COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 011086-99**

Jesus Sanchez Employee
O'Connor Construction Co. Employer
HVAC Compensation Corp. Self-insurer

REVIEWING BOARD DECISION
(Judges Levine, McCarthy and Maze-Rothstein)

APPEARANCES
Peter H. Collins, Esq., for the employee
Joseph M. Spinale, Esq., for the self-insurer at hearing
Edward M. Moriarty, Jr., Esq., and Ellen Harrington Sullivan, Esq., for the self-insurer on appeal

LEVINE, J. The self-insurer appeals an award of §§ 34 and 35 benefits, alleging that the judge erred in basing the employee's average weekly wage on one week's projected wages with the employer, and that he further erred in setting the employee's earning capacity without taking into consideration both the surveillance videotape submitted by the self-insurer and an increase in wages for an offered job. We find merit in the self-insurer's first argument, and therefore reverse and recommit for further findings on the employee's average weekly wage.

In a § 10A conference order, the judge awarded the employee a closed period of § 34 total incapacity benefits and ongoing § 35 partial incapacity benefits based on an assigned average weekly wage of $1,417.80, and an earning capacity of $817.50. Both parties appealed to a hearing de novo.

The judge's findings include the following. Jesus Sanchez was a twenty-eight year-old, unmarried father of six children at the time of hearing. He did not graduate from high school, nor had he been able to pass a test to obtain his GED. At the time of his industrial injury, he was a union laborer. His work was heavy, involving much

lifting, digging and cleaning up, as well as erecting scaffolding. Since he did not own a car, his fiancée dropped him off at various job sites. When a job ended, he would return to the union hall and be sent to another job. Gaps in employment were covered by unemployment compensation. (Dec. 792.)

On March 29, 1999, Mr. Sanchez began work with the employer. He expected that this would be a two week job, and that he would work six days per week, twelve hours per day. His wages were $20.25 an hour for the first eight hours of each day and $30.38 for the last four hours. His job was to clean sludge out of pipes. At the end of his first day of work, while he was clamping a heavy hose into a pump, the hose kicked back and struck him in the knee, dislocating his patella. (Dec. 792-793.)

He was taken by ambulance to the hospital where a closed reduction was attempted. When, after six hours, that procedure was unsuccessful, an open reduction was performed. The employee then began a course of physical therapy, and also received injections, which were not helpful. His doctor has recommended surgery. (Dec. 793.)

Pursuant to § 11A, Dr. Norman Goguen examined the employee on September 12, 2000, and his report and deposition testimony were admitted into evidence. The judge found the impartial report adequate, but allowed the submission of medical evidence to cover the "gap" period between the date of injury and the date of the impartial examination. (Dec. 791, 795.)

Dr. Goguen diagnosed the employee as having a dislocated right patella with chronic, medial quadriceps tendinitis and quadriceps adhesions, causally related to his injury at work. Dr. Goguen did not recommend further physical therapy or surgery since relief of the employee's symptoms could not be assured. Instead, he recommended that the employee be retrained for a more sedentary job, that he limit his standing and walking, and that he do no pushing or pulling over twenty-five pounds. He felt that the employee could drive a car, though not while taking vicodin. He opined that Mr. Sanchez could perform the light duty job offered by the employer, but felt that the travel required from the employee's home would " 'be a little bit much for him.' " (Dec. 795.)

The doctors whose opinions were admitted for the gap period agreed that as of January 2000 the employee was partially disabled. (Dec. 796-797.)

Relying on the reports of Dr. Goguen and the other doctors, the judge found the employee totally incapacitated from March 29, 1999 until January 16, 2000, and partially incapacitated thereafter. (Dec. 797.) In determining the employee's average weekly wage, the judge relied on the testimony of the employee and Richard Coakley, an agent of the employer, who agreed that the employee was paid $20.25 an hour, and time and a half for overtime. The judge found the employee's average weekly wage to be $1,782.00. He reached this figure by calculating what the employee would have earned in one week had he completed the job for the employer. He determined that, since the job was actually completed in six twelve-hour days, Mr. Sanchez would have worked forty hours of straight time ($20.25 x 40 = $810.00) and thirty two hours of overtime[1] ($30.375 x 32 = $972), for a total of $1,782.00 (Dec. 797, 800.)

The judge further determined that the employer had made a bona fide offer of light duty employment. The job would pay the going union rate for forty hours per week, but there would be no overtime. The employee admitted he could perform the job, but argued that, because of his ongoing disability, he could not get to the job by public transportation. The judge found that the employee had options for getting to work other than public transportation. (Dec. 794, 797-798.) The judge therefore assigned the employee an earning capacity equal to what he would have earned at the light duty job offered by the employer, which he found to be $20.25 per hour for a forty hour week, or $810.00. (Dec. 800.)

The self-insurer argues that the administrative judge erred by basing the employee's average weekly wage only on the wages he would have earned for one week with the employer. We agree and recommit the case for further findings regarding the employee's average weekly wage.

General Laws c. 152, § 1(1), defines "average weekly wages," in relevant part, as:

[1] The employee would have earned four hours of overtime for each of the first five days, and twelve hours of overtime for the sixth day, for a total of thirty-two hours overtime. (Dec. 797.)

> 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.

In our recent decision, Ciampa v. Chapman Restoration and Waterproofing Corp., 15 Mass. Workers' Comp. Rep. 114 (2001), we summarized the relevant case law:

> "The entire object in computing average weekly wages is to arrive as fairly as possible at an estimate of an employee's probable future earning capacity." DiMeo v. Walsh Bros., Inc., 6 Mass. Workers' Comp. Rep. 208, 209 (1992), citing Szwaja v. Deloid Assoc., 2 Mass. Workers' Comp. Rep. 40 (1988). The employee has the burden of proof. Szwaja, supra at 42. Although an employee's average weekly wage is a question of fact for the administrative judge, Caldwell v. Shamrock Enterprises, 12 Mass. Workers' Comp. Rep. 498, 500(1998), the amount found by the judge should "not . . . put the employee in a better position than he was in prior to the [industrial] injury." Herbst's Case, 416 Mass. 648, 651 (1993).

Ciampa, supra at 116. Like Mr. Sanchez, Mr. Ciampa was a union laborer who was subject to the well-known " 'vagaries of employment in the construction trades.' " Id., quoting Szwaja, supra at 43. Also like the employee here, he was injured on his first day of employment with the subject employer. We held in Ciampa that, although the parties agreed as to the employee's hourly union wage, there was no basis in the evidence on which to find that the employee worked without interruption over the previous fifty-two week period. Indeed, the judge in Ciampa had found that the employee had some seasonal layoff during the year prior to his accident. We held that, "To whatever extent the employee was laid off or otherwise worked less than forty hour weeks during the subject period, his average weekly wages would be affected." Id. at 117.

Similarly, in the instant case, there is no basis in the evidence from which the judge could conclude that the employee worked forty hours per week straight time plus thirty-two hours per week overtime, or a total of seventy-two hours per week, for the previous fifty-two weeks. The judge found that, "When a job ends he returns to the union hall and the agent sends him to another job. Any gaps in employment are covered with unemployment compensation." (Dec. 792.) This statement certainly suggests that the employee did have gaps in his employment. The employee testified that he worked from about July 1998 to September 1998 for J.W. Drywall, after which he had two weeks unemployment. (Tr. 9-10.) He also testified that he would do a job, be laid off, go back to the union, and then be sent to another job. (Tr. 10.) As in Ciampa, to whatever extent the employee was laid off and did not work or worked fewer than, in Mr. Sanchez' case, seventy-two hours per week, his average weekly wages would be affected. See also Bunnell v. Wequassett Inn, 12 Mass. Workers' Comp. Rep. 152, 154-155 (1998)(where the employee is a seasonal worker, the weeks that the employee does not work are included in the number of weeks by which the total amount is divided).[2]

We note that the employee offered no evidence on the precise number of weeks he worked, on the number of hours per week he worked or on his earnings in the fifty-two weeks prior to his injury. The employee did testify that he had been a union laborer at Local 22 since 1998. (Tr. 7.) The earliest union employment listed on the employee's biographical data sheet was from July 1998 through September 1998, (Exhibit 1), although the employee testified that he could not be sure the dates were exact. (Tr. 8-9.) The biographical data sheet lists only the months of his employment, showing no gaps between July 1998 and the date of injury, even though the employee's testimony was that there were two weeks of unemployment after his work for J.W. Drywall. In addition, the employee did not offer evidence on wages earned by a comparable employee at the same

[2] In Bunnell, we distinguished Morris's Case, 354 Mass. 420 (1968), where the court upheld a finding of average weekly wage based on the employee's anticipated full-time salary where the employee had worked only one day at that wage before being killed on the job. In Morris, the employee's job was a continuous one, with no defined termination.

job or in the same class of employment under § 1(1). On recommittal, the judge must determine, based on the evidence offered, which method is most appropriate to use in determining the employee's average weekly wage.[3] See Varano's Case, 334 Mass. 153 (1956) (neither the employee nor the insurer offered accurate evidence under § 1(1); case remanded for further hearing on the issue of average weekly wages, at which either party may offer additional evidence); Sylva's Case, 46 Mass. App. Ct. 679, 685-686 (1999) (where the record does not contain evidence from which the correct average weekly wages from the employee's two jobs can be determined, the case is remanded).

The self-insurer next argues that the judge erred by failing to adequately address and consider the self-insurer's surveillance evidence in assigning the employee an earning capacity. However, the judge listed the surveillance videotape and report of the private investigators as exhibits, (Exhibits 4 and 5), and commented on the videotape in his decision. (Dec. 794.) Cf. Rodgers v. Massachusetts Dept. of Pub. Works, 14 Mass. Workers' Comp. Rep. 310, 312 (2000) (case recommitted where reviewing board cannot tell whether judge received and reviewed employee's medical documents). There is no error in his earning capacity determination on this ground.

The self-insurer also argues that the administrative judge erred in basing the employee's earning capacity on the union hourly rate at the time of the employee's

[3] We have held that an administrative judge may compute average weekly wage by a means not specified in § 1(1) where the paucity of evidence on the issue meant that the statutory formula could not be applied. DiMeo v. Walsh Bros., Inc., 6 Mass. Workers' Comp. Rep. 208 (1992). In DiMeo, the employee chose not to submit further evidence of average weekly wage in response to the judge's request for additional wage information following a remand by the Appeals Court ordering a calculation of the employee's average weekly wage based on the employee's earnings from the 52 weeks prior to his injury, including wages earned while he resided abroad. Therefore, the judge based his average weekly wage determination on the employee's one week salary for the employer and his wages for two other covered employers during the year prior to his injury. Id. at 208. In addition, we have upheld an administrative judge's findings on average weekly wage based on a 1099 form, Pratte v. Liberty Movers, Inc., 7 Mass. Workers' Comp. Rep. 323 (1993), and on the employee's own testimony, Radke v. Eastham Foundations, 7 Mass. Workers' Comp. Rep. 197 (1993); Cahoon v. General Welding, Inc., 10 Mass. Workers' Comp. Rep. 235, 238 (1996).

injury, since the employer's witness testified that there had been two wage increases since then. However, that testimony did not reveal the amount or timing of the increases, (Tr. 62), so there was no evidence on which the judge could compute a different hourly rate. If, on recommittal, the judge wishes to solicit additional evidence on the alleged increases, he may do so. As to the self-insurer's other arguments on earning capacity, we summarily affirm the judge's decision.[4]

The decision of the administrative judge as to the employee's average weekly wage is vacated, and it is recommitted for further proceedings consistent with this opinion.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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[4] The employee argues that the judge's earning capacity determination should be re-opened because, subsequent to the hearing, the employee learned that the light duty position was no longer open. The employee did not appeal the judge's decision. Therefore, we do not address that issue, nor can it be raised on recommital. See Strescino v. Cyrk, Inc., 14 Mass. Workers' Comp. Rep. 242, 245 n. 3 (2000). If, however, additional evidence is received on the question of increases in the union hourly rate, it would seem appropriate to allow evidence on whether the light duty position is available. The employee is also free to file a new claim for benefits based on his contention that the job offer was retracted.