COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF INDUSTRIAL ACCIDENTS
BOARD NO. 41248-20

Edward P. Franco	Employee
McKinnon Construction Co. Inc.	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges O'Leary, Fabricant and Long)

The case was heard by Administrative Judge McNamara

APPEARANCES
Susan G. McDonald Esq., for the employee
Margo A. Sutton, Esq., for the insurer

O'LEARY, J. The insurer appeals from a hearing decision awarding the employee §34 and §34A benefits, arguing that the finding of an average weekly wage of $1,000.00 lacks evidentiary support. The judge's calculation of the employee's §34A compensation rate is also challenged by the insurer, and the employee agrees the calculation is incorrect. We affirm the decision but correct the §34A calculation.

At the time of hearing, the Employee was 63 years old. (Dec. 5.) The employee was working for McKinnon Construction Company, performing general construction tasks and acting as a supervisor (Tr. 27) in January of 2020, when he claims that, while nailing siding onto a wall, the staging "kicked out" and he fell about six feet, landing on concrete and a bush. He hit his head, which caused him to bleed. (Dec. 6.) He continued to work, but ongoing pain caused him to go to Beverly Hospital on January 17, 2020. (Dec. 6.) While there, he reported that he had fallen from a ladder about a week and a half previously, landing on his right shoulder and hitting his head. (Dec. 6.) The employee filed a claim for benefits, which was the subject of a §10A conference on April 4, 2022, and the administrative judge ordered §34 benefits at the weekly rate of $600.00 based upon an average weekly wage of $1,000.00 from June 24, 2021, and continuing, plus medical benefits pursuant to §§13 and 30. The Insurer appealed that order in a timely manner and a hearing *de novo* took place on June 27, 2024.[1] (Tr. 1.)

[1] The hearing decision erroneously states that the hearing took place on July 18, 2024. (Dec. 3.)

Following the hearing, the administrative judge found that the employee sustained a compensable work injury, and adopted the medical opinion of George Kasparyan, MD, that the accident resulted in a concussion, marked cervical post traumatic spasm, exacerbation of underlying cervical spondylolisthesis, spondylosis and stenosis, superimposed on prior anterior cervical discectomy and fusion to C5 to C7, cervical spondylosis with disc irritation from C5-C7, left greater than right, a torn right rotator cuff and a right knee contusion. (Dec. 17.) The administrative judge credited the employee's ongoing complaints of pain and found that he is permanently and totally incapacitated from substantial gainful employment for the foreseeable future. (Dec. 17.) Regarding the employee's average weekly wage, the judge found the insurer did not raise average weekly wage as a contested issue until its closing brief at hearing. (Dec. 16.) The administrative judge noted the issue was not included in the Insurer's Hearing Memorandum, nor was any evidence provided to the Court to dispute the claimed average weekly wage of $1,000.00. (Dec. 16.) At the time of conference, it was confirmed the employee worked for the employer, and no evidence was submitted at the hearing to dispute the Employee's claimed earnings. (Dec. 16.) The administrative judge further noted that in the joint pre-trial memorandum submitted to the Court on December 8, 2022, one of the stipulations listed was average weekly wage. As a result, the administrative judge adopted the claimed average weekly wage of $1,000.00. (Dec. 16.) The insurer was ordered to pay temporary incapacity benefits under §34 from June 24, 2021, to June 20, 2024, at the rate of $600.00 per week, based upon an average weekly wage of $1,000.00, followed by permanent and total incapacity benefits under §34A in the amount of $666.70 from June 21, 2024, and continuing. The insurer was also ordered to pay medical benefits pursuant to §§13 and 30. (Dec. 18.)

On appeal, the insurer again argues that the employee failed to meet his burden of proving average weekly wage because no testimony or documentary evidence establishing a $1,000.00 weekly wage was admitted at hearing. The insurer's contention that the employee failed to introduce evidence establishing the average weekly wage is unavailing.

While the insurer argues that no evidence was submitted, it is worth noting that this alleged procedural deficiency was one which the insurer helped create. The burden of proving average weekly wage rests with the employee. Phillips's Case, 41 Mass. App. Ct. 612 (1996). Likewise, a hearing decision rests upon evidence contained in the hearing record. G.L. c. 152, §11; 452 Code Mass. Regs. 1.11. This case, however, did not proceed in the ordinary course. Just short of two years prior to the hearing, on July 11, 2022, the parties jointly executed a pre-hearing memorandum expressly stipulating that the employee's average weekly wage was $1,000.00. Following that stipulation, the insurer never identified average weekly wage as a contested issue in its hearing memorandum, did not attempt to raise the issue on the record at the commencement of the hearing, never cross-examined the employee concerning his earnings, never sought production of wage evidence at hearing, and never requested that the record remain open for additional proof. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file). The insurer only contested the average weekly wage in its closing brief, *after* the close of the evidentiary record.

Stipulations of the parties are intended to narrow, not expand, disputed issues. Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997); Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep. 415, 418 (2009) ("clear legislative intent to establish a system which narrows the issues as litigants proceed through the dispute resolution process"). The parties expressly stipulated to the employee's average weekly wage, thereby removing that issue from dispute and relieving the employee of any obligation to present cumulative proof on a fact already agreed upon. See Cordeiro v. Carlos Painting, 33 Mass. Workers' Comp. Rep. 211 (2019) ("By stipulating to the employee's average weekly wage… the parties established, and presumably settled that issue, and there was no need for any further analysis."). A party seeking relief from a stipulation bears the burden of demonstrating that it was improvidently made, or that enforcement would not be conducive to justice. Hill v. Dunhill Staffing Systems, Inc., 14 Mass. Workers' Comp. Rep. 350, 351 (2000), citing Long v. Mercier, 318 Mass. 599, 601 (1945). Absent such relief, a stipulation remains binding upon the parties. See also Grant v. APA Transmissions, 13 Mass. Workers' Comp. Rep. 247 (1999) (recognizing that an average weekly wage established by agreement may not simply be reopened before the Board). Having affirmatively stipulated in the pre-hearing memorandum to the employee's average weekly wage at hearing and remaining silent on the issue while the employee litigated the remaining issues in the case, the insurer cannot reasonably be surprised that the judge treated the matter as established, nor can it now obtain appellate relief by asserting the absence of evidence which its own stipulation rendered unnecessary.

All findings regarding liability, medical causation, extent of incapacity, and entitlement to §§13, 30, 34, and 34A benefits are affirmed. However, both parties agree that the judge's §34A compensation rate contains a mathematical error. Assuming a $1,000.00 average weekly wage, two-thirds is $666.67, not $666.70. The compensation rate must therefore be corrected. We vacate that portion of the decision wherein §34A benefits are awarded at $666.70, and order §34A benefits at $666.67, commencing June 21, 2024, with the insurer taking credit for benefits already paid.

The insurer is ordered to pay employee's counsel an attorney's fee pursuant to §13A(6), in the amount of $1,964.82, plus necessary expenses.

So ordered.

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Kevin B. O'Leary
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***August 20, 2026***