

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 032554-09

Jose Ruiz
A&K Real Estate
Workers' Compensation Trust Fund

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Costigan and Horan)

The case was heard by Administrative Judge Hernández.

APPEARANCES

Jacob P. Morris, Esq., for the employee at hearing
James Riley Hodder, Esq., for the employee on appeal
Joanne C. Heffernan, Esq., for the insurer at hearing
Michael C. Najjar, Esq., for the employer

KOZIOL, J. The uninsured employer, joined as a party to the hearing, (Dec. 2), appeals from the administrative judge's decision awarding the employee weekly incapacity and medical benefits for an August 9, 2009, work injury. We summarily affirm the decision as to all but one of the issues raised in the employer's brief: the finding of an average weekly wage equal to the minimum compensation rate of \$218.65. We recommit for further findings on the issue of the employee's average weekly wage.

The judge's findings concerning the employee's weekly wages earned while working for the employer in the year prior to his injury are as follows:

I find that the Employee failed to establish that his average weekly wage was \$600.00 [40 hours x \$15.00/hour claimed by the employee (Dec. 4)]. The only evidence offered by the Employee regarding his wages was his 2009 U.S. Income Tax Return. The Employee testified that he reported \$1,000.00 in wages to the Internal Revenue Service. The Employee testified that he had a notebook that contained the number of hours he had worked for the Employer but was unable to produce the notebook for the Hearing. I find that the evidence in this case supports the minimum mandatory § 34 rate of \$218.65

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[applicable on the date of injury]. I find that the evidence in this case supports an average weekly wage of \$218.65.¹

(Dec. 9.) The findings state the judge’s conclusion that the employee was entitled to the minimum weekly compensation rate of \$218.65, by virtue of an average weekly wage of the same amount.² However, there are no subsidiary findings supporting that conclusion. Saulnier v. New England Window & Door, 17 Mass. Workers’ Comp. Rep. 453, 456-457 n.3 (2003)(“Recitations of testimony without clear subsidiary findings of fact do not enable the reviewing board to determine with reasonable certainty whether correct rules of law have been applied”). Without adequate subsidiary findings of fact, we cannot determine whether correct rules of law were applied to facts that could be properly found, and we are unable to perform a meaningful review of the decision. Hogan v. William Mascioli d/b/a Add-A-Room,

¹ General Laws c. 152, § 1(1), defines “average weekly wages”:

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

General Laws c. 152, § 1(11), provides the definition of “minimum weekly compensation rate”:

[T]wenty per cent of the average weekly wage in the commonwealth according to the calculation on or next prior to the date of injury by the deputy director of the division of employment and training.

Where the average weekly wage is less than the minimum weekly compensation rate set forth in § 1(11), General Laws c. 152, § 34, further provides:

While the incapacity for work resulting from the injury is total, during each week of incapacity the insurer shall pay the injured employee compensation equal to sixty percent of his or her average weekly wage before the injury, but not more than the maximum weekly compensation rate, unless the average weekly wage of the employee is less than the minimum weekly compensation rate, in which case said weekly compensation shall be equal to his average weekly wage.

² The employee’s average weekly wage could be any amount between \$218.65 and \$364.42 to support the assignment of the §1(11) minimum weekly rate of compensation. See Betances v. Consolidated Serv. Corp., 11 Mass. Workers’ Comp. Rep. 65, 68-70 (1997)(construing § 34 to provide fair meaning with equal treatment to all low income employees in its reference to minimum weekly compensation rate).

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25 Mass. Workers' Comp. Rep. 139 (2011), citing Praetz v. Factory Mut. Eng'g Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). We will not speculate as to an appropriate average weekly wage assignment, as that is a factual matter for the judge to decide at hearing.³ More's Case, 3 Mass. App. Ct. 715, 716 (1975). Therefore, recommittal is required for further findings on that issue.⁴

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: **January 10, 2012**

³ The employee testified he worked at least eight months per year, (Tr. 40), each job he performed for the employer took two to three months to complete, and he did not work for two to three weeks between each job. (Tr. 19-20, 38-39.) However, there are no "findings addressing the numbers of hours and days worked each week during the period of time he was employed by the employer." Hogan, supra at 142. The employer asserts that even without considering the seasonal nature of the employee's job, "at best" he earned an average weekly wage of \$62.50 per week, yielding a compensation rate of \$62.50 per week, based on four months of work and the \$1,000.00 reported on his income tax return. (Employer br. 12.) The employee contends he earned \$15 to \$17 dollars per hour, yielding, at the \$15 per hour rate, an average weekly wage of \$370 per week for eight months of work, and a § 34 rate of \$222 per week. (Employee br. 10.) Because the employee did not appeal the hearing decision, on recommittal he cannot be awarded benefits at a higher rate. Brackett v. Modern Cont'l Constr. Co., 19 Mass. Workers' Comp. Rep. 11, 16 (2005), citing Fay v. Federal Nat'l Mtge. Assn., 419 Mass. 782, 789 (1995).

⁴ On this record, we cannot say the average weekly wage found by the judge was erroneous as a matter of law. Accordingly, while recommittal is pending, the trust fund must continue to pay the employee's weekly benefits at the rate assigned by the judge in his hearing decision. (Dec. 11.)