COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016608-99**

Karen Kelly	Employee
Modern Continental	Employer
National Union Fire Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Wilson and Carroll)

APPEARANCES
George N. Keches, Esq., for the employee
Mark H. Likoff, Esq., for the insurer

LEVINE, J. The insurer appeals from an administrative judge's application of the "prevailing wage law," G. L. c. 149, §§ 26 and 27, to increase the employee's average weekly wage by the amount of employer payments for certain fringe benefits. We reverse the decision as it pertains to the average weekly wage.

Karen Kelly had been a union laborer performing heavy work for fifteen years at the time of her industrial injury. In October 1998, she began working for the employer as a carpenter tender, carrying lumber and tools for four to five carpenters, on the Central Artery/Tunnel Project.[1] On January 26, 1999, she injured her right elbow while lifting a sheet of plywood at work. She performed light duty work from January to March 1999, and has been out of work since then. (Dec. 5-6.)

Following a course of physical therapy and cortisone injections, Ms. Kelly had surgery on her elbow on April 13, 2000. She underwent another course of physical therapy, and had a second surgery on December 5, 2001. (Dec. 6.)

[1] Although the administrative judge found that the employee was working on the Central Artery Project, there was no testimony or other evidence either that she was working on that project or was injured in the course of working within the scope of that project. Martin Walsh, a union business manager, was not present when the employee was injured and answered only a hypothetical question to that effect. (Tr. 11.)

The employee's claim for compensation was accepted by the insurer. Thereafter, an administrative judge issued a conference order denying the insurer's complaint to discontinue benefits. The insurer appealed to a hearing de novo. (Dec. 3.) On the issue of the employee's earning capacity, the judge found the employee totally incapacitated. (See Dec. 8-13.)

At the hearing, the employee claimed, over the insurer's objection, that the "prevailing wage" law applied to increase her average weekly wage. (Dec. 14.) The parties stipulated that the employee's average weekly wage, without including fringe benefits, was $828.53. (Dec. 4.) The employee maintained that G. L. c. 149, §§ 26 and 27, in conjunction with c. 152, § 1(1), operated to include certain fringe benefits in the calculation of average weekly wage.

Martin Walsh, the business agent for union Local 223,[2] testified on the prevailing wage issue. Although he was not present at the time of the injury, he responded in the affirmative to a hypothetical question that the site at which the employee worked on the day of her accident was the Central Artery/Tunnel Project, a public construction job to which state and federal prevailing wage laws apply. He further testified that he was very familiar with the labor agreement for the Central Artery/Tunnel Project. (Dec. 14.) Over the insurer's objection, the judge admitted the labor agreement between Bechtel/Parsons and the building and construction trade unions on the Central Artery (I-93)/Tunnel (I-90) project. (Dec. 2, Employee Ex. 3, Tr. 10-13.) The judge also admitted, without objection, a schedule of wage rates for laborers promulgated by the Massachusetts Laborers' District Council. (Dec. 1, Employee Ex. 2, Tr. 9-10.) Mr. Walsh testified that this December 1, 1998 schedule of wage rates applied to the employee. (Dec. 14-15.)

The judge found Mr. Walsh credible and qualified, as business manager for Local 223, to testify regarding the labor agreement. She further found that Ms. Kelly was injured in the course of her employment on a public works project, the Central Artery/Tunnel Project. In fact, the judge noted, the project was the same project on

[2] The judge stated that the union was Local 233, (Dec. 15), but the transcript reveals that Mr. Walsh testified that he was business manager for Local 223. (Tr. 6.)

which the employee in McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285 (1997), was injured. In accordance with the decision in McCarty, the judge concluded that:

> Sections 26 and 27 [of chapter 149], requires [sic] the Commissioner of Labor and industries [sic] [now the Commissioner of Labor and Workforce Development] to set a minimum per capita wage ("prevailing wage") for workers doing certain public construction jobs, such as the project in issue. These sections apply to all covered workers regardless of trade or union affiliation, if any. The statute requires those employer payments for health and welfare plans, pension plans, and supplemental unemployment benefit plans, if any, shall be included for purposes of determining the "prevailing wage". Therefore, such payments are part of workers [sic] earnings and shall be added to his/her gross earnings to determine the average weekly wage under the Workers' Compensation Act.

(Dec. 15.) In accordance with the wage and benefit schedule for Local 223, applicable on the employee's date of injury, (Employee Ex. 2, Tr. 10), the judge determined that the employee's gross average weekly wage should be increased by $6.85 per hour, or $274 per week, as a result of adding health and welfare benefits, pension benefits and annuity payments to the stipulated average weekly wage. (Dec. 16.) The judge awarded the employee § 34 temporary total incapacity benefits from October 4, 2000, to date and continuing, at the rate of $661.51 per week, based on an average weekly wage of $1,102.53. (Dec. 17.)

The insurer appeals the judge's decision only insofar as she applied the prevailing wage law. The insurer first argues that the judge erroneously allowed the prevailing wage issue to be raised orally on the day of hearing; that the employee failed to meet her burden of proof since a proper foundation was not laid for the admission of the Project Labor Agreement, (Employee Ex. 3); and that the judge's calculations of the enhancement to the employee's stipulated average weekly wage were erroneous. Further, the insurer argues that we should overrule our prior holdings that c. 149, §§ 26 and 27, operate to increase average weekly wages by adding certain fringe benefits, and, finally, that the application of those sections is unconstitutional.

The judge did not err in allowing the prevailing wage issue to be raised at hearing for the first time. Cf. 452 Code Mass. Regs. § 1.23. We summarily affirm the decision on that issue.

On the issue of whether c. 149, §§ 26 and 27, and c. 152, § 1(1), operate to increase the employee's gross average weekly wage by the amount of certain fringe benefits, we have held that:

> Both § 26 and § 27 of c. 149 specifically require that employer payments for health and welfare plans, pension plans, supplemental unemployment benefits plan[s] *shall be included* for purposes of determining the minimum wage rates for any such job. Therefore, such payments *must* be considered part of employees' earnings for purposes of computing their average weekly wage under § 1(1) of the Workers' Compensation Act. Lyons v. Fontaine Bros., 4 Mass. Workers' Comp. Rep. 398, 399 (1990); Machado v. Joseph B. Fay Co., 3 Mass. Workers' Comp. Rep. 38, 40 (1989). The proper rate is calculated by including the additional employer payments in the gross pay. *Id*.

McCarty, supra at 289; emphasis in original. We decline to revisit our prior holdings on that issue. In addition, we decline to address the insurer's constitutional argument. See Barnard v. Nissen Baking Co., 12 Mass. Workers' Comp. Rep. 394, 395 (1998), citing Neff v. Commissioner of Dept. of Indus. Accidents, 421 Mass. 70, 72 (1995) (reviewing board does not address constitutional questions unless they necessarily must be reached); see also Figueredo v. City of Fall River, 10 Mass. Workers' Comp. Rep. 313, 314 (1996) (reviewing board has no authority to declare a statute unconstitutional).

The insurer also argues that the evidence is insufficient to apply the prevailing wage law. It argues that the employee has not proved that the Central Artery/Tunnel Project is a public works project specifically because the Project Labor Agreement was not properly authenticated. However, we do not need the labor agreement to conclude that the Central Artery/Tunnel Project is a "public works" project. In Utility Contrs. Ass'n of New England, Inc. v. Department of Pub. Works, 29 Mass. App. Ct. 726, 727 (1991), a case dealing with the same Project Labor Agreement between Bechtel/Parsons (the Department of Public Works' construction manager for the Central Artery/Tunnel Project) and the Trades Council (an organization of different building trade unions)

involved in the instant case, the court referred to the "public works project . . . known as the Central Artery/Third Harbor Tunnel Project (CAP)." Moreover, in McCarty, supra at 289, we noted that "[t]he third harbor tunnel is undoubtedly a public works project governed by §§ 26 and 27 of chapter 149." Thus, whether the Project Labor Agreement itself was properly authenticated is irrelevant to our determination of whether the project on which the employee was working at the time of her injury was a public works project.

However, the fact that the Central Artery/Third Harbor Tunnel Project is a public works project does not ipso facto mean that every employee on every job involved in the project is subject to the prevailing wage law. In determining whether the commissioner had authority to set wages for truck drivers transporting bituminous concrete to public works projects, the court in Construction Indus. of Mass. v. Commissioner of Labor & Indus., 406 Mass. 162, 167 (1989), pointed out that, "[t]he commissioner, under § 27, is required to prepare a list of the jobs usually performed on public works projects and, when requested, to assign to each job the minimum wage which must be paid to persons performing that job." Further, the court instructed:

> Quite clearly, the commissioner has not been given authority to set wages for all teamsters who have any connection with a public works project. The language of the statute limits his authority. The focus of that limitation is twofold. First, the statutory language makes repeated reference to the work site itself. This is the plain meaning of the language "on" and "upon" which appears in the statute. Second, the nature of the work performed on the site is an important aspect of the statute. This is evident from the use of phrases such as "in the construction" and "engaged in." Thus, the limits of the commissioner's authority to set wages under G. L. c. 149, §§ 26 and 27, are governed by the physical locus of the work site itself and the work which is performed there. The commissioner is empowered to set wages for teamsters when there is a significant nexus between the work those teamsters perform and the site of the construction project. In simple terms, the commissioner must ask, "What do they do at the site?" When the performance of a statutorily specified job has a significant connection with the construction project, then that job falls within the domain of the posted wage statute.

Id. at 168. "The plain requirement of these provisions [§§ 26 and 27] is that the commissioner set wage rates for teamsters (among others) whose work has a significant

connection with the work site." Id. at 169 n. 5. The same would hold true for laborers.[3] The court thus makes clear that the commissioner must determine to which jobs on a public works project the prevailing wage law applies. In the present case, although the employee may have been employed on a public works project, we do not have evidence of whether her position was one to which the prevailing wage law applies.[4]

Moreover, there is no evidence that the Commissioner adopted the wage rates for laborers promulgated by the Massachusetts Laborers' District Council, (Employee Ex. 2), in setting the prevailing wage, other than Mr. Walsh's testimony that those rates were the prevailing wage rates. See c. 149, § 26, and Construction Indus. of Mass., supra. As we stated in Lozowski v. C.H. Sweeney & Sons, Inc., 16 Mass. Workers' Comp. Rep. 338, 340 (2002), "[a] predicate for the application of the prevailing wage under G. L. c. 149, §§ 26 and 27, is the establishment of the prevailing wage for the subject project by the Commissioner of Labor and Workforce Development." That piece of evidence, as well as evidence that the employee was working on the Central Artery Project, as aforesaid, is missing from this case.[5]

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[3] Section 26 applies to "mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works."

[4] Thus, contrary to the dissent's position, the mere fact that the employee is a laborer who may have been working on the public works project, does not, ipso facto, make her a beneficiary of the prevailing wage law.

[5] Prior to oral argument, the reviewing board panel wrote to the parties directing them to prepare to address those two issues. The two issues were specifically addressed by the parties at oral argument.

Both the prevailing wage statute and long established court authority, Construction Indus. of Mass., supra, indicate that the Commissioner's letter is necessary to prove a claim for the prevailing wage. Thus, the requirement of such proof preceded the hearing here. But even if we were to assume, *arguendo,* that Lozowski, supra was a clarification of the law of such a significant nature as the dissent hypothesizes, "the general rule is in favor of retroactive application of a change in decisional law." McCarthy v. Litton Indus., Inc., 410 Mass. 15, 25-26 (1991). Therefore, employee counsel's offer of the purported Commissioner's letter at oral argument before us did nothing to rejuvenate his claim at hearing, where he failed to offer that document in evidence.

Therefore, because proof of all the essential elements necessary for the application of the prevailing wage is absent from this case, the decision as to the average weekly wage is reversed.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

CARROLL, J. (dissenting). I do not agree with the majority that the employee has failed to shoulder her burden of proving that she was working as a laborer on the Central Artery project at the time she was injured, thereby entitling her to the prevailing wage under G. L. c. 149. The employee's inclusion within that project is reasonably – I would say, compellingly – inferable from the very stipulation that an industrial injury occurred when she was working for Modern Continental, a contractor on that project. The judge credited the testimony of Mr. Walsh that the site where the employee laborer was working on the date of the injury was, in fact, part of the Central Artery Project. "Laborers" are explicitly included in the job classifications covered by G. L. c. 149, § 26. Unlike the teamsters that were the subject of Construction Indus. of Mass., supra, cited by the majority as support for its conclusion, the employee was clearly on – not hauling materials to and from – the work site, and there is no issue of the "significant nexus" that was presented by that case. See id.; G. L. c. 149, § 27 ("The commissioner shall prepare . . . a list of the several jobs usually performed on various types of public works upon which mechanics and apprentices, teamsters, chauffeurs and laborers are employed . . . .") Unless there were carpenters (whom the employee was assisting at the time of the

injury) working on the site of the Central Artery Project, but who were not actually working on the project, the nexus between the employee's work and the Central Artery Project is a matter of res ipsa loquitur, and the prevailing wage should indeed be applicable, ipso facto.[6]

Moreover, this case is distinguishable from our recent decision in Lozowski v. C.H. Sweeney & Sons, Inc., 16 Mass. Workers' Comp. Rep. 338 (2002). There, we affirmed the judge's decision refusing to apply the prevailing wage law in determining the employee's average weekly wage. We rejected, as did the administrative judge, the employee's argument that his average weekly wage was subject to the prevailing wage enhancement simply because the parties had stipulated that the prevailing wage would be paid. The evidence affirmatively indicated that no prevailing wage schedule had been established for the project on which the employee had worked and, therefore, the employee's claim for an average weekly wage determined in accordance with G. L. c. 149 was properly denied. We did not address whether the project at issue qualified as a public works project under G. L. c. 149.

In the case before us, there was no contest as to the employee's base pay under the union wage schedule in effect at the time of her injury, (Employee Exh. 2), or the amounts contained therein attributable to the relevant fringe benefits. (Tr. 9-10.) Whereas the majority states that the insurer addressed, at oral argument, the issue of the lack of proof that the union wage schedule was the basis for the setting of the prevailing wage, I have no recollection of such an argument, and there is no recording of that proceeding.[7] That being said, however, the majority's speculation that the union wage schedule might not have been the prevailing wage is simply contradicted by the statute itself. G. L. c. 149, § 26 provides, in pertinent part:

> The rate per hour of the wages paid to said mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works shall not be less than

[6] In footnote 4, the majority misstates the dissent's position.

[7] The Notice of Oral Argument simply asked the parties to be prepared to argue the relevance of Construction Indus. of Mass., supra and Lozowski, supra.

> the rate or rates of wages to be determined by the commissioner as hereinafter provided; provided, that the wages paid to laborers employed on said works shall not be less than those paid to laborers in the municipal service of the town or towns where said works are being constructed; provided, further, that where the same public work is to be constructed in two or more towns, the wages paid to laborers shall not be less than those paid to laborers in the municipal service of the town paying the highest rate; *provided, further, that if, in any of the towns where the works are to be constructed, a wage rate or wage rates have been established in certain trades and occupations by collective agreements or understandings in the private construction industry between organized labor and employers, the rate or rates to be paid on said works shall not be less than the rates so established*; . . . .

(Emphasis added). In the present case, the evidence provided the actual union wage rates for the applicable jobs in the Big Dig public works project. It strains credulity to imagine that these very union rates were *not* the prevailing wage here. Contrast Staples Coal Co. v. Ucello, 333 Mass. 464, 468 (1956)(court stated in dicta that non-union workers' claim to "prevailing union wages" could not stand in light of the fact that no union wage rate had been established for the subject city in that case). Under such circumstances as the instant case presents, the much ballyhooed letter from the Commissioner setting the prevailing wage is little more than surplusage.[8]

The judge's findings follow our construction of § 1(1) in McCarty, supra, as to its inclusion of fringe benefits where the prevailing wage under G. L. c. 149, §§ 26 and 27 applies, as it does here. The judge credited the testimony of Martin Walsh, through whom the union wage schedule was introduced without objection. (Dec. 15.) The judge

[8] Alternatively, it would have been appropriate to recommit the case for supplementation of the record and further findings – as counsel for the employee arrived at oral argument with the Commissioner's letter in response to our letter asking the parties to address Lozowski, supra. Recommittal, under these circumstances, would not result in a second bite of the apple, since the "apple" of Lozowski had not fallen off the tree until after the decision on appeal was filed. I find scant authority for the majority's proposition that the Commissioner's letter is a *sine qua non* of proving a prevailing wage claim, as my discussion of court cases above indicates. If Lozowski has clarified the law (which I find doubtful) while proceedings are ongoing at the appellate level, it is only right and just to allow the aggrieved party to address that clarification. Cf. Commonwealth v. D'Agostino, 421 Mass. 281, 284 (1995)(defendant has benefit of intervening decisional law while case is on direct appeal).

accurately found the categories of fringe benefits to be included in that wage schedule. (Dec. 16.) I would affirm the decision, because the judge's findings of the necessary predicates under G. L. c. 149 were well within the bounds of reasonable inferences, and not arbitrary, capricious or contrary to law.

Accordingly, I respectfully dissent.

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Martine Carroll
Administrative Law Judge

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