COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 033860-02**

Juan Reyes	Employee
Tony Meccia, Inc.	Employer
Eastern Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Costigan and Horan[1])

APPEARANCES
Steven D. Rose, Esq., for the employee at hearing
Charles R. Casartello, Jr., Esq., for the employee on appeal
Thomas M. Dillon, Esq., for the insurer

CARROLL, J. The insurer appeals a decision in which an administrative judge awarded the employee landscaper workers' compensation benefits based on an average weekly wage of $500.00. The insurer contends that the judge's finding of that average weekly wage was erroneous, because it did not take into account the seasonal nature of the employment. We agree. As a result, we reverse the average weekly wage finding, and recommit the case for further findings consistent with this opinion.

The employee injured his low back while lifting the tailgate of a truck on August 12, 2002. The employee continued to work with pain until September 23, 2002, when his symptoms increased, and he left work. (Dec. 4.) Given the single issue that the insurer argues on appeal, we need not recount the medical evidence. Pertinent to the issue on appeal, the judge found: "Since 1989, the employee annually worked from May through November and collected unemployment benefits during the winter months. On occasion, the employer would contact the

[1] Judge Horan recused and did not participate in the determination of this case.

employee during winter months to perform simple labor tasks such as shoveling.[2] The employee worked approximately forty hours per week and earned $12.50 per hour, for an average weekly wage of $500.00." (Dec. 4.) The judge awarded benefits under §§ 34 and 35 using that $500.00 average weekly wage.

The insurer contends that the judge erred in his average weekly wage finding, by using only the number of weeks worked (i.e., 35 weeks per Ins. br. 5; 38 weeks per Employee br. 5) as the divisor to the employee's fifty-two week pre-injury earnings, rather than fifty-two. See G. L. c. 152, § 1(1). The argument invokes the "seasonal employee" rule.[3]

There is no doubt but that the employee falls within the seasonal employee rule, which requires that his seasonal average weekly wage be divided by fifty-two weeks, rather than the actual number of weeks he worked. In Bunnell v. Wequasset Inn, 12 Mass. Workers' Comp. Rep. 152 (1998), we explained:

> Every year [the employee] worked in the employment, it was for a fixed period of time, ending in the autumn. (Dec. 5.) The employment could never become continuous, because there was no need for landscaping services during the winter off-season. She had regularly received unemployment compensation during those off-seasons. (Dec. 5.) As such, that off-season time could not be considered as being within the employment relationship, and could not therefore be "time lost" from the employment. Cf. Bartoni's Case, 225 Mass. 349, 352-353 (1916)(time lost for granite worker, due to inclement weather, excluded from average weekly wage calculation, because it was "time when one might have worked but was prevented").
>
> We consider that the nature of the seasonal employment in this case should be viewed as analogous to "the vagaries of employment in the construction trades." Szwaja v. Deloid Associates, 2 Mass. Workers' Comp. Rep. 40 (1988). In Szwaja, as in the present case, the work was accompanied by periods of unemployment due to layoffs that were predictable and commonplace. Id. at 43. . . . Applying the principle that "[t]he entire

[2] We disagree with the employee's argument on appeal, that such intermittent off-season work would support a finding that the employee was "on call," thereby transforming the winter months into "time lost." See Bunnell, infra.

[3] While the insurer refers to the "seasonable" employee, we take it to mean "seasonal."

> objective in computing average weekly wage is to arrive at as fair an estimate as possible of an employee's probable future earning capacity[,]" we stated, "[t]o compute the employee's average weekly wage on the basis that he had worked forty hours per week every week during that 52-week period, as the employee urges, does not produce an honest approximation of his probable future earning capacity." Id. See Morris's Case, 354 Mass. 420 (1968).
>
> The employee's landscaping job was, and always had been, of a determinate duration. In no event would the employee have actually worked continuously throughout the year at this job. We agree with the insurer that, "[t]o sustain the contention of the employee would give [her] more money while totally disabled than [she] could earn while working." Robichaud's Case, 292 Mass. 382, 384 (1935).

Bunnell, supra at 155.

This reasoning is directly apposite to the present case. Accordingly, we reverse the decision as to the average weekly wage, and recommit the case for a determination of the total amount of the employee's earnings from his landscaping job in the fifty-two weeks prior to his work injury of August 12, 2002. The judge shall then divide that amount by fifty-two in order to arrive at the employee's correct average weekly wage, in accordance with the seasonal employee rule as explained above.

So ordered.

_____
Martine Carroll
Administrative Law Judge

_____
Patricia A. Costigan
Administrative Law Judge

Filed: **June 5, 2006**