COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036763-04**

James Duran Employee
William Walsh, Inc. Employer
Granite State Insurance Co. Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Horan and Fabricant)

APPEARANCES
Francis J. Hurley, Esq., for the employee
Diane Cole Laine, Esq. for the insurer

McCARTHY, J. The insurer appeals from a decision in which the administrative judge awarded the employee, a union mover, § 34 incapacity benefits for two accepted work injuries, on November 5, 2004 and February 19, 2005. Both injuries occurred while the employee was working for the same moving company. The only issue we address is that of the employee's average weekly wage, the calculation of which was complicated by the trade practice of union movers working for several different employers. We think the judge correctly addressed this unusual issue, and affirm the decision.

The judge characterized the employee as a "spare" mover, and described the process of obtaining work:

> Each day the employee called various moving companies to determine whether they would need his services in the coming workday. The practice was that if one employer did not need the employee's services, the employee called another moving company, etc., until he either found work or there was no work that particular day. In the period of time at issue in this case, the employee primarily worked for the present employer. However, during that time period, the employee also worked for other insured moving companies. If the employee worked a sufficient number of hours with the various employers, he qualified for benefits (e.g. health insurance) through the union. The various employers made payments to the union that would count towards the employee's entitlement to and receipt of the aforesaid benefits.

(Dec. 5.) The judge determined that the employee had worked for forty-two of the fifty-two weeks preceding the 2005 work injury, characterizing the other ten weeks as "time lost" under § 1(1). [1]

The judge then analyzed the average weekly wage issue by reference to the venerable Gillen's Case, 215 Mass. 96 (1913), and concluded that the employee's wages from all of his moving jobs in the twelve months prior to his 2005 injury were to be included in that calculation. (Dec. 6-7.) We agree with the administrative judge and the employee, that the present case is governed by the principles first announced in Gillen.

Gillen is one of the earliest cases interpreting the then new workers' compensation statute in the Commonwealth. In that case, the court addressed the claim of a longshoreman, whose employment arrangement was quite similar to that of the present employee. Barney Gillen, "according to the custom of his craft," worked not only for the employer steamship company at which he was injured, but also for different employers in the same occupation during the twelve months prior to his injury. Gillen, supra at 97. The court reasoned that "average weekly wages," as defined in § 1(1), [2] "refers to substantially uninterrupted work in a particular employment from which the wages of the employee are derived." Id. The court held that the employee's claim was "a case where the condition of the workman is continuous labor in regular employment with different employers. The loss of his capacity to earn, as demonstrated by his conduct in such regular employment, is the basis upon which his compensation should be based." Id. at 99. In this case, we think the judge's reliance on Gillen to characterize the unionized moving industry as one featuring continuous work of a specified kind for different employers, was well placed.

Accordingly, the decision is affirmed. [3] We award the employee's attorney a fee under the provisions of G. L. c. 152, § 13A(6), in the amount of $1,407.15.

So ordered.

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[1] General Laws c. 152, § 1(1)'s primary definition of "Average weekly wages" upon which benefit entitlement is based is "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."

[2] This fundamental definition has not changed over the century.

[3] We summarily affirm the decision as to all other arguments put forth by the insurer on appeal.

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: April 24, 2008