COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026959-12**

Kenneth Arruda	Employee
A.Vozzella and Sons, Inc.	Employer
Star Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Long, Harpin and Calliotte)

This case was heard by Administrative Judge Williams.

APPEARANCES
Nicole M. McDonald, Esq., for the employee
Matthew F. King, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

LONG, J. The employee appeals the manner in which the judge calculated his average weekly wage using the "prevailing wage" rate, the denial of his § 34A claim for permanent and total incapacity benefits, and the assignment of a minimum wage earning capacity. For the following reasons, we hold recommittal is appropriate.

The employee was fifty-seven years old at the time of hearing, with a tenth grade education and reading comprehension issues. The employee has no computer skills and has worked as a manual laborer out of the laborer's union since he was approximately eighteen years old. He had also operated his own concrete installation company for approximately ten years, until the business ended in 2006. (Dec. 4.)

On October 20, 2012, the employee injured his low back while shoveling gravel at work. The employee was working on a "prevailing wage" job at the time of injury.[1] He

[1] "When an employee works and is injured on a public construction job, to properly determine a contested average weekly wage both G.L. c. 152, § 1(1), must be considered together with G.L. c. 149, § 26(4) and § 27 (5)." McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285, 288 (1997), aff'd McCarty's Case, 445 Mass. 361 (2005).

was unable to continue work on that day, and has not returned to work since then. (Dec. 4.) The insurer accepted liability for the October 20, 2012, low back injury, paying the employee § 34 benefits based on an average weekly wage of $1,032.49. The employee later filed a claim for an increase in his average weekly wage. A § 10A conference was held before a different administrative judge who, on May 6, 2013, ordered an adjustment of the employee's average weekly wage to $1,352.00. Both parties appealed, and a three-day hearing before the current administrative judge was held, concluding on March 11,

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The applicable portions of M.G.L. c. 152, § 1, entitled "Definitions" provide:

> (1) "Average weekly wages", 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.
>
> ….
>
> Except as provided by sections twenty-six and twenty-seven of chapter one hundred forty-nine, such fringe benefits as health insurance plans, pensions, child care, or education and training programs provided by employers shall not be included in employee earnings for the purpose of calculating average weekly wages under this section.

General Laws c. 149 § 26, provides, in relevant part:

> Payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans under collective bargaining agreements or understandings between organized labor and employers shall be included for the purpose of establishing minimum wage rates as herein provided.

General Laws, c. 149, § 27, states, in relevant part:

> The aforesaid rates of wages in the schedule of wages shall include payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans as provided in [§ 26], and such payments shall be considered as payments to persons under this section performing work as herein provided. Any employer engaged in the construction of such works who does not make payments to a health and welfare plan, a pension plan and a supplementary unemployment benefit plan, where such payments are included in said rates of wages, shall pay the amount of said payments directly to each employee engaged in said construction.

2016. At the hearing, the employee's motion to join claims for § 34A benefits and a cervical injury, as well as the insurer's motion to join a claim for modification, were allowed. (Tr. 1/29/16, 4; Dec. 3.) The hearing decision ordered § 34 temporary total incapacity benefits from October 20, 2012, to June 23, 2015, at the rate of $705.22 based upon an average weekly wage of $1,175.37, and § 35 temporary partial incapacity benefits from June 23, 2015, to date and continuing, at the rate of $441.22, based on a "minimum wage" earning capacity of $440.00. (Dec. 7-8.)

Regarding the average weekly wage calculation, the judge's findings, in their entirety, are as follows:

> In the present case there is no dispute that the Employee was working a prevailing wage job at the time of his injury. Documents in Employee's Exhibits 3,4,5,6 and 9 clearly detail the amount that the employee was paid for the 52 weeks prior to his injury. In accordance with M.G.L. c. 146 [sic] §§ 26, 27 the employer has included the fringe benefits to properly calculate the employee's average weekly wage, inclusive of time and compensation for prevailing wage jobs. Based on the inclusion of the prevailing wage and non-prevailing wage calculations for the prior 52 weeks the Employee's Average weekly wage is $1,175.37.

(Dec. 8.)

The numbered exhibits referenced by the judge include:

> Employee Exhibit No. 3 – Union Wage Sheet in effect on DOI 10/10/2012
> Employee Exhibit No. 4 – Union Wage Payments for October 10, 2012
> Employee Exhibit No. 5 – Union Wage Rate of $51.35
> Employee Exhibit No. 6 – Partial Wage Schedule[2]

(Dec. 2.)

[2] Exhibit 6 is labeled "Partial Wage Schedule" and appears to be an itemization of the employee's wages earned for 38 of the 52 weeks prior to his injury on October 20, 2012, with one column labeled "net" and another labeled "gross." It would appear that the "gross" figures include the increased "prevailing wage" earnings; however, we are unable to determine with certainty whether this is the case or not.

The parties agree that the employee was injured on a "prevailing wage" job and that M.G.L.c.149, §§26 and 27 apply to this claim. (Dec. 8.) In fact, in their closing arguments, the parties also agreed that the hourly rate for "prevailing wages" earned was $51.35 per hour. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(permissible to take judicial notice of board file). The central dispute is the proper application of the "prevailing wage" law and the concomitant calculation of the employee's average weekly wage. As stated by the employee in his appellate brief:

> The dispute between the parties was whether the Prevailing Wage benefits should be applied as a simple calculation (Prevailing Wage hourly rate times number of hours worked per week), or whether the additional benefits under the Prevailing Wage should only be added to the AWW for the actual weeks that the employee worked on Prevailing Wage jobs during the 52 weeks before his injury.

(Employee br. 11.)

The employee proposes that the average weekly wage be calculated by using the employee's testimony that he usually worked at least 40 hours per week and multiplying 40 by $51.35 (the prevailing wage hourly rate) to arrive at an average weekly wage of $2,054.00. (Employee br. 13.) However, during the 52 weeks prior to the employee's injury, the employee also worked for the employer on non-prevailing wage jobs, and evidence of those wages was also before the judge. The employee's calculation of wages ignores this fact and thus cannot be used. The insurer argues that the proper method of calculation is to follow the instructions found in M.G.L. c. 152, §1(1), which would capture the increased "prevailing wage" wages therein. (Insurer br. 6-7.) We agree, in principle, with the insurer, especially where, as here, there is sufficient wage documentation to follow the precept of the first sentence of § 1(1).

We have held that in "prevailing wage" situations "the proper rate is calculated by including the additional employer payments in the gross pay." McCarty v. Wilkinson, 11 Mass. Workers' Comp. Rep. 285, 289 (1997), aff'd McCarty's Case, 445 Mass. 361 (2005). The judge's finding that "[b]ased on the inclusion of the prevailing wage and non-prevailing wage calculations for the prior 52 weeks the Employee's Average weekly

wage is $1,175.37," appears to properly invoke the directives of § 1(1) by including both prevailing wage and non-prevailing wage earnings. However, the judge's explanations are not nearly enough to adequately explain how he actually arrived at the $1,175.37 figure. The analysis of the average weekly wage issue is merely a recitation of the documentary evidence and lacks any clear findings of fact. We are therefore unable to "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'd & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). Based upon our review of the insurer's closing argument, Rizzo, supra, it appears the judge simply adopted the average weekly wage figure proffered by the insurer; however, we are unable to tell for certain due to the previously noted deficiencies. We note also, however, that, while the insurer argues for following the directions outlined in M.G.L. c. 152, § 1(1), the manner in which it calculated the figure of $1,175.37 does not comport with § 1(1), because the insurer appears to average subparts of the employee's actual gross earnings rather than using the actual gross weekly figures that are available.[3] Therefore, we recommit the case for the judge to adequately outline a cogent factual determination of the average weekly wage pursuant to § 1(1).

[3] The insurer's calculation was partially based upon an alleged stipulation between the parties that the employee was paid $700.00 per week for the fourteen weeks not accounted for in Exhibit 6; however, we find no evidence of such a stipulation being agreed to or filed at any time during these proceedings. Rizzo, supra. Additionally, the insurer, in its closing argument, writes,

> Calculations using the payroll documents indicate that Mr. Arruda averaged 36.26 hours per week. Of that, the average was 10.1 hours per week at a prevailing wage job site and 26.16 hours per week at a non-prevailing wage job site. The insurer's calculations take into account the actual hours he worked during the prior fifty-two weeks at prevailing wage job sites. Calculated at 10.1 hours he worked at the higher rate of $51.35, which comes to $518.63. The 26.16 hours on non-prevailing wage job sites reflecting the $31.80 salary rate calculates to $831.88, thus, the insurer argues that for the thirty-eight weeks reflected in the payroll the average was $1,350.00. When adding in the fourteen weeks at $700.00 per week, the calculation comes out to the above-referenced $1,175.37 per week.

(Insurer's closing argument, 5-6.)

The employee also appeals the judge's partial incapacity order because "the decision does not address the effects of the Employee's pain, difficulty sleeping at night, and medication side effects on his ability to work. Further, the credited portions of testimony regarding the Employee's pain are contrary to the 40-hour per week earning capacity assigned." (Employee br. 2.) While the judge was not required to address the specific effects of the employee's pain as argued by the employee, he was required to at least credit or reject the employee's testimony and make clear findings of fact with respect thereto. Dawson v. D. Cronin's Welding Co., 23 Mass. Workers' Comp. Rep. 85, 87 (2009)(judge must make credibility and factual findings that resolve the conflicts in the evidence, and not merely recite the testimony). In his decision the judge recited the employee's testimony without indicating what testimony he adopted or found credible. The judge did not fare much better with the medical and vocational evidence, as the decision lacks any meaningful analysis regarding the interplay between the employee's medical restrictions and his vocational factors as required by Scheffler's Case, supra. As with the average weekly wage calculation previously addressed, we are unable to "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz, supra. We therefore recommit the case for the judge to issue a decision that contains such specific and definite findings, based on the evidence reported, as will enable us to make that determination. Judkin's Case, 315 Mass. 226, 227 (1943).

The employee also appeals on the ground that "it was error for the decision to assign the Employee a $440.00 "minimum wage" earning capacity retroactive to June 23, 2015, when the minimum wage as of June 2015 was only $9.00 per hour ($360.00 per week based on a 40 hour work week) in 2015 and $10.00 per hour ($400.00 per week) in 2016." (Employee br. 1, 15-16.) We agree that the judge's assignment of a "minimum wage" earning capacity requires the use of the correct minimum wage rates for the applicable time periods, which the judge must follow in the event he assigns a "minimum wage" earning capacity upon recommittal. Pavilonis v. City of Boston, 30 Mass. Workers' Comp. Rep. 267 (2016).

Accordingly, we recommit the case for further findings consistent with this opinion. Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7) to defray the reasonable costs of counsel. If such fee is sought, the employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee setting out either the specific fee agreed to for this appellate work, or an hourly rate, together with an affidavit from counsel as to the hours spent in preparing and presenting this appeal. No fee shall be due and collected from the employee unless and until that fee agreement and affidavit are reviewed and approved by this board.

So ordered.

Martin J. Long
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: **August 23, 2018**