COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036290-00**

Kenneth Arsenault	Employee
Ostrow Electric Company	Employer
Hanover Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Fabricant & Koziol[1])

The case was heard by Administrative Judge Taub.

APPEARANCES
Richard D. Surrette, Esq., for the employee
Terence O'Neill, Esq., for the insurer

LEVINE, J. The employee appeals from a decision denying his claim for three years of retroactive application of the wage enhancement benefit available pursuant to G. L. c. 152, § 51.[2] For the reasons that follow, we affirm the decision.[3]

While working in 2000, the employee, a union electrician, suffered two right upper extremity injuries. (Dec. II, 4.) The insurer accepted the claim, and paid the employee the statutory maximum entitlement of three years of § 34 temporary total incapacity benefits. This payment was based on an average weekly wage of $892.37, calculated on the employee's earnings in the fifty-two weeks preceding September 12, 2000, the date of the second injury. (Dec. II, 1.) The § 34 benefits exhausted on

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[1] Judge Koziol recused herself from this case.

[2] General Laws c. 152, § 51, provides, in pertinent part:

> Whenever an employee is injured under circumstances entitling him to compensation, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, in the open labor market, his wage would be expected to increase, that fact may be considered in determining his weekly wage.

[3] In addition to the present decision, (Dec. II), an earlier decision, (Dec. I), filed on March 16, 2006, is relevant to this appeal.

September 12, 2003. Thereafter, the employee filed a claim for § 34A permanent and total incapacity benefits or, in the alternative, § 35 benefits "from September 12, 2003 to date and continuing." (Dec. I, 2.) The employee also claimed § 51 enhancement to his average weekly wage. Id.

The judge who authored Dec. I denied the § 34A claim, but awarded the employee § 35 partial incapacity benefits.[4] He also made the following findings with respect to § 51:

> I find that the industrial injury of September 12, 2000 has interrupted [the employee's] career as a journeyman electrician.
> I find [the employee] commenced a five year apprenticeship at the age of twenty-six to become a journeyman electrician.
> I find [the employee] attained the classification as a journeyman wireman in May 2000.
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> . . .
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> The application of § 51 attempts to compensate a young worker such as [the employee] (thirty-one at the time of his injury and recently certified as journeyman electrician) who now due to an industrial injury has experienced an interruption of his career and a loss of prospective economic opportunity. As such, I adjust [the employee's] average weekly wage to the $1,262.00 which is the union journeyman rate at or about the time of his industrial injury.

(Dec. I, 10-11.) The judge awarded § 35 benefits based on the § 51-enhanced average weekly wage, commencing from September 12, 2003. (Dec. I, 12.) Only the insurer appealed the March 16, 2006 decision, which was summarily affirmed by the reviewing board.

Subsequently, the employee filed the present claim for § 34A benefits, as well as a claim that the $1,262.00 average weekly wage should apply retroactively to the date of injury, September 12, 2000. (Dec. II, 2.) The present judge awarded the claimed § 34A benefits, but denied the employee's claim for retroactive application of § 51,[5] reasoning that the prior judge's order of § 35 benefits at the increased rate, commencing as of September 12, 2003, was specific and unambiguous. The judge

[4] That judge no longer serves on the board.

further found the employee waived his claim because he failed to appeal the 2006 decision. See G. L. c. 152, § 11C. Having accepted the prior judge's decision to only award § 51 benefits beginning with the order of § 35 benefits, the employee could not, by way of the present claim, collaterally attack the failure of the 2006 decision to retroactively increase the § 34 benefits. (Dec. II, 10-11.) The employee appeals.

Initially, we note that what has been treated as a § 51 wage enhancement issue is, in fact, a less complicated average weekly wage issue. This is because at the time of his injury in September 2000, the employee had already (in May 2000) attained the journeyman classification. This removes the case from the purview of § 51, as § 51 is only triggered "if it be established that the injured employee was of such age and experience when injured that . . . his wage *would be expected to increase* . . . ." Id. (Emphasis added.) Because the wage sought by the employee pursuant to § 51 was already in effect prior to the date of injury, (Dec. I, 11), there could be no future expectation (i.e.,"would be expected to increase"). Thus, the statute, by its plain terms, does not apply.

A higher average weekly wage could have been found if the issue had been originally presented as a determination of the appropriate average weekly wage based on wages already earned. By using the weekly wage in effect on the date of injury, instead of calculating it based on the fifty-two week retrospective prescribed in § 1(1), the judge could have found the average weekly wage to be $1,262.00. "The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past . . . ." Gunderson's Case, 423 Mass. 642, 644 (1996). See also Morris's Case, 354 Mass. 420, 426 (1968)(employee's wage on first day of full-time work, having just been promoted from part-time duty, used to calculate average weekly wage for his work-related death on that very day); Bembery v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 476 (2003)(same). In the present case, the employee's journeyman wage established his "probable future earning capacity," and therefore was the correct basis

[5] The § 34A award is not in issue.

for assigning the average weekly wage. This is likely the same or close to the same amount as that assigned, under § 51, in the 2006 decision.

As to the employee's appeal, we are not persuaded that the enhanced average weekly wage assigned as of the date of the commencement of his claim, (Dec. I, 12), must be applied retroactively to the date of injury. The employee claims the lack of such a retroactive award in the 2006 decision constitutes a "mere unintentional clerical error." (Employee's br. 6.) We disagree, as the decision can be read reasonably to express an intent to order just what the judge ordered.

> We analogize to Mass.R.Civ.P. 60(a), which provides, in pertinent part:
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> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Construing this rule, the Appeals Court ruled against a party seeking to amend a judgment of divorce nisi to specifically convey real estate which arguably might have been included within the order of conveyance. Gagnon v. Fontaine, 36 Mass. App. Ct. 393, 394 (1994). The court reviewed the trial judge's denial of the request, and concluded that the plaintiff was not seeking a mere "corrective alteration, but . . . a modification in the judgment that goes beyond the judge's original intent." Id. at 399. The court reasoned that the judge had ordered "exactly what [the plaintiff] had requested." Id. It concluded, "[a] judgment like the one in this case, which appears correct and accurate on its face, will withstand a rule 60[a] motion because further alteration would involve tampering with a judgment ordered by a trial judge who cannot revisit the matter." Gagnon, supra at 401.[6]

[6] See also J.W. Smith & H.B. Zobel, Rules Practice § 60.2, at 190 (2003 Supp.)("The test is, first, whether the relief sought is 'clerical', rather than 'substantive'; and, second, whether the court intended to write the words or figures which it used").

The same rule should apply here, where the order clearly disposed of the § 51 issue as framed, *without a claim for application retroactive to the date of injury.*[7] See Paganelli v. Massachusetts Turnpike Auth., 21 Mass. Workers' Comp. Rep. 9, 14 (2007)(judge must decide only issues in dispute and nothing more). We conclude that there was no clerical error, as a matter of law, because the judge ordered just what the employee had requested, Gagnon, supra, and the order can be read to express the judge's "reasoned decision-making within the particular requirements governing a workers' compensation dispute." Scheffler's Case, 419 Mass. 251, 258 (1994).

The employee also agues that there should be an adjustment of the average weekly wage, as a matter of equity, from the date the judge assigned for its application (i.e., the date of injury), notwithstanding the employee's failure to appeal. In support, the employee cites Galindez v. International House of Pancakes, 12 Mass. Workers' Comp. Rep. 214 (1998), which dealt with the retroactive correction of the average weekly wage based on newly discovered evidence and equitable principles articulated in Norton v. National Wholesale Co., 7 Mass. Workers' Comp. Rep. 146 (1993).[8] We disagree with the employee's reliance on Galindez, as there is no issue of newly discovered evidence in this case.

Likewise, we conclude that the equity-based analysis in Norton, (see n. 8, supra), which allowed the employee to revisit an average weekly wage based on a clerical error, Norton, supra at 149, is inapplicable. Rather than follow that purely equity-based reasoning, we have more recently treated this issue as indistinguishable from any other matter already agreed to or litigated. In Grant v. APA Transmission, 13 Mass. Workers' Comp. Rep. 247 (1999), we reasoned "that average weekly wage

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[7] Once again, the application of § 51 as of the date of injury was erroneous, albeit harmless.

[8] "We find that pursuant to our equity powers under Utica Mutual Ins. Co. v. Liberty Mutual Ins. Co., 19 Mass. App. Ct. 262, 267 (1985), the administrative judge had the discretion to correct the prior average weekly wage figure. In Utica the Appeals Court held that the Industrial Accident Board was not bound by legal technicalities, but rather, governed by the practice in equity." Norton, supra at 149.

holds no special place in the pantheon of issues over which the board has no jurisdiction once it is agreed upon by the parties." Id. at 254. Thus, we concluded, "the Board has no authority to re-open the issue of average weekly wage, once it has been settled by agreement." Id. at 256.[9] See also Costa v. TGI Fridays, 24 Mass. Workers' Comp. Rep. 79, 83-84 (2010)(failure to appeal).

We further noted in Grant, supra, that the Appeals Court in Taylor's Case, 44 Mass. App. Ct. 495 (1998), limited Utica Mutual's equity-based approach to procedures in workers' compensation cases. Taylor decided the reviewing board had exceeded its authority in "permit[ting the employee] to reopen his case after it affirmed the decision of the administrative judge." Id. at 498. The court distinguished the equitable application in Utica Mutual by explaining that the erroneous action of reopening the employee's § 35B claim was not " 'necessary to dispose completely of the claim.' " Taylor, supra at 498, quoting Utica, supra at 267. In the present case, the prior unappealed hearing decision "dispose[d] completely of the [average weekly wage] claim." Id. A reopening of that issue in the present claim is therefore inappropriate.

Accordingly, the decision is affirmed.

So ordered.

Filed: FILED JUN 02 2011 Dept. of Industrial Accidents

Frederick E. Levine
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

[9] A § 19 agreement is in the same posture as an order or decision of an administrative judge with regard to issues that do not change over time, unlike extent of capacity and continuing causal relationship. See Kareske's Case, 250 Mass. 220, 227 (1924)("So far as the questions of fact involved in the [prior agreement] are essential to the determination of the second [proceeding], they are settled. Injury, liability and compensation had been fixed. There was nothing in regard to them which was open to controversy...").