COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 055840-98**

Sally A. McIntyre	Employee
Seymour H. Andrus, DMD, PC	Employer
Eastern Casualty	Insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, McCarthy and Wilson)

APPEARANCES
Charles E. Chase, Esq. for the employee
William E. Holtz, Esq., for the insurer

MAZE-ROTHSTEIN, J. The insurer appeals a decision that awarded the employee workers' compensation benefits based on an average weekly wage that included biweekly amounts paid "under the table." Because we reject the insurer's argument that our decision in Dawson v. Captain Parker Pub, 11 Mass. Workers' Comp. Rep. 84 (1997), is controlling, we affirm the decision.

The judge's findings relevant to the average weekly wage follow:

> Sally McIntyre, age 47, worked for 29 years as a dental hygienist for Seymour A. Andrus, DMD. At issue is whether the additional bi-weekly stipend which he regularly paid to her over a fifteen year period, in addition to her weekly paycheck, should be included in her average weekly wage. At the time of her accepted injury the additional payments totaled $3380.00 per year or $129.00 every two weeks, which would raise the weekly wage by $64.50 weekly. While adding this sum to the wage figure asserted by the insurer would raise the wage from $851.54 to $916.04, I note that the employee argues the $916.54 is the correct wage figure. The fifty-cent weekly difference in the calculations of the parties is noted, and the lower figure will be utilized for purposes of analysis in this decision.
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> It was Dr. Andrus who set up the process of paying his hygienist a regular, additional sum separate from her gross weekly pay. Over the years, as she received periodic pay increases, the dentist raised both her salary and the

> supplemental stipend. Each year he prepared a W2 [sic] form for his employee, which did not include these additional payments. This was his choice. The dentist treated the additional check as a business expense for purposes of his accounting. The employee did not in fact have to resort to this money to pay for such expenses as her hygienist uniforms, since the dentist additionally gave her the office credit card to use to pay for her uniforms. If she undertook continuing education courses the dentist also paid those expenses over and above the $129.00 bi-weekly stipend. There was no submission by her of receipts for expenses. The extra $129.00 bi-weekly check was money that went into the employee's pocket, and she was not actually expected to use the money to pay for hygienist-related expenses. She did not pay taxes on the sums received bi-weekly.
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> When the effects of the work injury forced her to work part time, the dentist continued to pay her the supplemental stipend, pro-rated to reflect her reduced hours of work. Again, there was no relationship between the extra payment and any actual expenses incurred by her. The stipend reflected her regular weekly check in relation to hours worked, without regard to any actual business expenses incurred.

(Dec. 2-4.)

Based on these subsidiary facts, the judge concluded that "it would not be accurate to characterize the employee's bi-weekly stipend as reimbursement. . . . This bi-weekly payment really constitutes an additional form of her pay. It was an allowance, which was paid to her consistently, and without regard to actual expenses incurred." (Dec. 4.) Distinguishing Dawson v. Captain Parker's Pub, supra, which held that an employee's omission to report tip income to his employer and the Internal Revenue Service excluded that income from the average weekly wage calculus, id. at 87, the judge aptly observed: "When employers pay employees 'under the table' and taxes are neither withheld by the employer nor paid by the injured employee, there is no statutory disqualification from receiving compensation benefits. The failure of an employee to pay taxes on other than tip income does not bar the inclusion of such non-tip income in calculation of average weekly wage. . . ." (Dec. 5-6.)

We agree with the judge that the case is governed by Fitzgerald v. Special Care Nursing Services, 13 Mass. Workers' Comp. Rep. 332 (1999). Dawson, which relates to unreported tip income is inapposite. In Fitzgerald, we first determined that the

employee's travel allowance at issue there – like the stipend here – was not reimbursement, rather it was extra remuneration that constituted real economic gain includable in average weekly wage. Id. at 334. See also Saxton v. Saxton Signcorp., 15 Mass. Workers' Comp. Rep. 84, 87 (2001)(noting the equitable consideration of the employee's unclean hands in Dawson not present in that case).

The insurer contends that the distinction between tip income and other sources of "under the table" income noted by the judge here, and us in prior cases, is arbitrary, capricious and contrary to law. The assertion overlooks the fact that the unreported income encountered here, as in Fitzgerald or Saxton, is distinguished from tip income because the latter form of pay is the only employee income that requires regular reporting to the employer. Entirely unlike the stipend paid in the present case, the employer can not know the amount of cash tip income, unless the employee herself reports it. In fact, a "special rule for tips" in 26 U.S.C. § 3102(c), governing employers' obligations for paying contributions to Social Security, contemplates and addresses this very distinction:

> (1) In the case of tips which constitute wages, subsection (a) [requiring employer to deduct employee's share of Social Security contribution from wages] shall be applicable only to such tips as are included in a written statement furnished to the employer pursuant to section 6053(a), and only to the extent that collection can be made by the employer, at or after the time such statement is so furnished and before the close of the 10th day following the calendar month. . . in which the tips were deemed paid, by deducting the amount of the tax from the wages of the employee . . . as are under control of the employer.

Herein lies the rationale for our analogous "special rule of tips" drawn from the unemployment compensation exemption, G. L. c. 151A, § 1(s)(A)(6), that we applied in Dawson to create a consistent and harmonious statutory provision. See Walsh v. Commissioners of Civil Service, 300 Mass. 244, 246 (1938); Devaney's Case, 223 Mass. 270, 271 (1916)("To ascertain its true construction the statute under consideration may be read in connection to" related and referenced statutes). Plainly, because the employer has no control over the employee's reporting of tip income, it should not later be accountable for any unreported amounts in the employee's average weekly wage. Conversely where,

as here, the employee and employer are *in pari delicto* on "under the table" payments there is no reason to penalize the employee for the employer's own illegal payroll system.

More fundamentally, beyond this *in pari delicto* rationale, "under the table" wages paid by an employer – like those here – are included in § 1(1) "average weekly wages" because they are part of that most elemental work relationship, the "contract of hire, express or implied, oral or written," otherwise known as the employee and employer relationship. G. L. c. 152 § 1(4). Thus, reading § 1(1) consistently with § 1(4) (as we must), we reach the same conclusion. While the employee's right to receive tips is also a part of the contract of hire, it is entirely the employee's voluntary disclosure of those receipts (at least those received in cash) that brings such earnings into that contract. Unlike the employer's sole obligation to pay Social Security taxes, see David v. United States, 551 F. Supp. 850 (D.C. Cal. 1982), the employer bears no responsibility for the employee's report of tip income. Therefore, unlike "under the table" payments, the exact tip amounts cannot reasonably be seen as part of the contract of hire between the two -- absent employee reporting. See also Brambila v. Chase-Walton Elastomers, Inc., 11 Mass. Workers' Comp. Rep. 410, 413-415 (1997)(illegal alien status does not invalidate or void § 1(4) contract for hire).

Finally, we address the closely related issue of whether a different section of G. L. c. 151A, § 1(s)(A), bears on this case. In Barofsky's Case, 4 Mass. Workers' Comp. Rep. 135 (1990), *aff'd* 411 Mass. 37 (1991), and later in Dawson, supra, we recognized that the benefit schemes under §§ 151A and 152 need to be interpreted in a manner that produces an harmonious and consistent body of employment-related legislation. We noted how the G. L. c. 152, § 1, definition of "average weekly wages" incorporates the G. L. c. 151A, § 29(a), "average weekly wage in the commonwealth" concept as a foundation to borrow generally from the definition of "wages" under G. L. c. 151A, § 1(s)(A). That latter section itemizes several exclusions from "wages" for the purpose of computing unemployment compensation benefits. Notable here is the meaning and relevance of the § 1(s)(A)(4) exclusion. General Laws c. 151A, § 1(s)(A), provides that

> wages, every form of remuneration of an employee subject to [c. 151A] for employment by an employer . . . shall not include:
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> . . .
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> (4) The payment by an employer without deduction from the remuneration of the employee of the tax imposed upon an employee under section 3101 of the Federal Internal Revenue Code, of any acts in addition thereto and amendments thereof.

Query: Does subsection (4) dictate that no unemployment benefits are due for *any* wages paid "under the table?" If so, Barofsky would counsel that we do the same under c 152. The answer, however, is a resounding "No."

We start by examining the syntax of the provision that would be necessary to support a construction that any wages – from which the § 3101 Social Security and Medicare deduction is not made by the employer – are excluded from the calculation of unemployment benefits. Such an interpretation would require the interplay of two necessary inferences. First the language, "without deduction from the remuneration of the employee of the tax imposed upon an employee under section 3101 . . .," is one clause. This clause would describe the nature of the "under the table" method of payment, i.e., Social Security and Medicare taxes are not being taken out of the employee's remuneration, as they should be. What is then left of the provision is strictly the object of the introductory, "Wages . . . shall not include," "*[t]he payment by an employer."* G. L. c. 151A, § 1(s)(A)(4). That object is left without a description or classification as to exactly *what* that employer is paying, because – as we have seen – the entire remainder of the provision is one clause. Thus, to arrive at a construction excluding all wages that lack payment of § 3101 Federal Internal Revenue taxes, the final clause, "[t]he payment by an employer," must also mean "wages." Ultimately, the statute must awkwardly be read as, "wages" from which Social Security and Medicare deductions are not taken do not constitute "wages" for the purpose of calculating unemployment benefits.

Besides the awkwardness of reading "the payment by the employer" as "wages," we find in the history of the provision conclusive proof that this interpretation was never intended by the Legislature, in any event. Before an amendment in 1990, St. 1990, c. 154, § 5 – which, in pertinent part, merely changed the section number of the reference to the Federal Internal Revenue Code – the provision had read, since the inception of the unemployment security act in 1941, as follows:

> The payment by an employer *(without deduction from the remuneration of the employee)* of the tax imposed upon an employee under section fourteen hundred of the Federal Internal Revenue Code . . . .

St. 1941, c. 685, § 1 (emphasis added).

So there we have it. "The payment by an employer" is "of the tax", it does not mean "wages" in general. It is the payment of the employee's part of Social Security and Medicare, which should be deducted, that is not to be considered "wages" if it is not so deducted. The fact that the Legislature dropped the parentheses in 1990 cannot reasonably be seen as changing the clear meaning of the provision as it stood, in to something entirely different. It is most likely a scrivener's error.

We conclude with an observation. We cannot see anywhere within c. 152 a wholesale policy to bar benefits to an employee in the event of an *employer's* deviation from lawful withholding and payment of Social Security and Medicare. With the exception of tip income, the proper handling of the employee's share of those assessments is entirely a matter of the employer's obligation. Morales v. U.S., 805 F. Supp. 1062 (D.P.R. 1992). "Both the workmen's compensation act, designed to relieve hardships experienced by employees injured while engaged in the performance of their work, and the employment security act, aimed at alleviating the harmful consequences to workmen resulting from times of business depression, are different and distinct parts of a general statutory plan adopted by the Legislature for the enhancement of the public welfare. Both acts must be construed as harmonious and consistent parts of the general plan." Pierce's Case, 325 Mass. 649, 656 (1950). We find nothing in either act to place priority on the fulfillment of the employer's obligations under §§ 3101 and 3102 of the

Federal Internal Revenue Code, over the welfare of injured or unemployed employees. Even if the statutory evidence were not as conclusive as it is, we would not so create such a policy, in the absence the Legislature's clear pronouncement on the matter.

Accordingly, as the administrative judge deftly stated:

> An employer should fully report payroll data to its insurer; should prepare accurate W2 [sic] forms for state and federal revenue collectors; and should pay taxes lawfully due. Workers should pay taxes. But the failure on the part of either party to pay due taxes is not the determinative factor in whether workers' compensation benefits are due.

(Dec. 5.) We affirm the decision.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: June 10, 2002

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Sara Holmes Wilson
Administrative Law Judge