COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 033904-16**

Brendan Ryan	Employee
GES Boston	Employer
Hartford Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

This case was heard by Administrative Judge Bean

APPEARANCES
Brian C. Cloherty, Esq., for the employee
Daniel W. Gracey, Esq., for the insurer

CALLIOTTE, J. The employee appeals from a decision ordering the insurer to pay ongoing §35 benefits, arguing that the judge's average weekly wage calculation was erroneous. Because the judge did not make sufficient findings for us to "determine with reasonable certainty" whether he applied "correct rules of law" to "facts that could be properly found," Praetz v. Factory Mut. Eng'g. and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993), we recommit the case for further findings on the issue of average weekly wage.

The employee, age fifty-seven at the time of hearing, suffered an industrial injury on December 8, 2016, when he fell off the back of a tractor trailer, striking his head, left shoulder and back. He has not returned to work. (Dec. 641.) The insurer accepted liability and paid § 34 benefits from the date of injury. On or about January 22, 2018, the insurer filed a complaint to modify or discontinue the employee's benefits, which is the subject of this appeal. The judge denied the insurer's complaint after a § 10A conference, and the insurer appealed. (Dec. 640.) See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of documents in board file). Following a § 11 hearing, the judge found the employee was

totally incapacitated until May 11, 2019, and partially incapacitated thereafter. (Dec. 643.)

We recount only the judge's findings impacting his average weekly wage determination, as that is the only issue on appeal. With respect to the employee's work history and earnings, the judge found as follows:

> He worked as a union laborer/truck driver for several companies through the years, often for more than one company in a year. He has been a member of the Teamsters Union since 1979, earning his first pension hours in 1983. He now has 13 years of service toward his Teamsters' pension. . . . He was employed in the trade show division of the union beginning in 1989. He has worked for GES Boston, the employer in this matter, as a truck driver and laborer assembling and breaking down trade show booths from 1990 to 2016. He worked for other companies when GES did not have work for him. In the year before his industrial accident he worked for GES and four other companies. He made $64,218.54 in that year. His W-2 Form from GES showed that he made $37,831.42 for [sic] them in 2016. In 24 of the weeks that year he did not work.

(Dec. 640.)[1] The judge found the employee was capable of sedentary or light work, earning minimum wage, for 20 hours per week, or $220 per week, beginning on May 11, 2019, the date Dr. James Nairus examined him at the request of the insurer. (Dec. 642-643.)

Addressing the employee's average weekly wage and compensation rate, the judge found as follows:

> The parties did not stipulate to an average weekly wage. The employee's 2016 W-2 form from the employer was submitted, but this contained only his

[1] The employee's testimony (Tr. 16, 17-18) and Exhibit 7 actually indicate the employee worked for GES and three other employers, rather than four, during the year prior to his injury.

In addition, we note that there are several places in the record where the employer is listed as "Viad" rather than "GES." See e.g., Exhibit 1, Employee's biographical data sheet; Exhibit 2, Insurer's issues sheet; Insurer's complaint for modification. However, the employer is listed as GES on the conference memorandum and conference order, and the W-2 submitted is from GES. (Exh. 7.) In addition to testifying that he worked for GES, (Tr. 15-18), the employee agreed when his attorney asked if he "worked for a company . . . called Viad. GES." (Tr. 14.) Neither party has pointed out any inconsistency in the employer name, but we mention it here so that it may be clarified on recommittal.

> earnings from the employer. The employee testified credibly that he worked for four other companies in the year before his industrial accident. During that year, he earned $64,218.54, yielding an average weekly wage of $1[,]234.97. Although I have found only a $220 weekly earning capacity, in accordance with § 35 the employee will be able to earn up to $308.74 before incurring a reduction in his § 35 weekly compensation benefits.

(Dec. 643.) Accordingly, based on an average weekly wage of $1,234.97, the judge found the employee entitled to § 34 benefits until May 11, 2019, and § 35 benefits of $555.74 thereafter.[2] (Dec. 643.)

On appeal, the employee does not challenge the judge's determination that his wages from all of his union jobs in the year before he was injured be used as the basis for his average weekly wage. The employee's sole argument is that the judge erred in determining his average weekly wage by dividing his earnings of $64,218.54 by 52 weeks, rather than by 28 weeks. The employee contends the judge should have considered the 24 weeks the judge found he did not work as "time lost" under the provision of G.L. c. 152, § 1(1).[3] Doing so would require that the employee's earnings in

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[2] General Laws c. 152, § 35 provides that, during each week of partial incapacity,

> [T]he insurer shall pay the injured employee a weekly compensation equal to sixty percent of the difference between his or her average weekly wage before the injury and the weekly wage he or she is capable of earning after the injury, but not more than seventy-five percent of what such employee would receive if he or she were eligible for total incapacity benefits under section thirty-four.

Here, based on the $1,234.97 average weekly wage found by the judge, the employee's § 34 rate would be $740.98. Accordingly, the maximum § 35 rate he could receive would be 75% of $740.98, or $555.74, as the judge found.

[3] General Laws c. 152, § 1(1), provides, in pertinent part:

> "Average weekly wages", the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two, but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the

the prior year be divided by 28, which was the number of weeks he actually worked, yielding a higher average weekly wage of $2,293.52, a § 34 rate of $1,244.11, and a weekly § 35 rate of $968.80. (Employee br. 6-7.)

The insurer does not take issue with the judge's use of $64,218.54, as the basis for the employee's average weekly wage, but responds that the 24 weeks the employee did not work in the year prior to his accident should not be considered "time lost" because the employee was free to work for other employers during those weeks, as evidenced by the fact that he worked for several different employers in that year. In support of its argument, the insurer cites Herbst's Case, 416 Mass. 648 (1993), where the court held that a teacher's thirteen-week summer vacation should not count as "time lost," as the employee was not prevented from working elsewhere during that time period. Id. at 650. The insurer also relies on Stone v. All Seasons Painting & Decorating, 28 Mass. Workers' Comp. Rep. 137 (2014), in which we held that one factor to consider in determining whether the employee's yearly wages should be divided by 52 or by the number of weeks actually worked is whether the employee's work was expected to be "continuous" (which would indicate division of earnings by the number of weeks worked). Here, the insurer argues the employee's testimony indicates that his assignments were irregular, that he would be assigned to various employers, and that he would often collect unemployment in between assignments, making his work not continuous and his earnings divisible by 52 weeks.[4] (Insurer br. 3.) Finally, the insurer argues that dividing the employee's total earnings over the year by the number of weeks

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> average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work, by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

[4] We have found no testimony or other evidence, nor is any specifically cited by the insurer, that the employee received unemployment benefits when he was not working during the year prior to the accident.

he actually worked would fly in the face of " '[t]he entire objective of wage calculation' " which " ' is to arrive at a fair approximation of the claimant's probable future earning capacity.' " Gunderson's Case, 423 Mass. 642, 645 (1996). Ultimately, the insurer urges that we affirm the judge's decision.[5] We agree with the employee to the extent he argues that the case must be recommitted for the judge to make further findings, as those he made are insufficient for us to determine whether he applied the law correctly. Praetz, supra.

The employee's contention on appeal is that the 24 weeks he did not work should be considered "time lost," and excluded from the calculation of his average weekly wage.[6] "The amount of the average weekly wage of an employee is a question of fact." More's Case, 3 Mass. App. Ct. 715 (1975); Stone, supra at 139. If the judge is unable to use one of the statutory methods of determining average weekly wage prescribed in § 1(1), he may use an alternative "common-sense method." Stone, supra; Carnute v. Stockbridge Golf Club, Inc., 17 Mass. Workers' Comp. Rep. 214, 219 (2007).

The problem with the judge's decision, is that he did not make sufficient findings for us to determine the factors upon which he relied in making his average weekly wage determination. Although he used the employee's total earnings for the year before the

[5] The insurer states, in the last paragraph of its brief, that "division by the number of weeks actually worked provides a very fair approximation of future earning capacity as it lines up perfectly with what he actually earned on an ordinary year of employment." (Insurer br. 4.) He then urges that we affirm the decision. We understand the quoted sentence to be an error, given the entirety of the insurer's argument.

[6] There appears to be some inconsistency between the employee's testimony and the documentary evidence. The employee's 2016 W-2 forms, (Exh. 7), reveal that he earned $64,218.54 in 2016, not in the 52 weeks prior to his injury, as 3.3 weeks from 2015 are missing from those documents. The employee's testimony about the jobs he worked in "the last year I worked," corresponded to the 2016 calendar year, (Tr. 16), without addressing the 3.3 weeks in 2015. When the employee further testified that he did not work for 24 *of the prior 52 weeks*, he necessarily implied that the missing 3.3 weeks of 2015, produced no wages and that the remaining 20.7 weeks were missed during the calendar year 2016. (Tr. 20.) The employee's argument on appeal is consistent with this interpretation as he asks to have his average weekly wage determined on the basis of 28 weeks worked during the 52 weeks prior to the injury.

injury as a basis for determining average weekly wage and credited the employee's testimony as to how he obtained his union jobs,[7] as well as his testimony that he did not work 24 weeks of the year, the judge did not explain what factors led him to conclude the "time lost" exception did not apply here. Indeed, in Duran v. William Walsh, Inc., 22 Mass. Workers' Comp. Rep. 67 (2008), we approved using a union employee's total earnings from several employers over the year and dividing those earnings by the number of weeks the employee actually worked to determine the employee's average weekly wage. There, it was the trade practice for the employee, a union mover, to call various moving companies each day to determine whether they would need his services. He would continue calling until he found work or there was no work on that particular day. During the 52 weeks prior to his injury, Duran primarily worked for the employer, but also worked for other insured moving companies, working a total of 42 out of 52 weeks. Relying on Gillen's Case, 215 Mass. 96 (1913), the judge concluded that the employee's wages from all of his moving jobs in the twelve months prior to his injury were to be included in the average weekly wage calculation. Further, he concluded that the ten weeks the employee did not work were "time lost" under § 1(1), and should not be considered in that calculation. Accordingly, he divided the employee's prior twelve-month earnings by 42 weeks. Duran, supra at 67-68.

Although there may be factors that would support the judge's decision to exclude the 24 weeks the employee did not work from the "time lost" exception, we do not know what facts the judge found determinative. "[W]e should be able to look at [the judge's] subsidiary findings of fact and clearly understand the logic behind [his] ultimate conclusion." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 5 (1993). Here we cannot.

[7] The employee testified that, if GES did not have a show, he would call the union hall and put his name in the hat. The labor call would come out that afternoon for the next day, and he would check the list to see if work was available for him. (Tr. 16, 17.)

Accordingly, we recommit the case for the judge to make further findings so that we may "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz, supra.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

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