COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 060353-92**

Carl Lozowski	Employee
C.H. Sweeney & Sons, Inc.	Employer
Travelers Insurance Company	Insurer

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

APPEARANCES
Frank J. Ciano, Esq., for the employee
Terence P. Reilly, Esq., for the insurer

WILSON, J. The employee appeals from a recommittal decision in which an administrative judge denied his claim for an average weekly wage based on the "prevailing wage" for public works projects set by the Commissioner for Labor and Workforce Development under G. L. c. 149, §§ 26 and 27. We affirm the decision.

The employee's injury occurred while working on the construction of the MassPort-financed Hyatt Harborside Hotel at Logan Airport on November 2, 1992. See Lozowski v. Sweeney & Sons, Inc., 13 Mass. Workers Comp. Rep. 454 (1999). In Lozowski, id., the reviewing board ordered that the case be recommitted for the administrative judge to mark exhibits to clarify the record and then return the case to us for review of the denial of the employee's claim for an average weekly wage based on the "prevailing wage" under G. L. c. 149, §§ 26 and 27. The judge on recommittal responded:

> Pursuant to the Reviewing Board remand decision in this matter I find as follows.
>
> The Exhibits now marked as *Employee Exhibit #2 through Employee Exhibit #6 respectively*, have been carefully reviewed by me.
>
> Specifically the document identified as *Ground lease for Phase C of the Bird Island Flats development by and between Massachusetts Port Authority and Logan Harborside Associates Limited Partnership.*

That document clearly states in Article 3 that "all contracts for construction on the Leased Premises shall require the Tenant's contractors and their subcontractors to pay the prevailing level of wages as established by the Commonwealth of Massachusetts Department of Labor and Industries . . ." (*Employee Exhibit #3, page 17).*

The correspondence marked as *Employee Exhibit #4* indicates that the Massachusetts Department of Labor and Workforce Development representative did a ". . .thorough review of our database indicates that no prevailing wage schedule was issued by DOS [Division of Occupational Safety of the Department of Labor and Workforce Development, formerly Labor & Industries] to MassPort specifically for the construction of the Harborside Hotel in Fiscal year 1990, 1991 or 1992. Please be aware that DOS routinely issued prevailing wage schedules to MassPort for various public works construction projects during that same period but there is no indication that a prevailing wage schedule was issued for the construction of the Harborside Hotel."

The correspondence goes on to state that ". . .this letter should not be construed as a statement that DOS takes the position that the construction of the Harborside Hotel was subject to the prevailing wage law (See M.G.L. c. 149, ss. 26-27D). However, as we discussed, parties to a *non-public works construction project* (italics mine) may include provisions stipulating to the payment of prevailing wage rates as determined by this office."

I have carefully considered the remaining documents submitted by the parties and marked in evidence.

Based on the above Additional Subsidiary Findings of Fact, I further find as follows:

I find that while parties may include provisions stipulating to the payment of prevailing wage rates in a construction project, that stipulation alone does not then make that contract subject to the prevailing wage law. (M.G.L. c. 149).

I further find that no prevailing wage schedule was issued by the Division of Occupational Safety for the construction of the Harborside Hotel project in fiscal years 1990, 1991 and 1992.

(Dec. 6-7, emphasis in original.)

The employee contends on appeal that the prevailing wage should have been applied to the average weekly wages calculation simply because the general contractor and employer/subcontractor agreed that it would. That is not the case. A predicate for the application of the prevailing wage under G. L. c. 149, §§ 26 and 27, is the establishment of the prevailing wage for the subject project by the Commissioner of Labor and Workforce Development.

> The scheme of G. L. c. 149, § 27, quite clearly requires that the commissioner set wage rates for *each* public works job. Any time that any public official or public agency plans to award a public works contract, the commissioner will set the wage rates applicable to *that project*. Rather than being a requirement of general application, we think the rate determinations required of the commissioner are very specific in application. Even though the commissioner refers to the same Statewide collective bargaining agreement each time he sets rates for teamsters on a public works project [for example], he sets rates for each job on each project separately.

Construction Indus. of Mass. v. Commissioner of Labor & Industries, 406 Mass. 162, 170 (1989)(emphases in original). "There is nothing in the [evidence] to suggest that any rate of wages had been established 'by collective agreements or understandings between organized labor and employers' in the city where the work was performed." Staples Coal Co. v. Ucello, 333 Mass. 464, 468 (1956). It was for this reason that the Ucello court denied in dicta that the prevailing wage law would apply to the construction project there at issue. Id. The evidence in this case, in fact, effectively operates *against* the application of the prevailing wage. Employee's Exhibit #4 states unequivocally that no such wage schedule was ever established for the Harborside Hotel project. Under these circumstances, the employee's claim for the c. 149 prevailing wage cannot stand. See Marino v. Commissioner of Labor and Industries, 426 Mass. 458, 460-461 (1998).

Given our disposition of the prevailing wage issue on the basis of the foregoing discussion, we need not address whether the Hyatt Harborside Hotel project qualified as a "public work" under c. 149.

We summarily affirm the decision with regard to the employee's contention that the judge otherwise committed error in calculating his average weekly wages under G. L. c. 152, § 1(1).

The decision is affirmed.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **August 28, 2002**

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Susan Maze-Rothstein
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge