

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 035728-98

Jeffrey Hill
Dunhill Staffing Systems, Inc.
Fireman's Fund Insurance

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll and McCarthy)

APPEARANCES

Anthony P. Facchini, Esq., for the employee
Gerard A. Butler, Esq., for the insurer at hearing and on appeal
Michele J. Mintz, Esq., for the insurer on appeal

LEVINE, J. The insurer appeals the decision of an administrative judge which awarded the employee a closed period of compensation benefits pursuant to § 34 and ongoing compensation benefits pursuant to § 35 based on a stipulated average weekly wage. The insurer contends that the wage stipulation was erroneous. In the circumstances, it is appropriate to recommit the case to the judge for reconsideration of the aforesaid stipulation.

Jeffrey Hill, the employee, was thirty-six years of age at the time of the decision. Mr. Hill commenced employment with Dunhill, a temporary agency, in May 1998. He was assigned to a company where he loaded tractor-trailers. On June 30, 1998, while operating a hand truck, the employee fell and injured his right knee. (Dec. 2.) He left work and sought medical attention the next day. Mr. Hill performed light duty work for Dunhill over the next month up until August 4, 1998. He has been out of work since that date. Id.

On March 30, 1999, the employee underwent surgery to his knee. Following the surgical procedure, the employee continued to experience difficulty with his knee. (Dec. 3.) The employee filed a claim for benefits, and the matter was conferenced before an administrative judge. The judge ordered § 34 benefits

from March 30, 1999 and continuing. Both parties appealed to a hearing de novo. (Dec. 2.)

Following the hearing, on December 21, 1999 the judge issued his decision in which he ordered § 34 temporary total incapacity benefits from August 4, 1998 through June 23, 1999 and § 35 partial incapacity benefits from June 24, 1999 to date and continuing. (Dec. 4.) The order of weekly indemnity benefits was based on an average weekly wage of \$ 585.00, (Dec. 4), stipulated to by the parties at the hearing. (Tr. 3.) By date of January 7, 2000, the insurer appealed the decision to the reviewing board. On February 24, 2000, the insurer filed a motion with the administrative judge to amend the hearing decision; the motion alleged that the parties erroneously stipulated to an average weekly wage of \$585.00 and that the correct average weekly wage was \$199.58. The judge denied the motion on February 29, 2000.

The only issue the insurer raises on appeal is its contention that the stipulated average weekly wage, on which the judge based his order of weekly benefits, is incorrect and that the correct average weekly wage should replace the stipulated one.

A stipulation of the parties may be vacated if a court deems it “improvident or not conducive to justice,” Loring v. Mercier, 318 Mass. 599, 601 (1945); the court should consider whether a stipulation “would work an injustice against one of the parties.” Grant v. APA Transmission, 13 Mass. Workers' Comp. Rep. 247, 252 (1999). The request to vacate a stipulation needs to be made “in the course of a single action.” Id. at 253.

The insurer moved to vacate the average weekly wage stipulation during the pendency of its appeal of the judge’s decision. The motion was thus timely raised. Grant, supra. The judge denied the motion, stating that “a check of my notes and of the transcript record confirms both parties stipulated to an average weekly wage of \$585.00 at the hearing.” This statement does not evince that the judge considered the proper standard (“improvident or not conducive to justice”)

when he denied the motion. In the circumstance we think it appropriate to recommit the case so that the judge can reconsider the motion having the proper standard in mind. §11C. For a review of cases dealing with vacating stipulations, see Crittenton Hastings House of the Florence Crittenton League v. Board of Appeal of Boston, 25 Mass. App. Ct. 704, 712-713 (1988).

Especially where the employee denies that the stipulated average weekly wage was wrong, the judge should hear the parties on the issue and consider whether to take evidence.¹

Another matter merits comment. The employee contends that the insurer is not paying the weekly benefits as ordered in the judge's decision. He states that the insurer has paid and is paying less than the §§ 34 and 35 benefits ordered in the decision. He seeks penalties for violation of G. L. c. 152, § 8. (Employee's brief, 9; in particular, see the second paragraph of § 8[1]). The judge may consider joining this claim to the proceedings when he considers the insurer's motion on recommitment.

The case is recommitted to the administrative judge for further proceedings consistent with this opinion.

So ordered.

¹ Should the issue of the correct average weekly wage actually be reached after recommitment, we note that the insurer contends that the correct average weekly wage is \$199.58. (Insurer's brief, 3.) However, the employee's work-weeks from which this figure appears to be derived includes the month after the injury when the employee did light duty work; because of the industrial injury, the employee's earnings during that period of time may have been less than his earnings prior to the industrial injury. (See Exhibit 5 attached to Insurer's brief.) Furthermore, the first sentence of § 1(1) of the act mandates that the average weekly wage be calculated based on the "twelve calendar months immediately preceding the date of injury." *Id.*, emphasis added. And if the employee did not work sufficient time prior to the industrial injury so as to be able to ascertain his average weekly wage pursuant to the first sentence of § 1(1), then one of the alternatives for deriving the average weekly wage provided for in that section may have to be considered.

Jeffrey Hill
Board No. 035728-98

Frederick E. Levine
Administrative Law Judge

Martine Carroll
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

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