COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 072311-01

Eugene Evansek, Jr.	Employee
Allied Systems, Ltd.	Employer
Lumbermen's Mutual Casualty Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Carroll)

APPEARANCES
John F. Trefethen, Esq., for the employee
Eliza M. Gerlach, Esq., for the insurer at hearing
David M. O'Connor, Esq., and Barbara L. Horan, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from a decision in which an administrative judge awarded workers' compensation benefits based on a comparable employee average weekly wage under G. L. c. 152, § 1(1). We summarily affirm the decision as to all issues argued, but one. Because it is not clear if the judge's use of the average weekly wage of a senior co-worker for determining the employee's average weekly wage is contrary to law, we recommit the case for further findings on the employee's average weekly wage.

The case came to hearing on the employee's appeal of an Order of Modification issued at a § 10A conference on the insurer's complaint for modification or discontinuance of benefits for an accepted left arm and shoulder injury. (Dec. 2-3.) The judge denied the insurer's complaint, and adjusted the employee's average weekly wage to reflect a rate higher than that which had been paid by the insurer on the accepted claim.[1] The new

[1] The employee had worked as a transport driver since 1980 hauling trailers of new cars for successor owners of the same company. He had a prior industrial accident doing this work, ultimately requiring three procedures: two surgeries in 1995, and a capsulitis procedure in 1996. After recovering from these procedures, he returned to work at the same job until January 17, 2001 when he injured his left arm and shoulder while working. The insurer accepted the claim and paid § 34 benefits in the amount of $514.34 (based on average weekly wage of $857.23) from February 7, 2001 to January 16, 2003. Section 35 benefits commenced on January 17, 2003 at the rate of $385.75

average weekly wage of $1,066.15 was ostensibly based on the earnings of a comparable employee under the alternate provisions for finding same under G. L. c. 152, § 1(1).[2] (Dec. 6.)

The judge's findings on the average weekly wage were as follows:

> I find that in computing the average weekly wage of the employee for his prior 52 week period from January 17, 2001 that his attendance was "spotty" by reason of his prior industrial injuries and it is impracticable to compute the average weekly wage other than by using the twelve month wages earned by a person, namely Frederick L. Chesbrough, III, performing the same work for this employer. Mr. Chesbrough, III, was a driver and co-worker in a near seniority slot to the employee. I find Mr. Chesbrough's earnings for that 12-month period to be accurate as reflected in "Exhibit 8" and the correct basis for computing the average weekly wage of Mr. Evansek.

(Dec. 5.) The insurer argues that the evidence does not support the judge's findings as to the employee's average weekly wage. We agree.

There is evidence that the drivers for the employer (such as the employee and Mr. Chesbrough) had access to the better paying routes based on seniority. The income

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pursuant to the §10A conference order. (Dec. 3.) At hearing, the employee testified that while he worked for the employer, he had endeavored to gross about $1,000.00 per week when he was not on restricted or part-time duty. (9/11/2003 Tr. 32.)

[2] General Laws c. 152, § 1(1) provides, in pertinent part, that "average weekly wages" are,

> the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury . . . .
>
> Where, by reason of the shortness of the time during which the employee has been in the employment of the employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as defined above, regard may be had to the average weekly amount which, during the same twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer . . . .

earned by any particular driver was individually based on the amount and quality of routes available to him, which, in turn, were based on the driver's seniority. Since Mr. Chesbrough was senior to the employee, he consistently had the opportunity to earn higher wages than the employee did. Therefore, we think it was ill-advised for the judge, without more, to base his average weekly wage findings on that employee's earnings. (20/29/2003 Tr. 7-13.) Given the nature of the seniority system in place, Mr. Chesbrough was not necessarily of the "same grade" as the employee for purposes of G. L. c. 152, § 1(1). See Green v. Seaboard Folding Box Co., Inc., 5 Mass. Workers' Comp. Rep. 86 (1991). cf. Sullivan v. Phillips Analytical, Inc., 18 Mass. Workers. Comp. Rep. 183, 187-188 (2004)(affirming use of alternative methods of proving average weekly wage, other than comparable employee); Rice's Case, 229 Mass. 325 (1918).

Accordingly, we recommit the case for further findings on the employee's average weekly wage.

The decision is otherwise affirmed and the employee has prevailed. 452 CMR 1.20(4). However, the attorney's fee due pursuant to G. L. c. §13A(6) is reduced to $656.10 in recognition of the fact that counsel for the employee has chosen not to file a brief in response to the insurer's appeal.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: May 26, 2005