COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009163-03**

Gabriel Abebe	Employee
Lowe's Home Centers	Employer
Lowe's Home Centers	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Costigan)

APPEARANCES
Robert L. Noa, Esq., for the employee
Clyde B. Kelton, Jr., Esq., for the self-insurer

McCARTHY, J. The self-insurer's appeal calls upon us to construe the concurrent wage provisions of § 1(1).[1] The administrative judge, whose decision we review, awarded the employee weekly incapacity benefits based on his average weekly wages from both his job with Lowe's, at which he was injured, and his own contracting company. The self-insurer argues the judge erred by including the employee's wages from the contracting company in the computation of his pre-injury average weekly wage because that employer was not insured for workers' compensation on the date of the employee's industrial accident at Lowe's. We agree, given the facts of this case. We therefore reverse the decision in part, and recommit the case for the reasons that follow.

The employee worked as a night shift stock clerk for Lowe's, earning $380 per week. (Dec. 4-5.) In addition to that job, the employee was the owner/operator of White Nile General Contractors (White Nile), where he supervised approximately ten (Dec. 9) to twenty (Dec. 4) employees. The company performed general construction projects from 2001 through 2003. (Dec. 4.)

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[1] General Laws c. 152, § 1(1), provides, in pertinent part:

> In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several insured employers and self-insurers shall be considered in determining his average weekly wages.

On March 23, 2003, while working at Lowe's, the employee suffered a concussion when he was struck on the left side of his head by a load of wood being moved on a forklift. (Dec. 6.) White Nile was not insured for workers' compensation coverage on the date of the employee's injury,[2] although there were policies in effect for periods before and after that date.[3] (Ex. 12, Certified Records from the Workers' Compensation Rating and Inspection Bureau.) Without analysis or subsidiary findings, the judge nevertheless included the employee's $600 average weekly earnings from White Nile as concurrent wages under § 1(1). For the reasons that follow, this was error.

We have recently visited the question of when concurrent earnings can be included in a situation involving an illegally uninsured employer. In Sellers v. John Havlin Tree Serv., 20 Mass Workers' Comp. Rep. 277 (2006), we concluded that the employee was entitled to his concurrent wages where the concurrent employer was insured, and the employer for which the employee worked when he was injured was illegally uninsured. On those facts, we interpreted "insured employer" in § 1(1) "to mean an employer legally required to carry workers' compensation insurance." Id. at 282. We reasoned:

> We see no policy or rationale to justify an interpretation of § 1(1) which would deprive the employee the benefit of his concurrent earnings simply because one of

[2] It is established that the question of whether an employee is concurrently employed, for purposes of § 1(1), must be determined as of the date of injury. Chartier's Case, 19 Mass. App. Ct. 7, 9-10 (1984)(Legislature intended that concurrent insured employment must exist at time of injury).

[3] The administrative judge's sole finding on the issue of White Nile's workers' compensation coverage was: "Mary DePierro of the Worker's Compensation Rating and Inspection Bureau of Massachusetts [WCRIB] testified that White Nile General Contractors, Inc. had last had workers' compensation insurance coverage on May 21, 2004." (Dec. 10.) This finding references a date some fourteen months *after* the employee's date of injury, and is irrelevant to the issue of whether White Nile was an insured employer when the employee was injured. Ms. DePierro's unrebutted testimony, and the certified records of the WCRIB submitted by the self-insurer, establish that White Nile had a workers' compensation policy for the periods from March 3, 2001 to March 3, 2002, and from May 21, 2003 to May 21, 2004, but there was no coverage in place between March 3, 2002 and May 21, 2003. (Tr. III, 6-7; Ex. 12.) As the employee does not dispute this fact, recommittal on this issue is unnecessary. Cf. Chalmers v. City of Boston, 13 Mass. Workers' Comp. Rep. 435 (1999)(question of whether concurrent employer's workers' compensation policy was properly cancelled required recommittal).

> his employers failed to provide the workers' compensation coverage required by law. We note an appellate court in New York has reached the same conclusion in construing a similar section of that state's workers' compensation law: "An employee's right to have his or her wages from concurrent employment included in the average weekly wage should not hinge upon whether that employee is fortunate enough to be employed by an entity in compliance with the law." Lashlee v. Pepsi-Cola Newburgh Bottling, 301 A.D. 2d 879, 881 (2003).[4]

Sellers, supra at 280-281.

Sellers is therefore distinguishable from the facts of the present case: Mr. Abebe is the owner of White Nile General Contractors, the uninsured entity from which he claims entitlement to concurrent wages. As owner of that illegally uninsured entity, Mr. Abebe would be personally liable to an employee injured there for personal injury and consequential damages under G. L. c. 152, § 66, due to his failure to obtain workers' compensation insurance. LeClair v. Silberline M'fg. Co., 379 Mass. 21, 26-28 (1979). It should be apparent that the "employee" Mr. Abebe could not sit at the same table with the "owner" Mr. Abebe in that § 66 action. Simply put, Mr. Abebe has unclean hands; his failure to provide workers' compensation insurance for White Nile bars him from receiving benefits based on his earnings there. Accord Dawson v. Captain Parker Pub, 11 Mass. Workers' Comp. Rep. 84 (1997)(employee barred from claiming benefits based on cash tip income which employee did not report as taxable income).

We therefore need not decide whether Sellers would govern the present case if the facts were different, i.e., an injured employee who was *not* the owner. See Commonwealth v. Gomes, 59 Mass. App. Ct. 332, 348-349 (2003)(McHugh, J., dissenting)(better practice to decide case on narrower grounds that are still adequate for its disposition).

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[4] We also noted that the legislature had inserted the concurrent wage provision into § 1(1) in 1935, when workers' compensation insurance was elective, not mandatory. Sellers, supra at 280. "Thus, at the time the legislature inserted the concurrent employment definition into the statute, it was impossible for an employer to be without workers' compensation insurance *illegally*. . . ." Id. (emphasis added).

Accordingly, we reverse the judge's finding that the employee's pre-injury average weekly wages should include his $600 average weekly earnings from White Nile. (Dec. 13.) Thus, the employee is left with his $380 average weekly wage from Lowe's. The judge's findings that the employee was only partially disabled from and after March 20, 2003, and that he had earning capacities of $600 and then $800 per week,[5] are supported by the evidence and unaffected by our ruling on the concurrent wage issue. See Federico's Case, 283 Mass. 430, 431 (1933). Therefore, as the employee's assigned earning capacity exceeded his pre-injury average weekly wages during all periods of incapacity claimed, he is not entitled to any weekly incapacity benefits, and we vacate the judge's award of § 35 benefits in its entirety. (Dec. 14.)

We must recommit the case, however, for the administrative judge to make subsidiary findings of fact and rulings on the self-insurer's duly raised § 14(2) fraud complaint against the employee. (Dec. 3; Tr. I, 4.) The judge made no findings whatsoever on this aspect of the controversy, as he was obliged to do. See G. L. c. 152, § 11B("Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision"). Chalmers, supra at 436, citing Leonard v. Merrimack Valley Reg. Transit Auth., 12 Mass. Workers' Comp. Rep. 508, 509 (1998); Foreman v. Highway Safety Sys., 19 Mass. Workers' Comp. Rep. 193, 197 (2005). As the self-insurer also raised the issue of recoupment under § 11D at hearing, and this decision vacates the hearing award of

[5] The judge found that although the employee was unable to return to work as a building materials stock clerk at Lowe's, he "is capable to perform the duties and responsibilities of the owner of White Nile General Contractor, Inc.," where he "earned approximately $600.00 per week." (Dec. 13.) The judge assigned a $600 weekly earning capacity from March 20, 2003 to September 13, 2003. (Dec. 14.) The judge also found that in September 2003, when the employee and his wife started Blue Nile Video Productions, (Dec. 5), the employee "could earn approximately $200.00 per week from his video production business." (Dec. 13.) Accordingly, the judge increased the employee's weekly earning capacity to $800 as of September 13, 2003 and continuing. (Dec. 14.)

benefits, the judge on recommittal should address the self-insurer's recoupment claim. Accordingly, the decision is reversed in part, the award of weekly partial incapacity benefits is vacated, and this case is recommitted for further findings on the self-insurer's § 14(2) complaint and its § 11D claim for recoupment.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

Filed: **March 13, 2007**

COSTIGAN, J. (concurring in part and dissenting in part) Although I agree that the administrative judge erred in finding the employee's earnings with White Nile constituted concurrent wages under § 1(1), I disagree with the majority's reason for so holding. In my view, the "unclean hands" theory is not, as the majority suggests, a narrower ground on which to decide this issue. Rather, that theory impermissibly broadens the plain meaning of the phrase "insured employer" to require an analysis of fault -- a determination of who is responsible for a concurrent employer's failure to be insured for workers' compensation.[6] The majority purports that it is not deciding whether an injured employee *not* responsible for his concurrent employer's failure to have such insurance would be entitled to have those concurrent wages included in his average weekly wage computation, but it seems to me that is precisely the import of the majority's opinion. If Mr. Abebe is not entitled to have his White Nile wages included

[6] The majority suggests that because the concurrent wage provisions of § 1(1) were enacted before workers' compensation coverage became mandatory for most (but not all) employers in 1947, the phrase "insured employer" should be construed to include an employer legally required to have workers' compensation insurance, but lacking same. See footnote 4, supra. I note that in the past sixty years, the legislature has had dozens of opportunities to redefine what "insured employer" means for purposes of concurrent wages, and has not done so.

because his hands were unclean, is it not the inevitable converse of that proposition that an employee whose hands are clean, that is, who bears no responsibility for his concurrent employer's failure to have workers' compensation coverage, is entitled to have those concurrent wages included in his average weekly wages, for purposes of calculating his weekly incapacity benefit? Insofar as the majority's holding implies such a result,[7] I respectfully disagree.

In Letteney's Case, 429 Mass. 280 (1999), the Supreme Judicial Court addressed the issue of average weekly wage computation in the context of the provisions of § 35C[8] and an employee whose last five years of earnings were from self-employment:

> The Legislature has enacted an insurance scheme. Employees give up their right to sue their employers in tort in return for a right to compensation for job-related injuries, whether or not the employer was at fault. . . . 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 general 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 equilibration cannot take place.

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[7] The majority's quotation from Sellers, see page 2-3, supra, is telling, although the one New York appellate decision cited with approval in that quotation is underwhelming authority for the proposition urged.

[8] General Laws c. 152, § 35C, provides, in pertinent part:

> When there is a difference of five years or more between the date of injury and the initial date on which the injured worker or his survivor first became eligible for benefits under section thirty-one, thirty-four, thirty-four A, or section thirty-five, the applicable benefits shall be those in effect on the first date of eligibility for benefits.

Id. at 284-285. (Emphasis added.) Concurrent employment with an employer *not* participating in the Massachusetts workers' compensation insurance system at the time of the injury -- in this case, White Nile -- is just such "excluded employment" for purposes of determining the employee's benefit entitlement.

As the majority notes, our decision in Sellers v. John Havlin Tree Serv., 20 Mass Workers' Comp. Rep. 277 (2006), is distinguishable on the facts, but I do not think the facts cited by the majority are the relevant ones. In Sellers, the concurrent employer, unlike White Nile, *was* properly insured under the act; it was the employer on whose watch the employee was injured that was uninsured. As such, the Trust Fund assumed the role of the insurer of last resort under § 65(2)(e).[9] The Trust Fund is an entity whose revenues are raised by assessments on all insured and self-insured Massachusetts employers, the commonwealth and its political subdivisions. See §§ 65(2) and (3). In Sellers, we held the concurrent wage provisions of § 1(1) were applicable to the employee's claim because both of his employers were within the Massachusetts workers' compensation system, one by direct insurance with a carrier, and the other by indirect insurance from the pool of insured and self-insured Massachusetts employers, via the Trust Fund. Thus, the "long-run equilibration" endorsed by the Supreme Judicial Court in Letteney was preserved.

Here, we have no such equilibration because the concurrent employer, White Nile, was without workers' compensation insurance on the date of the employee's injury while working for the self-insured employer, and the Trust Fund has no statutory obligation -- indeed, no role whatsoever -- when the concurrent employer not involved in the industrial injury is uninsured. Thus, the employee's earnings from White Nile, like those from an out-of-state employer or from self-employment,[10] as in Letteney, constituted "a liability

[9] The Trust Fund makes "payment of benefits resulting from approved claims against employers subject to the personal jurisdiction of the commonwealth who are uninsured in violation of this chapter. . . ."

[10] I note that G. L. c. 152, § 1(4), as amended by St. 2002, c. 169, effective October 23, 2002, allows a sole proprietor, at his option, to elect workers' compensation coverage by securing insurance with a carrier.

for which neither the [self-insured] employer nor any other Massachusetts employer has provided." Letteney, supra at 285.

In my view, no fair reading of § 1(1) requires, or even permits, a determination of fault or responsibility for a concurrent employer's lack of workers' compensation coverage.[11] The statute speaks in terms of "concurrent service of more than one *insured employer* or self-insurer." It does not say, "or uninsured employer, provided the employer is uninsured through no fault of the injured employee." I am mindful that in circumstances such as Mr. Abebe's, where an employee's wages with the uninsured concurrent employer are greater than those earned with the insured employer where the injury occurs, the exclusion of those wages results in significant financial detriment to the employee. However, the same is true when, for example, an employee has a higher-paying job out-of-state, even if that employer has workers' compensation insurance in that jurisdiction, but is injured while working for an insured employer in Massachusetts.

> If an argument can be made that the law should be changed, it is up to the legislature, not the reviewing board or the administrative judge, to amend the statute. As the Appeals Court stated in Rogers v. Metropolitan Dist. Comm'n, 18 Mass. App. Ct. 337, 339 (1984):
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> > When statutory language is plain and unambiguous, it is not a court's function to make repairs in the 'faulty' text on the basis of . . . presumed legislative intent. . . . '[I]f the omission was intentional, no court can supply it. If the omission was due to inadvertence, an attempt to supply it . . . would be tantamount to adding to a statute a meaning not intended by the Legislature.'

Kerrigan v. Commercial Masonry Corp., 15 Mass. Workers' Comp. Rep. 209, 215 (2001).

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[11] The majority correctly points out that under § 66, Mr. Abebe, as owner of White Nile, would be personally liable if one of his employees was injured while White Nile was uninsured for workers' compensation. Such a circumstance would not, however, require him to "sit at the table" as both the owner of the company and an employee. That scenario could arise only if Mr. Abebe was injured while working for uninsured White Nile, and brought a claim for benefits against the Trust Fund. The Fund most likely would raise the "unclean hands" defense on those facts but, in my view, the majority improperly applies that defense to the facts of this case.

Thus, for the sole reason that White Nile was uninsured for workers' compensation on the date Mr. Abebe was injured working for Lowe's, his White Nile earnings are not concurrent wages for purposes of § 1(1).

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Patricia A. Costigan
Administrative Law Judge

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