STATE OF VERMONT
DEPARTMENT OF LABOR

David Marrier

v.

Music Services of Vermont, Inc.

Opinion No. 09-20WC

By: Beth A. DeBernardi
Administrative Law Judge

For: Michael A. Harrington
Interim Commissioner

State File No. HH-58666

RULING ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
William J. Blake, Esq., for Defendant

ISSUE PRESENTED:

Were the payments made to Claimant for his health insurance within the 26 weeks prior to his work injury properly excluded from the calculation of his average weekly wage and compensation rate as a matter of law?

EXHIBITS:

Defendant's Statement of Undisputed Material Facts filed January 9, 2020

Defendant's Exhibit A:	Wage Statement (Form 25) dated March 2, 2016
Defendant's Exhibit B:	Agreement for Temporary Compensation (Form 32) approved by the Department on April 14, 2016
Defendant's Exhibit C:	Claimant's deposition transcript of September 9, 2019
Defendant's Exhibit D:	Douglas Lothrop's deposition transcript of September 9, 2019

Claimant's Statement of Undisputed Material Facts and Response to Defendant's Statement of Undisputed Material Facts filed March 18, 2020

Claimant's Exhibit 1:	Claimant's deposition transcript of September 9, 2019
Claimant's Exhibit 2:	Douglas Lothrop's deposition transcript of September 9, 2019

FINDINGS OF FACT:

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

1. On January 11, 2016, Claimant sustained an injury while working in the course and scope of his employment for Defendant. Defendant accepted the injury as

compensable and began paying workers' compensation benefits accordingly. *See Defendant's Statement of Undisputed Material Facts* ("*Defendant's Statement*"), ¶ 1.

2. In March 2016, the parties executed an Agreement for Temporary Compensation (Form 32). The Agreement specified Claimant's average weekly wage as $845.00 and his compensation rate as $563.62. The Department approved the Agreement on April 14, 2016. *Defendant's Statement,* ¶ 8; *Defendant's Exhibit B.*

3. Claimant now alleges permanent and total disability as a result of his injury. This claim is currently scheduled for a formal hearing. *Defendant's Statement*, ¶ 2.

Claimant's Wage Statement and Average Weekly Wage Calculation

4. The parties dispute the amount of Claimant's average weekly wage for purposes of calculating his compensation rate. *Defendant's Statement*, ¶ 3. Claimant contends that the payments Defendant made directly to him to reimburse him for health insurance should be included in the average weekly wage calculation. Defendant maintains that these payments were properly excluded because Vermont law excludes employer-paid health insurance premiums from the average weekly wage calculation. *See Defendant's Statement*, ¶ 4.

5. On October 1, 2018, Claimant filed a Notice and Application for Hearing (Form 6) on the issue of his correct average weekly wage. This issue was transferred to the formal hearing docket and consolidated with the claim for permanent total disability benefits. *Defendant's Statement*, ¶ 9.

6. Defendant is owned by Douglas Lothrop. In March 2016, Mr. Lothrop completed a Wage Statement (Form 25) for the wages Claimant earned in the 26 weeks prior to his injury. *Defendant's Statement*, ¶ 5; *Defendant's Exhibit A.*

7. The Wage Statement shows earnings in the "Gross Wages" column of $845.00 per week for 26 weeks. The "Extras" column shows six monthly payments in the amount of $883.00 each; Mr. Lothrop's handwritten notation at the top of that column describes these payments as "Health Insurance." *Defendant's Statement*, ¶ 6; *Defendant's Exhibit A*; *Defendant's Exhibit D*, at 8-9.

8. The calculation of Claimant's average weekly wage excluded the $883.00 payments for "Health Insurance." Claimant's average weekly wage was calculated as $845.00, and his compensation rate was calculated as $563.62.[1] *Defendant's Statement*, ¶ 7; *Defendant's Exhibits A and B.*

[1] $845.00 x 0.667 = $563.62. *See* 21 V.S.A. § 642; Workers' Compensation Rule 8.1600.

Defendant's Payments to Claimant for Health Insurance

9. Some of Defendant's employees had health insurance provided through other sources. For employees who did not have health insurance from another source, Defendant provided money for their insurance. *Defendant's Exhibit D*, at 10-11.

10. Claimant did not have health insurance from another source, so he and his wife selected an insurance plan from Vermont Health Connect. Claimant told Defendant the premium amount for their chosen policy, and Defendant agreed to pay it. *See Defendant's Statement, ¶ 12; Claimant's Response to Defendant's Statement* ("*Claimant's Response*"), ¶ 12; *Claimant's Exhibit 1*, at 21.

11. Defendant told Claimant to pay his health insurance premiums directly to the insurer, as "they have to see a check coming from you." *Claimant's Statement of Undisputed Material Facts* ("*Claimant's Statement*"), ¶ 2; *Claimant's Exhibit 1*, at 18. Thus, Claimant paid $883.00 every month to his health insurance provider,[2] and Defendant paid him the same amount every month for the express purpose of reimbursing him. *Claimant's Statement*, ¶ 1; *Claimant's Exhibit 1*, at 15; *see also Defendant's Statement*, ¶¶ 11, 14.

12. The amount Defendant paid to Claimant each month was the amount of his insurance premium; it was not a different amount negotiated between them. *Defendant's Statement*, ¶ 13; *Defendant's Exhibit C*, at 15.

13. Defendant did not require its employees to provide proof of coverage or documentation of their insurance costs; nor did it know whether the employees actually spent the additional money on health insurance. *Claimant's Statement*, ¶ 4; *Claimant's Exhibit 2*, at 11. Rather, Defendant just trusted its employees to use the money as intended. *Claimant's Response*, ¶ 14; *Claimant's Exhibit 2*, at 11.

14. Defendant treated the $883.00 payments to Claimant as a business expense for employee health insurance, not as wages. *Claimant's Statement*, ¶ 5; *Claimant's Exhibit 2*, at 13-14. Defendant thereby benefitted by paying less in taxes.[3] *Claimant's Statement*, ¶ 5; *Claimant's Exhibit 2*, at 13-14, 21.

15. According to Mr. Lothrop, reimbursing some employees for health insurance did not provide them with a greater economic benefit compared to other employees because "the other employees were compensated more in wages." *Claimant's Statement, ¶ 5; Claimant's Exhibit 2*, at 13. For that reason, when determining the employees' regular wages, he considered whether they received reimbursement for health insurance. *See Claimant's Statement, ¶ 6; Claimant's Exhibit 2*, at 13-14.

[2] Claimant confirmed in his deposition that he paid his health insurance premiums. *Defendant's Statement*, ¶ 13; *Defendant's Exhibit C*, at 15.

[3] Mr. Lothrop explained that, by paying money for health insurance rather than more wages, Defendant avoided paying FICA taxes on those payments. *See Claimant's Exhibit 2*, at 21.

16. The $883.00 monthly payments to Claimant were a factor that Defendant took into consideration when it determined his wages. *Claimant's Statement*, ¶ 6; *Claimant's Exhibit 2*, at 14-15.

CONCLUSIONS OF LAW:

1. To prevail on a summary judgment motion, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). The party opposing the motion is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979).

Health Insurance Reimbursement and the Average Weekly Wage Analysis

2. An injured worker's weekly compensation is based on his or her average weekly wages in the 26 weeks prior to the injury. 21 V.S.A. § 650. The statute defines "wages" to include "bonuses and the market value of board, lodging, fuel, and other advantages which can be estimated in money and which the employee receives from the employer as a part of his or her remuneration." *Id.* § 601(13). Thus, the question here is whether the phrase "other advantages" includes the monthly amounts Defendant paid to Claimant to reimburse him for health insurance.

3. In 2013 the Vermont Supreme Court considered whether the premiums an employer pays to an insurance carrier for an employee's health insurance must be included when calculating the employee's average weekly wage. In *Lydy v. Trustaff, Inc*., 2013 VT 44, the Court held that such premiums were not "wages" and therefore should not be included in the average weekly wage and compensation rate calculations.

4. In so holding, the *Lydy* Court first found that the phrase "other advantages which can be estimated in money" was ambiguous, potentially covering countless costs paid by an employer for an employee. Thus, the Court looked to legislative history to determine whether the legislature intended to include employer-paid health insurance premiums in the definition of wages. 2013 VT 44, ¶ 7. The Court concluded that the legislature did not intend to do so because it did not amend the workers' compensation statute to include them once health insurance became commonplace. *Id.* ¶ 11.

5. The *Lydy* Court then focused on the second part of the statutory definition of wages, which limits "other advantages" to those that "the employee receives from the employer as a part of his or her remuneration." 2013 VT 44, ¶ 12. The Court found that an employee is not remunerated, or "paid," for his or her work with health insurance; rather, health insurance is a fringe benefit. The Court wrote: "The definition of wages implies a *payment actually received by an employee* – it more closely refers to the actual earnings of the worker." *Id.* ¶ 12 (emphasis added). The Court concluded:

> While the employer may contribute a set figure for the coverage, the employee may enjoy medical services that far exceed the cost to the employer or, if lucky in health, the employee may never gain any tangible benefit from the coverage. As such, we find that the employer's contribution for health insurance, though determinable, does not accurately reflect the employee's labors or compensation as defined through wages.
>
> *Id.* ¶ 14.

Thus, the Court held that employer-paid health insurance premiums are not included in the definition of "wages" and are therefore not included in the average weekly wage and compensation rate calculations.

6. If Defendant here provided health insurance for its employees and paid the premiums directly to the insurance carrier, the result here would be governed by *Lydy*. However, the undisputed facts here differ from those of *Lydy* in several significant respects.

7. First, Defendant did not provide Claimant with a health insurance plan, nor did it require proof that he had obtained his own coverage. Defendant also did not require documentation of the premium cost or proof that Claimant in fact used the $883.00 payments for health insurance.[4] Finally, Mr. Lothrop made no mention of any policy or practice requiring employees to repay the money if they did not use it as intended; rather, he testified that he just "made the assumption of trust." *Defendant's Exhibit D*, at 11. Based on these facts, I conclude that the $883.00 payments to Claimant were not "employer-paid health insurance premiums," as contemplated in *Lydy*. Instead, Claimant could use these payments for any purpose, just like his regular wages.

8. Second, in determining each employee's wages, Defendant took into consideration whether the employee received additional money for health insurance. Employees who had health insurance from other sources were, all things considered, paid higher wages than the employees who were reimbursed for insurance, as Claimant was. Accordingly, the health insurance payments made to certain employees functioned as a portion of their regular wages, rather than as a fringe benefit.

9. For these reasons, I conclude that the payments Defendant made to Claimant to reimburse him for health insurance were significantly different in nature from the employer-paid health insurance premiums in question in *Lydy v. Trustaff, Inc*., 2013 VT 44. Thus, whether the $883.00 monthly payments must be included in Claimant's average weekly wage requires its own analysis.

[4] Although Claimant testified in his deposition that he used the money for health insurance, and I do not discredit his testimony, the fact remains that nothing prevented him or other similarly situated employees from using those payments for another purpose.

10. The statutory definition of "wages" includes "other advantages which can be estimated in money and which the employee receives from the employer as a part of his or her remuneration." 21 V.S.A. § 601(13). Claimant here received $883.00 per month with no restrictions on how he could use it. The value of that advantage can easily be estimated in money (namely, $883.00). Thus, the first part of the definition of wages has been met.

11. The second part of the definition requires that the "other advantages" be part of the remuneration that the employee receives from the employer. 21 V.S.A. § 601(13). In *Lydy*, the Court found that employer-paid health insurance premiums were a fringe benefit, rather than remuneration, in part because the definition of wages implies a payment actually received by the employee. 2013 VT 44, ¶ 12; *see also Haller v. Champlain College*, 2017 VT 86 (value of tuition-free college credits includable in average weekly wage because the value thereof was provided directly to the claimant, as distinguished from the employer-paid health insurance premiums in *Lydy*, which were paid to a third party). *Id.* ¶ 18.

12. Defendant here paid the additional $883.00 each month directly to Claimant, not to a third party. Thus, the payments provided a direct benefit to him, as was the case in *Haller*. Further, if Claimant were not receiving these payments, his regular wages would likely have been higher. Thus, I conclude that Defendant paid the extra $883.00 per month to Claimant as part of his remuneration.

13. For all these reasons, I conclude that the $883.00 monthly payments to Claimant met the definition of wages. *See* 21 V.S.A. § 601(13). Accordingly, the payments made in the 26 weeks prior to his injury are includable in his average weekly wage.

Binding Effect of the Approved Agreement for Temporary Compensation

14. Defendant next contends that the approved Agreement for Temporary Compensation may not be modified to revise the compensation rate because such agreements are binding on the parties absent fraud or mistake of fact, neither of which is present here.

15. The workers' compensation rules have long recognized the need for finality as a necessary component of any compensation agreement. Accordingly, the circumstances under which an approved agreement can be contested are limited. Rule 9.1420 provides:

> Once approved, a duly executed *Agreement for Temporary Compensation* constitutes a binding and enforceable contract. Absent evidence of fraud or material mistake of fact, the parties will be deemed to have waived their right to contest the material portions thereof.

16. Neither party here has alleged fraud as a basis for modification. Therefore, I consider whether a material mistake of fact allows Claimant to contest the compensation rate included in the parties' approved Agreement.

17. The Wage Statement sets forth monthly payments of $883.00 in the "Extras" column, and the column heading describes these payments as "Health Insurance." The employer-provided description "Health Insurance" in this context implies employer-paid health insurance premiums. However, the payments were not employer-paid health insurance premiums, but rather additional wages that Claimant could use without restriction. As such, they were includable in the average weekly wage calculation. *See* Conclusion of Law No. 13 *supra*.

18. In calculating Claimant's average weekly wage, the adjuster excluded the so-called "Health Insurance" payments from the calculation, as if they were employer-paid health insurance premiums. As a result, Claimant's total gross wages, average weekly wage and compensation rate were all calculated incorrectly. Defendant contends that there was no mistake of fact here, as the Wage Statement correctly set forth Claimant's earnings. Instead, Defendant contends that whether the earnings in the "Extras" column should have been included in the average weekly wage calculation is a question of law.

19. In *Liberty v. Town of Richmond,* Opinion No. 15-17WC (November 29, 2017), the Department had approved an Agreement for Temporary Compensation. The Wage Statement included three pay periods during which the claimant did not work but instead received paid leave. It also left blank the column in which the number of hours he worked during each pay period should have been indicated. Thus, the amounts set forth for the three pay periods at issue were erroneously included in the average weekly wage calculation.[5] If the "Hours Worked" column had been completed, the adjuster presumably would have recognized that the earnings for those periods were paid leave and would have excluded them from the calculation. The defendant in *Liberty* contended that the Wage Statement accurately set forth the claimant's earnings and there was accordingly no mistake of fact. Instead, it contended, the mistake was one of law, stemming from the failure to comprehend the legal consequences of the earnings so recorded.

20. The Commissioner in *Liberty* found that the omission of data from the "Hours Worked" column was a "critical factual omission" that led to the inaccurate calculation of the claimant's gross wages, average weekly wage and compensation rate. She concluded that these factual errors were mutual because, although either party could have discovered the true facts, neither one did. *Id.* at 7. The Commissioner therefore held that the erroneous calculation of the claimant's average weekly wage and compensation rate resulted from a mutual mistake of fact, not a mistake of law. *Id.*

21. The same analysis applies here. When Defendant completed the Wage Statement, it included the $883.00 payments and identified them as "Health Insurance." However, it did not indicate that the payments were made directly to the employee, nor did it indicate that they were not restricted to health insurance. Thus, the Wage Statement's "Extras" column omitted critical factual information, leading to the incorrect

[5] Weeks during which the injured worker did not work at all are excluded from the average weekly wage calculation, even if the worker received paid leave for those weeks. *See* Workers' Compensation Rule 8.1220.

calculations, as was the case in *Liberty*. Further, although either party could have discovered the true facts here, neither did. Thus, their mistake was mutual as well. *Liberty*, Opinion No. 15-17WC, at 7.

22. The mutual mistake of fact here affected a material term of the parties' Agreement for Temporary Compensation, namely the compensation rate. Therefore, for purposes of Defendant's partial summary judgment motion, I conclude that Claimant is not bound by the compensation rate set forth in the Agreement as a matter of law.[6]

ORDER:

Defendant's Motion for Partial Summary Judgment requesting a determination that the payments made directly to Claimant for his health insurance within the 26 weeks prior to his work injury were properly excluded from the calculation of his average weekly wage and compensation rate as a matter of law is hereby **DENIED**.

DATED at Montpelier, Vermont, this 9th day of May 2020.

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Michael A. Harrington
Interim Commissioner

[6] To correct the error, Claimant may request modification of the Agreement as provided in Rule 9.1420. *See Liberty v. Town of Richmond*, Opinion No. 15-17WC (November 29, 2017), citing *Maglin v. Tschannerl*, 174 Vt. 39, 45 (2002).