COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001660-95**

Donald Kinder	Employee
Lance, Inc.	Employer
Commercial Union Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Smith and Wilson)

APPEARANCES
Melissa E. Brooks, Esq., for employee
Paul M. Moretti, Esq., for the insurer on appeal
Linda D. Oliveira , Esq., for the insurer at hearing

MCCARTHY, J. Commercial Union Insurance Company appeals from a decision in which an administrative judge awarded Mr. Kinder weekly compensation benefits based on an average weekly wage that included his earnings from "concurrent" employment in Rhode Island. Because such earnings were not derived from the employee's service to an employer insured "for the payment to his employees by an insurer of the compensation provided for by this chapter," they were improperly included in Mr. Kinder's average weekly wage. See G.L. c. 152, §§ 1(1) and 1(6). On that basis, and in light of the recent decision in Letteney's Case, 429 Mass. 280 (1999), we reverse the decision.[1]

The facts were stipulated. Donald Kinder was employed by Lance Buick Pontiac in Attleboro, MA on February 10, 1995. On or about that date Mr. Kinder jumped off the back of a truck and developed bilateral tarsal tunnel syndrome. The insurer accepted liability for the injury. Mr. Kinder's average weekly wage with Lance Buick Pontiac was $651.39 on the date of injury. Mr. Kinder had a second job at Precision Harley-

[1] The judge did not have the advantage of the Letteney court's analysis at the time he wrote this decision.

Davidson, where he earned $60.88 per week. Precision Harley-Davidson, located in Rhode Island, carried workers' compensation insurance with Beacon Mutual Insurance Company, a Rhode Island insurer licensed only to sell insurance in that state. The employee returned to work full duty with Lance Buick Pontiac on January 6, 1997. (Dec. 2.) Because of his February 10, 1995 industrial injury he did not return to work at Precision Harley-Davidson. (Dec. 2-3.) The single issue before the judge at the hearing was whether concurrent employment with an out-of-state employer should be included in the computation of an employee's average weekly wage. (Dec. 2.)

The judge determined that the employee was entitled to benefits based on his earnings from Precision Harley-Davidson, an out-of-state employer insured for workers' compensation only in the State of Rhode Island. First, the judge set out the applicable statutory provisions. The definition of "average weekly wage" contained in § 1(1) states in pertinent part:

> In case the injured employee is employed in the concurrent service of more than one insured employer . . . his total earnings from the several insured employers . . . should be considered in determining his average weekly wages.

The definition of an "insured" employer is contained in § 1(6): "An employer who has provided by insurance for the payment to his employees by an insurer of the compensation provided for by this chapter." Noting that the statute makes no distinction between in-state and out-of-state insured employers, and that the employee was employed by a § 1(6) employer,. (Dec. 4), the judge reasoned:

> There is no dispute that the employee lost his ability to earn wages in both jobs due to the work-related injury of February 10, 1995. There is no dispute that both employers were insured for workers' compensation claims. Had the employee been in the concurrent employment of two Massachusetts employers covered by a workers' compensation policy, the employee's compensation rate would have been based upon the aggregate wages from those jobs. Adopting the reasoning of the Supreme Judicial Court in Mailhot v. Travelers Insurance Co., 375 Mass. 342 (1978)], there is no ground which appeals to reason why the employee should not receive compensation based upon his total earnings from a Massachusetts and a Rhode Island employer.
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> . . .

> Based upon the principal [sic] of beneficent statutory construction, it is clear that to interpret the statute to exclude those concurrent wages solely on the basis that they were earned in Rhode Island would result in depriving the employee of the very benefits which G.L. c. 152 plainly intended him to receive.

(Dec. 5-6.)

The judge erred. Precision Harley Davidson was not an "insured employer" within the meaning of § 1(6), as it was not insured for the payment of compensation under c. 152. Rather, its workers' compensation insurance covered only liability under the compensation law of Rhode Island. As such, the employee's earnings from that employer could not be considered "concurrent" within the meaning of § 1(1), because they were not derived from "insured" employment. The geographic designation of the subject insurance coverage is crucial and dispositive. Insurance covering workers' compensation liability under the laws of Rhode Island does not provide for coverage under c. 152. See Murphy v. Patriots' Trial Girl Scout Council, 11 Mass. Workers' Comp. Rep. 534, 537-538 (1997), and cases cited therein. Any ambiguity in construction of the applicable sections of c. 152 was made perfectly clear by the Supreme Judicial Court's opinion in Letteney's Case, 429 Mass. 280 (1999), a case involving the question of whether out-of-state self-employment should be includable in average weekly wage for the purposes of § 35C's benefit augmentation. The court's reasoning is directly applicable to the present case:

> Compensation to the employee measured by earnings outside the Massachusetts workers' compensation system constitutes a liability for which neither the employer nor any other Massachusetts employer has provided. It may be said that this happens whenever an employee receives a higher award than that measured by the last wage the employee earned from the employer for whom he worked at the time he sustained the injury. That would not be a valid objection. The later Massachusetts employer paying that higher wage would presumably have paid premiums based on that higher wage. Although that later employer would not be liable for the higher award, its participation in the system may be supposed, at least roughly, to work out in the long run when it must pay higher compensation for subsequent earnings of its employees earned elsewhere in the system. Self-employment, *out-of-state employment*, and other excluded employment are not within the system and thus this long run equilibrium cannot take place.

> Where an employee is injured by an employer who is required to but illegally has not insured, the worker obtains his compensation from the trust fund, to which all Massachusetts employers are required to contribute. See G.L. c. 152, § 65 (2). See generally 452 Code Mass. Regs. § 3.04 (1997). The trust fund may then seek to recover the award from the delinquent employer. See G.L. c. 152, § 65(a); 452 Code Mass. Regs. § 3.04(6). This is a demonstration that all Massachusetts employers participate in a common system, and thus, that it would be unfair to measure their obligations by events occurring outside that system.

Id. at 285-286. The employee's Rhode Island employment was not "within the system" of c. 152, and thus his earnings therefrom cannot be included in his § 1(1) average weekly wage.

As to the employee's commerce clause argument, we agree with the insurer that there is no discernible burden on interstate commerce by the exclusion of out-of-state wages from the calculation of average weekly wage. The exclusion affects both Massachusetts residents and non-residents alike. We see no discrimination, disadvantage or burden on interstate commerce stemming from the Commonwealth's legitimate regulation of its own workers' compensation system.

The decision is reversed. Compensation shall be paid based solely upon the employee's Massachusetts average weekly wage of $651.39.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: November 19, 1999

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge