COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 33904-96**

David G. Saxton	Employee
Saxton Signcorp	Employer
Eastern Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Wilson and Levine)

APPEARANCES
James H. Tourtelotte, Esq., for the employee
Thomas M. Dillon, Esq., for the insurer

CARROLL, J. The insurer appeals from a decision in which an administrative judge awarded the employee ongoing partial incapacity benefits, without calculating the employee's income from an out-of-state company as part of his earning capacity. The insurer contends that the judge erred in failing to account for this income. For the reasons that follow, we disagree. We affirm the decision.

The employee injured his foot when he stepped on a long screw while working on August 21, 1996, resulting in a partial amputation of the foot. The employee worked for his family's sign company at the time. The employee still works part-time, in a restricted capacity, for the company, which sells, manufactures, installs and services large signs. (Dec. 2.) At the time of his injury, the employee's average weekly wage was $1,040.00. Since his return to work, he has earned $390.00 per week for generally overseeing the business. (Dec. 3.)

In addition to his sign business in Massachusetts, the employee is half-owner of another sign company in New York, which uses the employee's family name, Saxton. The name is well regarded in the sign industry. The employee does not do any day-to-day work for the New York company. He occasionally consults with the other owner – the real operator of the business – with regard to major purchases and additions. The New York company paid the employee an income of $35,800.00 in 1995, $20,800.00 in

1996, and $42,800.00 in 1997, which amounts were reported on Internal Revenue Service W-2 forms for those years. (Dec. 3.) The employee also reported Schedule E subchapter S income from the New York company. (Insurer's Exhibits 2-4.)

The judge found that the employee's income from the New York company was in the nature of a return on his investment, rather than earnings, and should not be considered in establishing earning capacity. The judge found that, "[w]hat little work he did was in the nature of managing his investment, rather than a true measure of a work capacity in the open labor market. That work capacity was better demonstrated through his day to day work in the Massachusetts company . . . ." (Dec. 5.) As such, the judge concluded that the employee's $390.00 per week salary from the employer in Massachusetts was "a good faith estimate of the value of the work he now does for the company." (Dec. 6.) The judge therefore awarded the employee § 35 partial incapacity benefits, based on those actual earnings as the weekly earning capacity, and the $1,040.00 average weekly wage. (Dec. 7.) See § 35D(1).[1]

The insurer contends that the judge erred by ignoring the amounts listed on the W-2 forms from the New York company in his assessment of the employee's earning capacity. The insurer argues that those amounts were reported to the Internal Revenue Service as "wages" and must therefore be counted as part of the employee's post-injury earning capacity as "actual wages" under § 35D(1). We do not agree.

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[1] General Laws c. 152, § 35D (St. 1991, c. 398, § 65) provides, in pertinent part:

> For the purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:--
>
> (1) The actual earnings of the employee during each week.

The insurer is correct as to the error in the judge's citation to Plante v. Garelick Farms, 3 Mass. Workers' Comp. Rep. 48 (1989), for the proposition that the actual earnings of an employee may be disregarded in earning capacity analyses. Section 35D legislatively overruled that proposition, which had been stated in Sjoberg's Case, 394 Mass. 458 (1985). Nonetheless, the error is harmless in light of the judge's other findings of fact regarding the lack of practically any involvement on the part of the employee in the New York company.

The judge found that the New York company did not pay the employee wages for services rendered, and that the amounts paid as "wages" in the W-2 forms were essentially a return on the employee's investment of money and his family name. (Dec. 5; Tr. 22-29.) We cannot say, as a matter of law, that the judge was wrong in so finding, given the evidence of the minimal services provided by the employee to that company. The reported W-2 income simply did not reflect an actual earning capacity. (Dec. 4.) See Tehle v. Alpine Plumbing, 835 P.2d 1, 2 (Mont. 1992)(recognizing distinction between wages and income from profits, court declined to count post-injury income from employee's company toward earning capacity, where he performed only minor duties); Joy Technologies v. Workmen's Compensation Appeal Bd., 624 A.2d 710, 712 (Pa. Cmwlth. 1993) (court ruled that profits from family owned company, which "were not derived almost entirely as the *direct result* of Claimant's personal management and endeavor[,]" did not constitute "earnings" within the meaning of that commonwealth's Act; emphasis in original).

The fact that the income was characterized as "wages" for purposes of the Internal Revenue Service is not controlling. Harvey Auto Supply Inc. v. Indus. Comm'n., 25 Ariz. App. 274, 542 P.2d 1154, 1156 (1976)("Workmen's compensation laws are not controlled by the Internal Revenue Code's standards for reporting income"); Hobbs v. Indus. Comm'n., 23 Ariz. App. 422, 533 P.2d 1159, 1161 (1975) (recognizing "independence of workmen's compensation statutes from the provisions of other unrelated laws"; in that case, the Internal Revenue Code). See Federico's Case, 283 Mass. 430, 432-433 (1933)(characterization of income "by whatever name [the employee's] earnings may be described" was immaterial to earning capacity assessment where such amounts did not arise from his ability to earn); Seymour's Case, 6 Mass. App. Ct. 935 (1978)(ignoring use of word, "salary," the court advised that board on remand for earning capacity reexamination must look at evidence that "payments were not made by reason of any services performed by" the employee).

The insurer contends that Dawson v. Captain Parker Pub, 11 Mass. Workers' Comp. Rep. 84 (1997), is controlling. That case is distinguishable. Dawson concerned a

bartender's failure to report tip income to his employer and the I.R.S. We concluded that *the employee's failure to report the tip income* equitably barred its inclusion in his average weekly wages. Id. at 87. We harmonized our approach under c. 152 with the exclusion of unreported tips under the provisions of G.L. c. 151A for unemployment compensation. Id. at 86-87. We have declined to apply the Dawson construction beyond its particular application to unreported tip income. See Fitzgerald v. Special Care Nursing Service, 13 Mass. Workers' Comp. Rep. 332, 335 (1999). We note that unlike the employee in Dawson, the employee in the present case does not have unclean hands. Finally – and most importantly – Dawson is inapposite to the present case because the employee's average weekly wages are not the issue here. The analysis necessary for the determination of pre-injury average weekly wage is simply not interchangeable with the calculation of post-injury earning capacity. Compare Letteney's Case, 429 Mass. 280 (1999)(closed system of workers' compensation does not allow for inclusion of income from self-employment or out-of-state employment in average weekly wage) with Federico's Case, supra at 432 (1933) (earning capacity "include[s] the whole monetary result of a reasonable use of all [the employee's] powers, mental and physical, whether working for others or for himself, and whether his earnings are called 'wages' in common speech or not").[2]

The judge's conclusion that the employee's income listed on his W-2 forms was not in the nature of "actual earnings" under § 35D(1) was well within his particular authority as the finder of facts regarding earning capacity. See Mendes v. Percor, Inc., 12 Mass. Workers' Comp. Rep. 487, 490 (1998); Trant's Case, 21 Mass. App. Ct. 983, 984 (1986). We defer to that authority, and therefore the decision is affirmed.

The insurer shall pay an attorney's fee of $1,243.38.

So ordered.

[2] The judge's citation to Letteney, supra, as pertinent to the earning capacity issue in the present case, is another instance of harmless error.

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Martine Carroll
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

MC/jdm
Filed: February 26, 2001