COMMONWEALTH OF MASSACHUSETTS

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

Carl Lozowski	Employee
Sweeney & Sons, Inc.	Employer
Travelers Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

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

WILSON, J. The employee appeals from a decision in which the administrative judge denied his claim for permanent and total incapacity benefits, and awarded partial incapacity benefits based on an average weekly wage that the employee contends was miscalculated. We summarily affirm the decision as to the employee's appeal from the judge's conclusion that he was not entitled to § 34A permanent and total incapacity benefits. The employee contends that the judge erred by failing to assign his average weekly wage in accordance with the "prevailing wage" provisions of G.L. c. 149, § 26, governing "public works" construction projects. See McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285, 288-289 (1997). However, because we cannot tell from the decision what documents the judge considered in reaching his decision to deny the employee's claim for a higher average weekly wage, we must recommit the case for clarification of the record. Only after all of the documents considered by the judge have been marked and identified on the record will the prevailing wage issue be ready for appellate review.

The employee was injured on November 2, 1992, while working on the construction of the Hyatt Hotel at Logan Airport in Boston. (Dec. 4.) The parties

submitted writings relevant to the prevailing wage issue following the close of testimony on the employee's § 34A claim, which hearing took place on October 29, 1996. (Dec. 2, 17.) The judge reported in his decision that "[t]hose writings along with the parties' closing arguments are incorporated in the record of these proceedings by reference." (Dec. 17.) The only exhibits relevant to the issue that are identified in the decision are the Mass Port Authority Enabling Act (Employee Ex. A for Identification) and a document entitled Mass Port Authority Special Project Revenue Bonds (Employee Ex. B for Identification). (Dec. 1-2.) The judge concluded that "there is insufficient evidence to determine whether the job the Employee was working on, on the date of injury, in this matter was, in fact, a 'public work' pursuant to MGL Ch. 149[,]" thereby qualifying the employee for the "prevailing wage" calculation of his average weekly wage.[1] (Dec. 18.) We are left with no way of knowing what documents the judge considered to reach that conclusion. As we have pointed out before:

> All evidence considered by the administrative judge must be properly identified, not only to provide the parties an opportunity to challenge such evidence but also to establish an accurate and complete record in the event of an appeal. Castillo v. Arthur Blank & Co., 4 Mass. Workers' Comp. Rep. 110 (1990). Therefore . . . on recommittal, the judge should clearly identify any documents offered by the parties and marked as exhibits and considered by him in reaching his conclusions . . . .

Rossi v. M.W.R.A., 7 Mass. Workers' Comp. Rep. 101, 102 (1993). See also Reis v. Anchor Motor Freight Inc., 9 Mass. Workers' Comp. Rep. 82, 85 (1995)("Offered exhibits must be admitted or excluded by rulings which are disclosed."); Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 680 (1997). Accord Fitzsimmons v. Sigma Instruments, 7 Mass. Workers' Comp. Rep. 12, 14 (1993)("A

[1] The judge also concluded: "I further find that I do not have jurisdiction to make that determination[,]" i.e. the c. 149 inquiry. (Dec. 18.) This statement is error and cannot stand. General Laws c. 152, § 1(1), brings the prevailing wage question under c. 149 within this agency's jurisdiction*: "Except as provided by sections twenty-six and twenty-seven of chapter one hundred forty-nine,* such fringe benefits as health insurance plans . . . shall not be included in employee earnings for the purpose of calculating average weekly wages under this section." (Emphasis added).

hearing must be conducted in a manner that allows an appellate body to know on what evidence the judge based his findings of fact and rulings of law.").

Accordingly, we recommit the case for the judge to mark and list in the decision the documents (or portions thereof) he relied upon in reaching his conclusion that the employee was not entitled to a prevailing wage under G.L. c. 149, § 26, after considering such objections to the proffered documents as the parties may register. Only then will the decision be reviewable. When the record is complete, the administrative judge shall return the case to us for our decision on the merits of the appeal. See Fitzsimmons, supra at 16.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: December 21, 1999

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William A. McCarthy
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge