COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 054619-96**

Enrico Ciampa, Jr.	Employee
Chapman Restoration and Waterproofing Corp.	Employer
Reliance National Insurance	Insurer

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

APPEARANCES
James F. Fitzgerald, Esq., and Louis P. Massaro, Jr., Esq., for the employee at hearing
Paul M. Moretti, Esq., for the employee on brief
Bernard W. Fabricant, Esq., for the insurer at hearing and on brief
Andre A. Sansoucy, Esq., for the insurer on brief

LEVINE, J. The insurer appeals from a decision in which an administrative judge awarded the employee workers' compensation benefits pursuant to §§ 34 and 34A, based on a disputed average weekly wage. We agree with the insurer that the case must be recommitted on the issue of average weekly wages. We summarily affirm the remainder of the decision.

Enrico Ciampa, Jr., the employee, was a fifty-seven year old union laborer at the time of the alleged industrial injury. (Dec. 3.) On June 25, 1996, the union assigned the employee to work for Calhess Restoration and Waterproofing Corporation, which is owned by Chapman Waterproofing Co. (Dec. 3, 6.) While unloading granite blocks that day, Mr. Ciampa heard a pop on the left side of his neck and shoulder. Although he was in pain, the employee completed the workday and appeared for work the next day, June 26, 1996. However, there was no work for the employee that day. On June 27, 1996, although still in pain, the employee reported to the union hall. He was sent to the Emanouil Company's job-site at Northeastern University. From June 27, 1996 through

June 29, 1996, Mr. Ciampa planted junipers and put on ground cover for the Emanouil Company. Mr. Ciampa earned the regular union wage of $19.50 per hour. (Dec. 4.)

From June 26, 1996 through June 29, 1996, Mr. Ciampa's pain grew in intensity. Id. On July 6, 1996, Mr. Ciampa underwent emergency surgery -- a C5 fusion with a bone graft from his hip. Over the next few years, the employee underwent three additional surgeries to his neck. (Dec. 5.) Notwithstanding the multiple surgeries and physical therapy, Mr. Ciampa's complaints of pain continued. Id.

The employee filed a claim for compensation benefits which the insurer denied. Following a § 10A conference, the administrative judge ordered payment of § 34 benefits. The insurer appealed to a hearing de novo. (Dec. 2.) Pursuant to § 11A, the employee was examined by Dr. Frederick Ayers. That examination occurred on January 29, 1999. Since the employee was scheduled for a third surgery, a second examination by the same impartial physician was conducted on October 29, 1999. The physician's medical reports and deposition were admitted in evidence. Id.

The administrative judge found that the employee suffered an industrial injury on June 25, 1996, for which the insurer is liable. (Dec. 8, 9.)[1] She also found the employee to be totally incapacitated from June 25, 1996 to June 24, 1999, and permanently and totally incapacitated beginning on June 25, 1999. (Dec. 9.) The judge also credited the employee's testimony with regard to his hourly wage and found the employee's average weekly wages to be $780.00. (Dec. 5-6, 8-9.) Because there was error in the finding as to average weekly wages, the case must be recommitted.

"The entire object in computing average weekly wages is to arrive as fairly as possible at an estimate of an employee's probable future earning capacity." DiMeo v. Walsh Bros., Inc., 6 Mass. Workers' Comp. Rep. 208, 209 (1992), citing Szwaja v.

[1] The § 11A examiner opined that, although possible, he did not think it probable that the work activities of June 27 through June 29, 1996 aggravated the employee's condition. (Dec. 7.)

Deloid Assoc., 2 Mass. Workers' Comp. Rep. 40 (1988). The employee has the burden of proof. Szwaja, supra at 42. Although an employee's average weekly wage is a question of fact for the administrative judge, Caldwell v. Shamrock Enterprises, 12 Mass. Workers' Comp. Rep. 498, 500 (1998), the amount found by the judge should "not … put the employee in a better position than he was in prior to the [industrial] injury." Herbst's Case, 416 Mass. 648, 651 (1993).

The administrative judge's finding in the present case that the employee was paid the union rate of $19.50 per hour, (Dec. 5), is not challenged on appeal. But the insurer is correct that the judge erroneously concluded that the employee's average weekly wages could be found by multiplying $19.50 by forty hours per week for the fifty-two weeks prior to the industrial injury. There is no basis to find that the employee, a union laborer, worked without interruption over that previous fifty-two week period. Szwaja, supra at 43 ("The vagaries of employment in the construction trades are well known"). The judge's own words do not support such a conclusion. Thus, the judge stated: "Mr. Ciampa did not deny that he did not work the entire fifty-two week period prior to June 25, 1996, or that he had some seasonal layoff during that time." (Dec. 6.) She also found that

> generally 1995-96 was a good year for employment, given the amount of construction in the area . . . that was available for him. Further, Mr. Ciampa's credible testimony showed that even if there were not regular construction type jobs available to him, there were other jobs for union hall laborers that did not necessarily involve working only on construction sites, but also involved such jobs as planting junipers and doing landscaping. This type work is certainly indicative that a union hall laborer could be employed in various types of jobs and that one did not have to have an [sic] extensive a lay-off as [the insurer's proposed comparable employee] . . . .

(Dec. 9, emphasis added.)[2] Even if the judge is correct that the employee's layoff need not have been as extensive as the proposed comparable employee, that would not mean

[2] General Laws c. 152, § 1(1), provides that "[w]here by reason of the shortness of the time during which the employee has been in the employment of his employer . . ., it is impractical to compute the average weekly wages, . . . regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade

that the judge was warranted in finding that the employee was not subject to any layoffs. To whatever extent the employee was laid off or otherwise worked less than forty hour weeks during the subject period, his average weekly wages would be affected. (See Tr. 29, 32, 35-36 for the employee's testimony on his work schedule over the year.) On the record here, "[t]o compute the employee's average weekly wage on the basis that he had worked forty hours per week every week during that 52 week period . . . does not produce an honest approximation of his future probable earning capacity." Szwaja, supra.

Since the decision is flawed as to the employee's average weekly wages, the case must be recommitted for new findings thereon. On all other issues the decision is affirmed. Because the administrative judge who heard the case no longer serves in the department, we transfer the case to the senior judge for reassignment to a different judge for a hearing de novo on the issue of average weekly wages.[3]

So ordered.

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employed at the same work by the same employer." The judge rejected the insurer's evidence of what a supposed comparable employee earned while working for the employer because there was no evidence of why that comparable employee worked less than a full year; e.g., did that employee take a voluntary layoff. (Dec. 6, 9.)

[3] Because there will be a de novo hearing on average weekly wages, the parties will have an opportunity to put in evidence on the issue. The judge must then determine the average weekly wages; if she cannot make that determination by one of the formulas set forth in § 1(1), she may be able to make the determination by other means. See Pratte v. Liberty Movers, Inc., 7 Mass. Workers' Comp. Rep. 323, 325 (1993), and cases cited. See also Caldwell, supra at 501 n. 5.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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