COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **Board No.** 023387-06

Charles Donovan	Employee
Town of Brewster	Employer
MIIA Workers' Compensation SIG	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Costigan and Fabricant)

The case was heard by Administrative Judge Brendemuehl.

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on brief
Teresa Brooks Benoit, Esq., for the employee at oral argument
Donald E. Wallace, Esq., for the insurer

McCARTHY, J. The single issue the employee raises on appeal is whether the administrative judge erred by refusing to include the value of his employer-provided golf privileges in the calculation of his average weekly wage. For the following reasons, we affirm the judge's decision.

In April 2006, the employee, then age seventy-one and a retired teacher, began working approximately ten to twelve hours per week at the town-owned Captain's Golf Course in Brewster, Massachusetts, earning $9.71 per hour. (Dec. 4.) On August 6, 2006, while in the course of his employment, the employee was struck in the face and left eye by a golf ball. He eventually required surgery on his eye, and remained out from work until April 2007. At the time of the hearing, he continued to work for the employer on a part-time seasonal basis.[1] (Dec. 6.)

[1] At hearing, the employee attempted to raise as an issue the effect of seasonal employment on the calculation of his average weekly wage, but the judge denied his

The insurer paid § 34 benefits from August 7, 2006 to February 4, 2007. The employee subsequently filed a claim seeking adjustment of his average weekly wage to include the value of his golf privileges. Following a § 10A conference, the administrative judge denied the claim, and the employee appealed. (Dec. 2, 3.)

At hearing, the parties agreed the employee's average weekly wage was $74.55, if the value of golf privileges was not included in the wage calculation. (Dec. 3, n.2.) The employee testified that prior to taking the job at the golf course, he had heard employees could play golf and use the driving range at no charge. (Dec. 4.) After he was hired, he played golf approximately one or two times per week, provided the golf pro indicated the course was available, and he hit about three buckets of balls per week on the driving range. In high season, the green fees were $60 before 3 p.m., and less later in the day and in the off-season. The employee did not keep any records reflecting how often he played golf or used the driving range, nor did he claim the value of the golf privileges on his income tax returns. (Dec. 5-6.)

The insurer presented two witnesses, Jillian Douglass, the assistant town administrator, and Mark O'Brien, the director of operations at the golf course. They agreed the privilege of playing golf, which was offered to year-round town employees and seasonal employees of the golf course, was contingent on the availability of tee times. Mr. O'Brien testified that when he hired an employee, he discussed the golf and driving range privileges, but did not provide a written policy. Although the personnel manual indicated that town employees are offered free golf privileges after 3 p.m. daily, (Ins. Ex. 3), Mr. O'Brien testified he sometimes allowed employees to play before that time on weekdays and in the off-season, if tee times were available. The driving range privilege was informal, and an employee could take advantage of it any time the range and sufficient golf balls were available. Mr. O'Brien did not keep track of the number of rounds of golf each employee played, nor did he give employees a statement regarding the value of the golf privileges. Both insurer witnesses testified that additional compensation was not provided to employees who did not use the golf privileges. (Dec. 4-5.)

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request, finding the insurer had no prior notice of this issue. The judge reserved to the employee the right to raise the issue at a later date. (Dec. 3, n.1.)

Reasoning that fringe benefits may be included in the calculation of average weekly wage if they "bear a close analogy to wages," or are "an express wage substitute," the judge found:

> [T]he privilege of golfing at the Captains Golf Course has no real monetary value; and such privileges are not an express wage substitute. The employee receives no compensation if he does not avail himself of the golf privilege. The privilege was not extended to the employee in lieu of other wages or salary. Such privileges did not extend any real economic gain to the employee.
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> Furthermore, I also do not find that golf privileges were even considered in any salary negotiations. I do not find that the employee accepted a reduced wage in exchange for free golf time. I do not find any merit nor do I credit the employee's arguments that he took the job because of the aforementioned privileges.

(Dec. 7.) The judge denied the employee's claim to increase his average weekly wage based on the value of his golf privileges. Id. at 7-8.

On appeal, the employee argues the judge erred as a matter of law in refusing to include the value of the golf privileges in his average weekly wage. He argues he took the job to avail himself of those privileges, and that he received a significant financial benefit from them, particularly in relation to his low hourly wage. That the privilege was not expressly negotiated and the value of the free golf was not included in his W-2 tax form are facts not dispositive of his claim, the employee argues. Acknowledging that the issue presented by his claim is a fact-intensive one, the employee nevertheless faults the judge for establishing a "multi-prong" test to answer that question. (Employee br. 8.)

We agree with the employee that the question posed by his claim requires a factual analysis. More's Case, 3 Mass. App. 715 (1975)(average weekly wage is question of fact); Foreman v. Hwy. Safety Sys., 19 Mass. Workers' Comp. Rep. 193, 195 (2005)(same); Fitzgerald v. Special Care Nursing Srvc., 13 Mass. Workers' Comp. Rep. 332, 334 (1999)(same). However, we disagree the judge erred by applying a multi-pronged test. Although the overarching principle in making this determination is whether the benefit in question bears a close analogy to wages, there are a number of factors the

judge must weigh. While we take issue with the relevance of one factor the judge considered,[2] on the whole her analysis was sound.

General Laws c. 152, § 1(1), defines "average weekly wages" as "the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two." The statute, however, "does not detail the categories of benefits factored into the determination of such 'earnings.' " Borofsky's Case, 411 Mass. 379, 380 (1991). In Borofsky, the court approved the test, applied in earlier cases, of whether such benefits " 'bear a close analogy to wages paid by [the employer].' " Id. at 380, quoting Powers' Case, 275 Mass. 515, 519 (1931). To construe the meaning of "wages," the court looked to the unemployment compensation act's definition: "every form of remuneration of an employee . . . whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all remuneration aid in any medium other than cash. . . ." G. L. c. 151A, § 1(s)(A). The court deemed it significant that the definition of wages had been narrowed by a 1941 amendment which deleted the phrase "and similar advantages" from the forms of remuneration. See St. 1941, c. 685, § 1. The court cited with approval earlier cases holding that "wages" include tips, Powers' Case, 275 Mass. 515, 520 (1931), sales commissions, Perkins's Case, 278 Mass. 294, 301-302

[2] The judge found the golf privileges should not be considered earnings because they represented no "real monetary value" or "real economic gain." (Dec. 7.) Although we have cited "real economic gain" as a relevant factor in distinguishing reimbursements from earnings, see, e.g., Bradley v. Commonwealth Gas Co., 11 Mass. Workers' Comp. Rep. 439, 441 (1997)(meal reimbursement did not result in economic gain), we do not think this factor is necessarily relevant where, as here, there is no contention the benefit in question was a reimbursement. Certainly, the privilege of playing golf at no charge has a monetary value, and can be seen as an economic benefit, if not an economic gain, to the employee. Depending on the season and the hour of day, the greens fees the town charged ranged from $30 to $62. (Dec. 6, fn.3.) Similarly, the fringe benefits statutorily excluded from the definition of earnings -- health insurance plans, pensions, day care and education and training programs -- have potentially significant monetary value and represent real economic benefit and gain to the employee. Therefore, we do not consider the question of monetary value or economic gain determinative of whether a benefit should be included in an employee's average weekly wage.

(1932), and room and board, Palomba's Case, 9 Mass. App. Ct. 881 (1980), because these technically non-wage benefits are closely analogous to wages. While holding employer-paid health insurance premiums did *not* bear a close analogy to wages, and therefore should not be included in an employee's average weekly wage, the court acknowledged the legislature was best suited to address the issue. Borofsky, supra at 381.[3]

[3] Shortly after Borofsky was decided, the legislature amended the § 1(1) definition of average weekly wage to provide: " *such fringe benefits* as health insurance plans, pensions, day care, or education and training programs provided by employers *shall not be included* in employee earnings for the purpose of calculating average weekly wages under this section." St. 1991, c. 398, § 13. (Emphases added). In McCarty's Case, 445 Mass. 361, 366 n.7 (2005), the court did not reach the issue of whether this list of fringe benefits is exhaustive. The reviewing board has held the value of a company car provided explicitly in lieu of a wage increase is not a fringe benefit but an express wage substitute, and should be included in the average weekly wage computation. Roberts v. Central Heating and Cooling, 9 Mass. Workers' Comp. Rep. 431 (1995). An hourly wage increase paid in lieu of travel reimbursement, when travel is not required, should be included, although reimbursement for actual travel should not be included, in calculating average weekly wage. Fitzgerald, supra. A parking space provided by the employer to a resident building manager is no different from the housing also provided, and should be included in the manager's average weekly wage. Corbett v. The Drucker Co., 14 Mass. Workers' Comp. Rep. 276 (2000). In Louis's Case, 424 Mass. 136, 140-141 (1997), the court held that § 35 partial incapacity benefits are appropriately factored into average weekly wage computation because they are "a direct substitute for such wages [paid by the employer] -- not fringe benefits by any interpretation, but compensation provided to meet an employee's fundamental needs which propelled her to seek employment in the first place." Adopting an "interpretive approach" to § 1(1)'s definition of average weekly wage, Louis's Case, supra at 140, the court recognized that the " '[e]ntire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity.' " Gunderson's Case, 423 Mass. 642 (1996), quoting 2 A. Larson, Workmen's Compensation § 60.11(f), at 10-647—10-648 (1996). Nonetheless, the touchstone for the factual analysis continues to be whether the benefit received "bear[s] a close analogy to wages." See, e.g., Bradley's Case, 46 Mass. App. Ct. 651, 654 (1999).

We are convinced the judge's findings comport with the relevant statutes and case law, and support her conclusion that the employee's golf privileges do not admit of the requisite analogy to wages. She did not credit the employee's testimony that he took the job at the golf course because of the golf privileges. (Dec. 7.) We will not disturb that finding. See Lettich's Case, 403 Mass. App. Ct. 389, 394 (1988) (credibility determinations, unless based on error of law, are sole province of judge). The judge properly found there was no evidence the employee negotiated golf privileges in lieu of increased wages, or accepted a reduced hourly wage in exchange for the opportunity to play golf. Cf. Roberts, supra (company car provided in lieu of wages a factor in average weekly wage), and Corbett, supra (employer-provided parking space indistinguishable from room and board, thus a factor in average weekly wage). The judge correctly found the privilege was not an express wage substitute. The testimony of both insurer witnesses supports the judge's finding that the employee would not receive alternative compensation if he did not play golf. Cf. Fitzgerald, supra(travel allowance paid when employee did not travel constituted earnings).

Because the judge's findings are neither arbitrary and capricious nor contrary to law, we affirm her decision.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **January 27, 2010**