COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

Don Q. Arrington
Tewksbury Home Painting
Workers' Compensation Trust Fund
BOARD NO.: 04980996

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Carroll and Levine)

APPEARANCES
Christopher S. O'Connor, Esq., for the employee
Pedro Benitez-Perales, Esq., for the trust fund
Michael Najjar, Esq., for the employer

MAZE-ROTHSTEIN, J. The uninsured employer and the Workers' Compensation Trust Fund appeal a decision that awarded the employee compensation benefits for an industrial injury to his lower back and left ankle. Pursuant to G.L. c. 152, § 65(2)(e) and (13) and 452 Code Mass. Regs. § 1.20(1), the uninsured employer was joined as a party to the proceeding at the § 10A conference on May 5, 1997.[1] (Dec. 2.) Both appellants argue on appeal that the

[1] General Laws c. 152, § 65(2)(e), provides, in pertinent part:

> There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: . . . (e) payment of benefits resulting from approved claims against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter . . . .

Amended by St. 1991, c. 398, § 85.

General Laws c. 152, § 65(13), provides, in pertinent part:

> Claims against the Workers' Compensation Trust Fund for payment of compensation pursuant to clause (e) of subsection (2) shall be handled in accordance with section ten; provided, however, that no penalty pursuant to section seven shall be levied against the fund . . . . No voluntary payment for any period of time shall alone be held to foreclose the fund from defending any issue involved in a claim for compensation. On a motion of

judge erred in his calculation of the average weekly wage. (Trust Fund Br. 3-4; Employer Br. 5-6.) The uninsured employer also argues that it was error to deny its motion to join a § 27 claim of serious and wilful employee misconduct on the first day of the hearing, December 9, 1998.[2] Because the ruling on the § 27 claim was not an abuse of discretion, we affirm that aspect of the decision. As for the average weekly wage issue, we recommit the case for further findings. See G.L. c. 152, § 11C.

The following are the facts pertinent to the issue being discussed. Don Arrington, the employee, was badly injured on September 26, 1996, when he fell twenty feet from a roof while working as a painter for the employer. (Dec. 3.) The employer failed to maintain a policy of workers' compensation insurance, in violation of G.L. c. 152,
§ 25A(1).[3] As a result, the Workers' Compensation Trust Fund was required to take on the employee's claim, pursuant to G.L. c. 152, § 65(2)(e). The Trust Fund

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a claimant or representative of the fund, an administrative judge may join the uninsured employer as a party.

Amended by St. 1991, c.398, § 89.

452 Code Mass. Regs. § 1.20(1), provides:

(1) An administrative judge before whom a proceeding is pending may join, or any party to such proceeding may request the administrative judge to join, as a party, on written notice and a right to be heard, an insurer, employer, or other person who may be liable for payment of compensation to the claimant.

[2] General Laws c. 152, § 27, provides, in pertinent part, that "[i]f the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation . . . ."

Amended by St. 1935, c. 331.

[3] General Laws c. 152, § 25A(1), provides:

resisted the claim for compensation benefits, which was denied after a May 5, 1997 § 10A conference. The judge, exercising his discretion to do so, see § 65(13), joined the uninsured employer at the conference.[4] (Dec. 2.) This case highlights one of the many complications that can arise from such a discretionary joinder.

After a delay of nineteen months, the employee's claim for compensation benefits finally came on for hearing on December 9, 1998. At that time, the employer attempted to raise the issue of the employee's serious and wilful misconduct under § 27, based on evidence in the employee's medical records of alcohol use at the time of the injury. The judge denied the motion to join the § 27 defense, as the employer had not raised it until that late date.[5] (December 9, 1998

> In order to promote the health, safety and welfare of employees, every employer shall provide for the payment to his employees of the compensation provided for by this chapter in the following manner:
>
> (1) By insurance with an insurer or by membership in a workers' compensation self-insurance group . . . .

Added by St. 1943, c. 529, § 7.

[4] The uninsured employer in cases defended by the Trust Fund "may be liable for the payment of compensation to the claimant." 452 Code Mass. Regs. § 1.20(1). General Laws c. 152, § 65(8), provides:

> If the trust fund pays compensation to a claimant pursuant to clause (e) of subsection (2), it may seek recovery from the uninsured employer for an amount equal to the amount paid on behalf of the claimant under this chapter, plus any necessary and reasonable attorney fees. Any action by the trust fund to seek recovery from the uninsured employer shall be commenced within twenty years of the claimant's filing a claim for benefits under this chapter against the trust fund.

Amended by St. 1991, c. 398, § 88.

[5] Notwithstanding the employer's protestations that it did not receive the medical records until one month before the hearing, it must be noted that the medical records were available, through the normal discovery procedures (see 452 Code Mass. Regs. § 1.12), at any time during the *nineteen month* interval between the conference and the hearing. As such, the employer's claim of newly discovered evidence lacks merit.

Tr. 4-5.) The employer claims error, and argues that the case must be recommitted for proceedings on its § 27 claim.[6] We disagree.

One unaddressed intricacy of joining an employer at the trust fund's behest at hearing is that the Act does not articulate a specific procedure for the joined employer's enumeration of its defenses. In the normal course, an insurer's defenses to an employee's original liability claim would be set out in its § 7(1) notification of "the grounds and factual basis for the refusal to commence payment of [compensation] benefits" within fourteen days of its receipt of the employer's first report of injury. However, an uninsured employer is not an insurer to which the § 7 procedures of claim and defense apply.[7] Although, in cases such as that before us, once the judge has exercised his discretionary authority to join such a party (the uninsured employer under
§ 65[13] and regulation § 1.20[1]), its ability to raise defenses to the employee's claim appears to be addressed by paragraphs (2) and (3) of 452 Code Mass. Regs. § 1.20:

> (2) A party to be joined shall not be allowed to raise a defense of late claim if the original claim was filed timely, but shall be allowed to raise any and

[6] The employer advances a second argument that "at one point in the hearing [it] attempted to question the employee on his substance abuse for reasons other than a § 27 defense, and was quickly dissuaded by the judge." (Employer brief 2; December 9, 1998 Tr. 47-48.) On inspection of the transcript, the other reasons offered for the questions asked were unclearly and ambiguously stated as going to, "treatment and causal connection." (December 9, 1998 Tr. 49.) Nonetheless, the judge generously responded "I understand where you are going but you can rephrase the question to get there another way." Id. Whereupon the employer began an entirely different line of questioning. Id. We deem any further objection on this point waived. See Phillips Case, 278 Mass. 194, 196 (1932); Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21, 26 (2000).

[7] Likewise, under § 65(13), the Workers' Compensation Trust Fund is not subject to the notification provisions of § 7. The reason for this exclusion would appear to be practical: since the Trust Fund receives no first report of injury from uninsured employers, § 7 rules based on that receipt cannot apply. For the many civil and criminal penalties which can be imposed against uninsured employers and their owners and officers, see G.L. c. 152, § 25C.

> all other reasonable defenses which would have been available to him had the claimant filed an original claim against the party to be joined . . . .
>
> (3) When it is decided, after proper hearing of a request to join, that the subject of such request shall be joined, the new party shall be allowed a reasonable period of time to prepare a defense. Such period shall not exceed 45 calendar days from the date of joinder, unless the administrative judge who orders the joinder finds that additional time to prepare a defense is needed.

We see it as fair and reasonable to consider the regulation's forty-five day period for the joined employer's preparation of defenses as applicable also for its *notification* of such defenses to the other parties. Where there is nothing in the record to indicate any additional time requested or allotted for the employer's preparation of its defense, the employer's *right* to bring and announce its defense was duly bounded by that forty-five day limit prescribed by regulation § 1.20(3). Therefore, as the motion to bring its defense of serious and wilful misconduct did not come until nineteen months after the employer was joined to the proceeding, the ruling on that motion was strictly a matter within the exercise of the judge's sound discretion. Rodriguez v. National Surface Cleaning, 9 Mass. Workers' Comp. Rep. 199, 200 (1995).

The reviewing board has addressed the parameters of judicial discretion:

> "By [discretion of the court] is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just. It may be assumed that conduct manifesting abuse of judicial discretion will be reviewed and some relief afforded."

Saez v. Raytheon, 7 Mass. Workers' Comp. Rep. 20, 22 (1993), quoting Davis v. Boston Elevated Ry., 235 Mass. 482, 496-497 (1920). Under the circumstances, given the delay between the § 10A conference and the § 11 hearing – during which time the employer had every opportunity to notify the employee of its intention to challenge his claim on the grounds of his alleged serious and wilful misconduct – the judge's denial of the employer's motion to raise the defense was not an abuse of discretion.

As to the appellants' arguments on the rectitude of the average weekly wage assessment, the employee responds, and we agree, that the record could support year round employment, (Dec. 9, 1998 Tr. 78), in which case the average weekly wage calculations would be sound. However, there are no findings as to either the seasonal or year round nature of the employment. See Bunnell v. Weguasset Inn, 12 Mass. Worker's Comp. Rep. 152, 154-155 (1998)(discussing the impact of each on an average weekly wage analysis). Thus, we are unable to determine whether the average weekly wage analysis was error as a matter of law. See Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45 (1993). We therefore recommit the decision as to that issue. On recommital the judge must make findings on the duration of the employment.

Accordingly, the decision is recommitted in part and affirmed in part.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Filed: November 1, 2000