9:	Lump sum check, January 7, 2011
Claimant's Exhibit 10:	Email from Attorney Fox, September 25, 2014
Claimant's Exhibit 11:	Email from Attorney Ferguson, October 8, 2014
Claimant's Exhibit 12:	Email from Department Specialist, October 10, 2014
Claimant's Exhibit 13:	Formal hearing docket referral, October 16, 2014

## FINDINGS OF FACT:

Considering the evidence in the light most favorable to Defendant as the non-moving party, *see, e.g., State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following:

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. Judicial notice is taken of all relevant forms contained in the Department's file relative to this claim.
3. Claimant suffered a right shoulder injury on January 31, 2002. Defendant accepted the injury as compensable and paid benefits accordingly.
4. At Defendant's request, Dr. Upton examined Claimant on March 12, 2008. He concluded that Claimant had reached an end medical result, and rated him with a 23-percent whole person permanent impairment. With the Department's approval, Defendant discontinued temporary disability benefits effective May 18, 2008. On that same date, it began advancing weekly permanent partial disability benefits in accordance with Dr. Upton's rating. At that time, Claimant's compensation rate was \$617.10 per week.
5. Claimant filed a claim for permanent total disability benefits in April 2009. After a formal hearing the Commissioner concluded that Claimant was permanently and totally disabled as a consequence of his January 2002 work injury. *Boyd v. Kennametal, Inc.*, Opinion No. 33-10WC (November 15, 2010).
6. In December 2010, the Commissioner granted Claimant's motion to have the balance of his permanent total disability benefits paid in a lump sum (allowing credit for permanent partial disability benefits already advanced). *Boyd v. Kennametal, Inc.*, Opinion No. 33S-10WC (December 29, 2010). In accordance with 21 V.S.A. §652(c), the Commissioner also ordered that the lump sum benefits be prorated over the course of Claimant's life expectancy in order to maximize his entitlement to Social Security benefits.
7. On January 7, 2011 Defendant issued Claimant a check for \$140,531.52, the balance owed on his lump sum 330-week permanent total disability award after subtracting the permanent partial disability benefits that previously had been paid.<sup>1</sup> The lump sum balance was calculated based on Claimant's compensation rate at the time, which with annual cost of living adjustments now amounted to \$732.48 per week. The total amount paid for the 330-week period of permanent total disability was \$239,085.41.

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<sup>1</sup> According to 21 V.S.A. §645(a), an employer is obligated to pay benefits "for the duration of the employee's permanent total disability, but in no event shall the employee receive benefits for less than 330 weeks." The first 330 weeks are thus guaranteed, while benefits beyond that point are payable only to the extent that the employee continues to have "no reasonable prospect of finding regular employment."

8. The initial 330-week period covered by Defendant's payments (including both weekly permanent partial disability benefits and the January 2011 lump sum payment) expired on September 13, 2014. Defendant then resumed paying weekly permanent total disability benefits, at the same compensation rate that had been in effect as of the date of its lump sum payment, \$732.48 per week.
9. Claimant's counsel requested that Defendant modify the compensation rate to include the cost of living adjustments for the four intervening years (July 2011 through July 2014) covered by the January 2011 lump sum payment. By counsel's calculation, this would result in a weekly compensation rate as of September 2014 of \$783.44. Defendant disagreed that any cost of living adjustments were owed. The pending motion for summary judgment followed.

**DISCUSSION:**

1. Claimant presents a purely legal issue for determination – whether a worker who accepts a lump sum payment of permanent total disability benefits is entitled to cost of living adjustments for the intervening years when benefits are resumed after the initial 330-week period. 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), 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 . . .

4. The Commissioner had occasion to apply these same provisions of statute and regulation in *Birchmore v. The McKernon Group*, Opinion No. 40-11WC (November 28, 2011), though in a somewhat different context. The claimant in that case suffered a work-related injury in March 2007, as a result of which he received temporary disability benefits through January 30, 2010. In February 2010 his employer paid the permanent partial disability benefits due him in a lump sum. Thereafter, he returned to work and as of July 1, 2010 he was not receiving any workers' compensation disability benefits. When he suffered a subsequent period of disability in January 2011, he sought to have his compensation rate increased to account for the July 1, 2010 cost of living adjustment.
5. Citing the "plain language" of Rule 16.2000, the Commissioner concluded that the claimant was not entitled to a cost of living adjustment. According to that rule, "only those claimants who are *receiving* disability benefits on July 1<sup>st</sup> are entitled to a cost of living adjustment for that year." *Id.* at Conclusion of Law ¶4 (emphasis in original); *see also 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). As the claimant had already returned to work as of July 1, 2010 and was not receiving any disability benefits, the requirement for triggering a cost of living adjustment had not been met.
6. The case before me now presents a different scenario from the ones presented in the above-cited cases. The claimants in those cases were all working as of the July 1<sup>st</sup> cost of living adjustment date. Presumably, therefore, all were earning current wages, with whatever salary increases and/or cost of living adjustments their employers made available to them in the ordinary course of their employment. In contrast, Claimant here remains permanently and totally disabled, with no current wages and thus no access to periodic salary adjustments. The question thus becomes whether the fact that he received his benefits in a lump sum adequately compensates him for having forgone the cost of living adjustments to which he would have been entitled had those benefits been paid weekly instead.
7. The primary advantage of a lump sum payment lies in what economists refer to as the "time value of money." According to that principle, money that is available now is worth more than the same amount paid in the future, because of its potential earning capacity. Simply put, provided that dollars can earn interest, the sooner they are received, the more they are worth.
8. Here, therefore, the fact that Claimant received a lump sum payment of \$140,531.52 in 2011 presumably was worth more to him than would have been the case had those funds been paid out on a weekly basis. Even if only partially invested, the interest available to him should have been equivalent to the cost of living adjustments he would have received otherwise.

9. The "time value" of Claimant's lump sum settlement thus compensated him adequately for the cost of living adjustments he would have received had the benefits owed from him from July 1, 2011 through September 13, 2014 been paid to him on a weekly basis. For that reason, Defendant should not be obligated to pay any additional amounts covering that same period.
10. However, as Claimant correctly asserts, now that the period covered by the lump sum payment has passed and weekly benefits have resumed, his current compensation rate must be updated to include the intervening cost of living adjustments. If they are not, then going forward his weekly benefit will no longer bear the same percentage relationship to the state average weekly wage as it did at the time of his injury, in violation of the specific language of §650(d).
11. I conclude that by requesting and accepting payment of his permanent total disability benefits in a lump sum rather than on a weekly basis, Claimant thereby forfeited his right to any cost of living increases that otherwise would have been owed during the intervening period. However, I further conclude that he did not forfeit his right to the intervening adjustments once weekly benefits resumed. Effective September 14, 2014 the compensation rate at which these benefits should have been paid was \$783.44.
12. I emphasize the limited scope of this conclusion. Because an injured worker who is permanently and totally disabled is likely never to return to work, his or her ability to maintain the required relationship between the compensation rate and the state average weekly wage is completely dependent on the annual cost of living adjustments mandated by §650(d). In contrast, injured workers who are only partially disabled and therefore presumably able to return to work will have other avenues available to them to earn both current wages and periodic increases. As noted above, Conclusion of Law No. 6 *supra*, this was the case in both *Birchmore* and *Bollard*, and my conclusion here should not be read to overturn the holdings in those cases.

**ORDER:**

Claimant's Motion for Summary Judgment is hereby **GRANTED**. Defendant is hereby **ORDERED** to adjust Claimant's weekly compensation rate to \$783.44, effective September 13, 2014, with further cost of living adjustments annually on July 1<sup>st</sup> in accordance with 21 V.S.A. §650(d) for so long as he remains permanently and totally disabled.

**DATED** at Montpelier, Vermont this 17 day of June 2015.



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.