COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026265-00**

Frank Carnute	Employee
Stockbridge Golf Club, Inc.	Employer
Eastern Casualty Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Levine and Carroll)

APPEARANCES
Frank E. Antonucci, Esq., for the employee
Thomas M. Dillon, Esq., for the insurer

WILSON, J. The insurer appeals an administrative judge's finding that the employee's average weekly wages in a job, which was expected to last only part of the year, were his actual weekly earnings of $600.00 per week. For the following reasons, we affirm the decision.

Frank Carnute, who has an eighth grade education, had been a cook in a family-owned restaurant for twenty years when he went to work for a series of restaurants as head chef. His only deviation from that employment was in the mid-1990's when he worked briefly as a landscaper. His last job before going to work for the employer was as a chef for the Village Inn from May until December 1999, at which time he was let go. He was unemployed until May of 2000,[1] when he began work as head chef for the employer. The job was expected to be seasonal, lasting twenty-seven weeks, and would pay $600.00 per week. (Dec. 2.)

[1] The employee's testimony was somewhat different from the judge's findings on this issue. The employee testified that after he was let go from the Village Inn in November or December of 1999, he worked at Heritage, a bar and lunch place in Lenox, for about four or five months. After he left Heritage, he collected unemployment until going to work for the employer. (Tr. 16-17.) Neither party mentions the discrepancy between the testimony and the judge's findings in its brief.

On June 25, 2000, Mr. Carnute injured his shoulder and back while at work. (Dec. 2-3.) He was out of work for eight or nine months, when he began doing prep work for the Backwater Grille, earning $10.00 per hour for approximately twenty to twenty-four hours a week. By doing prep work he can avoid the heavier lifting required of most chefs that aggravates his pain. (Dec. 3.)

Following a § 10A conference, an administrative judge ordered the insurer to pay a closed period of § 34 temporary total incapacity benefits. Both parties appealed to a de novo hearing. (Dec. 2.) The impartial physician chosen pursuant to § 11A opined that Mr. Carnute sustained injuries to his shoulder and back that resolved around the time he actually returned to light duty prep work. He suggested that, though Mr. Carnute had lifting restrictions, he could perform full-time work. (Dec. 4.)

The administrative judge found that the employee was totally disabled until he returned to part-time light duty work on February 19, 2001.[2] At that time, the judge found the employee was able to do full-time, rather than part-time, prep work. The judge then addressed the issue of the employee's average weekly wages:

> Mr. Carnute's job at the Country Club was seasonal. However, his work history was not that of a seasonal employee, nor is the position of head chef one that is usually or necessarily seasonal in nature. In this the case is clearly distinguishable from Bunnel v. Waequasset [sic] Inn, 12 Mass. Workers' Comp. Rep. 152, 155 (1998). In that case the employee regularly was laid off and unemployed for periods and then called back to work, specifically every fall when the Landscaping job ended. Layoffs in that line of work were "predictable and commonplace." Id. Mr. Carnute's job as a head chef was one that usually was not subject to layoffs or seasonal shifts. In fact, the job at Stockbridge Country Club was the only seasonal job as a head chef Mr. Carnute seems to have had. The other jobs he had as a chef were year-round, full-time jobs. Having established this as his usual work history in this field, I find that the most accurate reflection of Mr. Carnute's diminished earnings are [sic] to assume that he would have found comparable work after the job at Stockbridge Country Club had ended. Therefore, his average weekly wage of $600.00 per week is the proper measure of his earnings ability.

[2] The judge earlier had found that Mr. Carnute returned to work on March 21, 2001. (Dec. 3.) As neither party challenges the date chosen for the change from total to partial disability benefits, we do not address it.

(Dec. 5-6.) Accordingly, the judge awarded a closed period of § 34 benefits based on average weekly wages of $600.00 per week, and ongoing § 35 partial incapacity benefits based on an earning capacity of $400.00 per week. (Dec. 7.)

The insurer appeals, arguing that the judge improperly determined the employee's average weekly wages. Since it was undisputed that the job at which the employee was working when he was injured was seasonal, as the Stockbridge Golf Club was open only twenty-seven weeks out of the year, (Tr. 6-7), the insurer maintains that, contrary to the judge's finding, the reviewing board's decision in Bunnell v. Wequasset Inn, 12 Mass. Workers' Comp. Rep. 152 (1998), should apply. According to the insurer, the employee's projected salary for the twenty-seven weeks he was expected to work for the employer should be divided by fifty-two weeks, yielding average weekly wages of $311.54. The employee maintains that such a computation would not provide an accurate reflection of the employee's probable future earning capacity, based on his past history of full-time work, and that the judge's method of calculating his average weekly wages does.[3] We agree with the employee.

> "Average weekly wages" is defined in relevant part in G. L. c. 152, § 1(1), as:
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> the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, 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 employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

[3] The parties stipulated that the employee was paid $600 per week while working for the employer. Though the judge did not specify the precise method he used to calculate the employee's average weekly wages, a determination that it was $600 per week amounts to dividing his earnings while working for the employer by the number of weeks he worked.

However, the courts and the reviewing board have endorsed alternative methods of calculating average weekly wages where the statute is not applicable in a particular case or where evidence has not been introduced which would allow the calculation of average weekly wages in accordance with the statute. See, e.g., Rice's Case, 229 Mass. 325, 328 (1918)(the words "average weekly wages". . . "should be interpreted in their common and ordinary sense and should be computed by dividing the total amount earned by the number of weeks of employment"); Robichaud's Case, 292 Mass. 382 (1935) (following Rice's Case, supra); Ethier's Case, 286 Mass. 139 (1934) (where there was no evidence introduced of the average weekly wages of a "spare time worker" such as the employee, compensation should be based on the amount the employee earned for the only two days he worked); Dimeo v. Walsh Bros., Inc., 6 Mass. Workers' Comp. Rep. 208 (1992) (administrative judge was within his authority in calculating average weekly wages by dividing the employee's earnings in three different jobs over the course of a year by fifty-two weeks where, due to the paucity of evidence on the issue, the statutory formula could not be applied). More to the point, the Supreme Judicial Court has upheld the board's determination of average weekly wages based on a projected full-time hourly rate of $1.25 per hour, even though the employee was killed on his first day on the job. Morris' Case, 354 Mass. 420 (1968).

Endorsing an "interpretive" approach to determining average weekly wages, the court has observed:

> "The entire objective of wage calculation is to arrive at a fair approximation of claimant's *probable future earning capacity*. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis (footnote omitted). 2 A. Larson, Workmen's Compensation § 60.11(f) at 10-647—10-648 (1996)."

Gunderson's Case, 423 Mass. 642, 644-645 (1996) (emphasis added). In discussing the way in which average weekly wages is determined under § 1(1) where the employee has concurrent employment, the Appeals Court has noted that:

> [t]he workers' compensation statute is a remedial one and, as such, should be given 'a broad interpretation, viewed in light of its purpose.' Neff v. Commissioner of Dept. of Industrial Acc., 421 Mass. at 73 . . . . 'The history of work[ers'] compensation in this Commonwealth shows that the Legislature gradually but consistently has enlarged the scope of the laws pertaining to it and that the courts have construed them liberally for the protection of the injured employee.' Roberge's Case, 330 Mass. 506, 509 . . . (1953).

Sylva's Case, 46 Mass. App. Ct. 679, 685 (1999). Finally, the average weekly wages of an employee is a question of fact for the administrative judge. More's Case, 3 Mass. App. Ct. 715 (1975) (rescript op.); Caldwell v. Shamrock Enterprises, 12 Mass. Workers' Comp. Rep. 498, 500 (1998); Cahoon v. General Welding, Inc., 10 Mass. Workers' Comp. Rep. 235, 238 (1996).

With these principles in mind, we turn to the instant case. The judge did not attempt to calculate the employee's average weekly wages based on his prior fifty-two weeks of employment because Mr. Carnute had not worked for the employer for fifty-two weeks before his injury. See Gillen's Case, 215 Mass. 96, 97 (1913). The remaining methods prescribed by the statute cannot be used to determine average weekly wages, because there was no evidence introduced of the wages of a similarly situated employee working for the employer or for another employer in the area.[4] As discussed above, in cases such as this where the definition in § 1(1) is not a good fit, due to the paucity of the evidence submitted, the time during which the employee has been employed, or for other reasons, the judge may use a common-sense method to determine average weekly wages.

[4] Contrary to the employee's assertion, the employee's testimony that a person with his ability and experience could command a salary of $650.00 and up in the Berkshires, (Tr. 21), is not sufficient to satisfy the prescription in § 1(1) of evidence of a person "in the same grade employed elsewhere in the same class of employment and in the same district." "Evidence is required of the earnings of a particular person employed by another employer, not of general wage levels for similarly classified workers in the vicinity." L. Locke, Workmen's Compensation, § 303 at 358-359 (2d ed. 1981), citing Snow's Case, 259 Mass. 376 (1927).

Rice's Case, supra at 328; Dimeo, supra at 209-210.

The judge here apparently did just that. In effect, he divided the employee's earnings during the times he worked by the number of weeks worked. See Rice's Case, supra; Robichaud's Case, supra; Roberts v. Central Heating and Cooling, 9 Mass. Workers' Comp. Rep. 431, 433 (1995). The troubling aspect of the judge's method of calculating average weekly wages is the agreed fact that the employee was, at the time of his injury, employed in a seasonal job. The cases in which the courts and the board have endorsed the division of earnings by weeks worked, even when the employee has been employed fewer than fifty-two weeks, have not been cases where the employee had a definite termination date, as did the employee here. Nevertheless, the distinction made by the judge—that though his employment at the time of his injury was seasonal, Mr. Carnute's work history showed him not to be a seasonal employee—was not, we believe, arbitrary or capricious. It was a factual finding with support in the evidence. See Caldwell, supra; Cahoon, supra.

Indeed, the few cases involving seasonal employees are distinguishable from the case at bar. In Bunnell, supra, where we held that the employee's earnings in a seasonal landscaping job should be divided by fifty-two rather than by the number of weeks she actually worked, we emphasized the fact that "[t]he employee's landscaping job was, and always had been, of a determinate duration." Id. at 155.

> *Every year* she worked in the employment, it was for a fixed period of time, ending in the autumn. [citation omitted.] The employment could never become continuous because there was no need for landscaping services during the winter off-season. She had *regularly received unemployment compensation* during those off-seasons. [citation omitted.] As such, that off-season time could not be considered as being within the employment relationship, and could not therefore be "time lost" from the employment.

Id., emphasis added. Similarly, in Defelice v. Derbes Bros., Inc., 16 Mass. Workers' Comp. Rep. ___ (October 29, 2002), where the judge found the employee, a road construction worker who was laid off " *'each year during the winter months' "* and collected unemployment benefits, to be a seasonal employee, we upheld the calculation of average weekly wages by dividing earnings over the previous year by fifty-two weeks.

Id. at ___, emphasis added. In both of these cases, the employee had demonstrated a work history of seasonal type employment accompanied by expected layoffs. We contrast the judge's finding here: "Other than the period after his termination from the Village Inn, he has always worked year round, although the Stockbridge Country Club was only a seasonal job. He says he intended to look for other work when he was done with the season." (Dec. 4.) Mr. Carnute did indeed find other work when he was able, as a prep cook at the Backwater Grille. (Dec. 3.) His testimony was that this was a year-round job. (Tr. 20.) The insurer has cited, and we have found, no cases which prohibit the method of calculation employed by the judge here.[5] Given these factors, we cannot say that the judge's method of calculating Mr. Carnute's average weekly wages did not provide a fair estimate of his probable future earning capacity. See Gunderson's Case, supra at 644-645; and Dimeo, supra at 209.

The decision is affirmed. Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel a fee of $1,273.54.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

[5] To the contrary, recent cases involving the determination of average weekly wages where the employees were union workers with histories of expected layoffs illuminate the distinction between those employees and Mr. Carnute, while at the same time supporting non-statutory ways of calculating average weekly wages, if the statutorily prescribed methods are not feasible. In Ciampa v. Chapman Restoration and Waterproofing Corp., 15 Mass. Workers' Comp. Rep. 114 (2000), which also involved a union laborer, we held that the judge erred in basing the employee's average weekly wages on his earnings for the only day he worked for the employer where the employee had testified to having had seasonal layoffs in the prior fifty-two weeks. We recommitted the case, noting that if the judge could not determine average weekly wages by one of the formulas in § 1(1), she may be able to determine it by other means. Id. at 118 n.7. Similarly, in Sanchez v. O'Connor Constr. Co., 16 Mass. Workers' Comp. Rep. 241 (2002), which involved another union laborer injured on his first day on a particular job, we held that there was no evidence that the employee had, in the past 52 weeks, or would in the future, earn the amount he was expected to earn at the job on which he was injured. To the contrary, working out of a union hall involved some periods of layoff. We recommitted the case for further findings on average weekly wages by a statutory or alternative method. Id. at 246 n.3.

Filed: **May 19, 2003**

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge