COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 011703-99**

Heather B. Whitman	Employee
Department of Mental Retardation	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll and McCarthy)

APPEARANCES
William F. Scannell, Jr., Esq., for the employee
Terence H. Buckley, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee benefits for a psychological injury causally related to an assault that occurred at work. We affirm the decision, discussing only the self-insurer's contention that the judge erred in his calculation of the average weekly wages.

The employee began working 30 hours per week for the employer in 1998, providing direct care to mentally retarded clients in group homes. The employee also worked for Matson Community Services, a concurrent insured employer as a residential counselor, on both a part-time and full-time basis in 1998 and 1999, until the industrial accident of April 5, 1999. (Dec. 7-8.) The employee's work arrangement was changing around the time of the industrial accident. The employee went to on-call status with the concurrent employer Matson; in this position, the employee could accept any work offered; and there was no limit on the amount of time she could accept. The employee intended to continue to work at the concurrent employer, and to work for her mother providing shared living to clients at the same location as the concurrent employer. (Dec. 7.) The industrial accident occurred when a client assaulted the employee, breaking her finger, and scratching and bruising the employee's face. The employee was paid benefits for her physical injuries on a without-prejudice basis until July 29, 1999. The issue in the

present case was whether the employee had suffered a psychological injury and disability causally related to the assault at work. (Dec. 5, 8-9.)

The judge concluded that the employee did suffer from post traumatic stress disorder and major depression causally related to the industrial accident. (Dec. 12.) The judge awarded the employee temporary total incapacity benefits, based on an average weekly wage calculated pursuant to § 1(1) of the act:

> The employee was concurrently employed as found above. At issue is what is the appropriate measure of her average weekly wage for her concurrent employer. The employee had changed status with that employer five days before the injury. The self-insurer's position is that the appropriate average weekly wage would be based on the projected earnings of the employee at this new on call status. The employee's position is that the average weekly wage should be based on the employee's actual wages over the past year. There is every indication from the evidence and I find that it was the intention to continue to work full time at concurrent employment so as to make at least her pre-injury concurrent wages. This was to be split between working for her mother and Matson. The nature of the work for these two employers was to be the same, taking care of mentally retarded individuals in an apartment setting. I find that had the employee been employed by her mother as planned, that her mother would have been an insured employer since insurance is legally required and I credit the employee's testimony that her mother intended to treat her as an employee. I find that the most reasonable measure of average weekly wage is to take the actual wages that the employee earned over the past fifty-two weeks.

(Dec. 11.)

The self-insurer challenges the judge's calculation of the average weekly wage, pointing to the speculative nature of the employee's future earnings from her concurrent employment. We agree that the judge's finding as to the employee's mother's future insurance coverage was speculative. However, that is of no consequence. The judge also found that the employee intended to make "at least" as much at her concurrent employment as before the injury, notwithstanding the change in her status. Furthermore, the judge found that "[o]n call status had no set schedule and the employee could accept any work offered to her. There is no minimum or maximum limit on the amount of time that the employee could accept." (Dec. 7.) Although the employee intended to also work for her mother, the "[e]mployee never did work for her mother because she was injured

before making the transition." Id. But the employee did work for Matson on the day before the industrial injury. In the circumstance where the employee in fact had continued to work for Matson, although her technical status had changed, and she had not begun to work for her mother, the judge appropriately relied on § 1(1)'s primary definition of "average weekly wages." That section provides, in pertinent part, that an employee's average weekly wage is

> the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two. . . . 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.

The alternative § 1(1) formulations urged by the self-insurer do not come into play here, as the method for determining average weekly wages quoted above applies. Cases cited by the self-insurer such as Pleska v. Worcester Taper Pin, 4 Mass. Workers' Comp. Rep. 408 (1990), and Morris's Case, 354 Mass. 420 (1968), are inapposite. In those cases, the employees' work schedules definitely changed -- full to part-time in the former and part to full-time in the latter -- coincidentally with the industrial accidents. See also Chartier's Case, 19 Mass. App. Ct. 7 (1984), where the employee had terminated his employment with the concurrent employer some three months before the industrial injury. Here, the employee's change to on-call status had not translated to lower weekly earnings at Matson. It would have been speculation to project that the employee would have earned less at Matson.

We summarily affirm the decision as to the other issues argued by the self-insurer on appeal.

Accordingly, the decision is affirmed. Pursuant to § 13A(6), the self-insurer is ordered to pay attorney's fees in the amount of $1,273.54, plus necessary expenses.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: **July 16, 2003**