COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034365-09**

Nilso Perez Employee
Aguila Construction Co. Employer
American Zurich Insurance Co. Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Calliotte.)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Teresa Brooks Benoit, Esq., for the employee at hearing
and at oral argument
James N. Ellis, Esq., for the employee on appeal
Matthew F. King, Esq., for the insurer at hearing
John J. Canniff, Esq., for the insurer on appeal

HARPIN, J. The employee appeals from a decision awarding him a closed period of §§ 34 and 35 benefits,[1] arguing the judge erred in his calculation of the average weekly wage and finding that the industrial injury was not a major cause of disability or need for treatment[2] after September 1, 2011, based on a surveillance video. We affirm the calculation of the average weekly wage, and reverse the finding of no causal relationship to the industrial accident after the date of surveillance.

The employee, age fifty-two at hearing, came to this country from Uruguay when he was forty-one. He had a ninth grade education and limited work experience. On November 6, 2009, while working as a laborer in construction/road repair, the employee felt a sharp pain in his back after lifting a

[1] The insurer was also ordered to pay medical benefits, interest, and an enhanced attorney's fee. (Dec. 15-16.)

[2] The insurer's defense of § 1(7A) was properly raised at the onset of the hearing and considered by the judge.

manhole cover. (Dec. 6.) Testimony from the employee and coworkers suggest the employer paid the employees in multiple forms, including corporate checks, personal checks and cash. The judge found, based on the testimony, that the employee received $800.00 per week for the weeks he actually worked, and that he worked for only nine months in 2009. (Dec. 12.) Furthermore, the judge found the employee collected unemployment compensation for the weeks that he did not work, and that the work was seasonal. Id.

Pursuant to § 11A, the employee was examined by Dr. David Morley, Jr. on March 11, 2011. The doctor found the employee sustained a thoracic sprain/strain superimposed on pre-existing degenerative disc disease, and that the industrial injury combined with a pre-existing condition to cause or prolong disability or the need for treatment. Dr. Morley opined that the employee was capable of returning to full-time gainful employment with restrictions. (Ex.1; Dec. 7-8.) At a deposition on February 13, 2013, Dr. Morley testified that when he saw the employee in March, 2011, the industrial injury was still a major cause of the employee's disability and need for treatment. (Dep. 13.) He testified further that for the first three months after the § 11A exam, his suggested limitations included no lifting greater than 20 pounds, no carrying, no pushing or pulling over 40 pounds, and avoiding stairs, squatting, bending and climbing ladders. (Dec. 9; Dep. 11.) His "best estimate" was that the employee could return to full unrestricted duties from six to twelve months after the March 11, 2011 exam. (Dec. 10; Dep. 20.)

The judge accepted and adopted the opinion of Dr. Morley. (Dec. 9.) Following his review of surveillance videos, the judge found the employee was not incapacitated as of September 1, 2011. (Dec. 14.) He also found "the industrial injury was not a major cause of disability or need for treatment on or after [that date]." (Dec. 15.)

On appeal, the employee first argues the judge erred by failing to apply the prevailing wage law in the calculation of his average weekly wage.[3] While the judge seemed somewhat sympathetic to the prevailing wage claim, he felt he was precluded from ruling on it by our decision in Blanco v. Alonso Const., 26 Mass. Workers' Comp. Rep. 157 (2012)(wages paid arguably in violation of labor laws not a matter for determination at the DIA). (Dec. 12.) However, it was not necessary for the judge to consider Blanco, because the employee's claim fails due to a lack of proof.

The employee did not present any evidence that the job he was working on at the time of his injury was certified as requiring the prevailing wage, or that any of the other multiple jobs on which he worked were prevailing wage jobs. See Kelly v. Modern Continental, 17 Mass. Workers' Comp. Rep. 172, 178 (2003) (predicate for application of prevailing wage is establishment of such for the subject project by the Commissioner of Labor and Workforce Development). Having thus failed in the basic element of a prevailing wage claim, the employee's claim was properly rejected by the judge. McCambly v. M.B.T.A., 21 Mass. Workers' Comp. Rep. 57, 61 (2007)(reviewing board will affirm decision with right result, even if judge asserts wrong reason).

Next, the employee argues the judge erred in computing his average weekly wage because he did not use the wages of a comparable employee. The employee concedes that the "documents submitted in an attempt to show wages paid to the employees of Aguila Construction and Alonso Construction were

[3] Although in his reply brief the employee appeared to waive this particular issue, (Employee reply br. 8), at oral argument the employee's attorney attempted to revive the argument, by stating that the lack of information on the prevailing wage issue was due to an inability to obtain documents from the employer, because he was under indictment for wage and hour violations. (Oral argument Tr. 20.) Because the employee originally briefed this issue and argued it before us, we will address it, not least because this attorney raised a similar, but unsuccessful, argument against this same employer in a prior case. Robles' Case, 85 Mass.App.Ct. 1109 (Memorandum and Order Pursuant to Rule 1:28 (2014).

insufficient to definitively show average weekly wage." (Employee br. 15.) However, the employee suggests the judge should have considered the evidence in its entirety to find the average weekly wage was greater than that found by the judge. Id. We disagree.

An employee's average weekly wage is determined with reference to G. L. c. 152, § 1(1).[4] The employee worked for the employer in 1999, 2002, 2004, 2006, 2008 and 2009. (Tr. I, 10.)[5] Accordingly, the wages of a similar employee would not be germane to this proceeding, as the employee was not a new employee, nor was there any evidence that the "nature or terms of employment" would require utilization of a comparable employee.

"The amount of the average weekly wage of an employee is a question of fact." More's Case, 3 Mass. App. Ct. 715 (1975). Based on the testimony presented, the judge found the employee received an average of $800.00 for those weeks that he worked during the 52 weeks prior to the injury. (Dec. 12.)[6] The

---

[4] General Laws c. 152, § 1, states, in part:

> (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; . . . Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

[5] The hearing transcript from March 9, 2012 will be referred to as "Tr. I"; the transcript from May 11, 2012 as "Tr. II"; the transcript from July 13, 2012 as "Tr. III"; the transcript from November 2, 2012 as "Tr. IV".

[6] The employee himself testified to receiving approximately $800.00 per week.

> Q: Did you average $2,000.00 per week?
> EE: No.
> Q.: What did you average per week?
> EE: Because it varies, the payment changes, but approximately $800.00 a week.
> Q.: You only averaged $800.00 a week?

judge concluded that the employee's average weekly wage, given that he was a seasonal worker, amounted to $597.93.[7] (Dec. 12.) Absent any other evidence, and in the face of the employee's own admission, the judge's finding was neither arbitrary nor capricious, and we therefore affirm it.

The employee also takes issue with the judge's finding that the industrial injury was not a major cause of disability or need for treatment on or after September 1, 2011, based on the evidence presented in the surveillance video. The employee asserts the surveillance video should not affect the issue of causation. We agree.

The judge adopted the opinions of Dr. Morley which: 1) causally related the employee's thoracic sprain/strain superimposed on pre-existing multiple level thoracic disk degenerative disease to the industrial injury of November 6, 2009; and, 2) found the industrial injury combined with a pre-existing condition to cause or prolong disability or need for treatment. (Dec. 8.) He also adopted Dr. Morley's opinion that the industrial injury remained a major cause of the limitations on the return to work that he "suggest[ed] the Employee follow for a time after his March 11, 2011" examination. (Dec. 13; Dep. 25.)

The judge then made specific findings on the surveillance videos and related them to the fact that six months had elapsed since the § 11A exam.

> I have reviewed the surveillance video discs submitted into evidence. Contrary to what often is the case, the fruits of these surveillance efforts are useful to me as finder of fact. I have observed the Employee using a hedge trimmer, using an electric drill, pounding the ground with a long-handled shovel, squatting to remove weeds, lifting a little girl, leaning into his vehicle's middle area and back end, stepping over a 3-foot concrete barrier, and

---

EE: No more than that.

(Tr. I, 55.) While his last statement may be ambiguous, there is no other evidence as to the amount he earned each week. The judge's finding on the amount earned thus was supported by the only specific evidence in the record on wages.

[7] The employee does not dispute that he was a seasonal worker.

> moving about in no apparent discomfort. These activities occurred during the August – September 2011 timeframe, and the most active day during the period of surveillance was September 1, 2011. This was about 6 months following Dr. Morley's § 11A examination. I find that these surveillance videos are testament to the accuracy of Dr. Morley's learned expectations, and an example of the old saw that *seeing is believing*. I find that the Employee was not incapacitated as of September 1, 2011.

(Dec. 14; emphasis in original.)

The judge went on to state: "I find that the industrial injury was not a major cause of disability or need for treatment on or after September 1, 2011, the date of the surveillance video . . . which is 6 months after the § 11A examination." (Dec. 15.)

The employee does not challenge the finding that he was no longer disabled as of September 1, 2011.[8] Thus, although Dr. Morley's opinion is speculative (his "very best estimate" was that the claimant "would . . . return to full unrestricted duties [in] six months to a year" [Dep. 20]), and therefore insufficient to support a finding disability has ceased, we do not disturb it. LaFleur v. M.C.I. Shirley, 24 Mass. Workers' Comp. Rep. 301, 306 (2010)(medical opinion predicting future cessation of disability is speculative).[9] However, we agree with the employee's argument that the judge erred by finding that causation ceased as well on September 1, 2011, based on his viewing of the surveillance video.

[8] "The Judge's findings regarding causation in this matter are arbitrary and capricious as the employee's lack of ongoing disability does not have any bearing on whether the employee would need ongoing treatment causally related to the industrial accident. Furthermore, the lack of ongoing disability does not have any bearing on whether the Employee suffers any loss of function as a result of this industrial injury." (Employee br. 17.)

[9] A different standard applies when a doctor feels that a disability in the present is likely to continue into the foreseeable future. Hilane v. Adecco Employment Serv., 17 Mass. Workers' Comp. Rep. 465 (2003).

In the only medical opinion evidence the judge adopted, Dr. Morley testified that, as of his examination on March 11, 2011, the work injury was still a major cause of the employee's disability. (Dep. 13.) He offered no subsequent medical opinion that the work injury ceased to be a major cause of the employee's need for medical treatment or any future disability.

The judge's finding on causal relationship was thus his own medical assessment that it had ended as of the date of the most active surveillance, and that causal relationship of any future incapacity, including a need for medical treatment or loss of function, had ceased as well. This was error, as a judge may not fill a medical evidentiary gap based on non-medical evidence. Taylor v. USF Logistics, 17 Mass. Workers' Comp. Rep. 182, 184 (2003); see Josi's Case, 324 Mass. 415, 417-418 (1949)(proof of causal relationship between accident and disability must rest upon expert medical testimony). Moreover, even if the medical evidence had supported the judge's finding that disability would cease as of September 1, 2011, that evidence would not support a finding that causal relationship had ceased.

Relevant videos may, of course, be presented to a medical expert for consideration in reaching an opinion on causal relationship and disability. Jaho v. Sunrise Partition Systems, Inc., 23 Mass. Workers' Comp. Rep. 185, 190 (2009); see also Araujo v. United Walls Systems, LLC, 28 Mass. Workers' Comp. Rep. 229, 232 (2014). However, where the videos are not presented to the physician, it is error for the judge to substitute his opinion on the effect of the activities for the required medical evidence. Jaho, supra. Stated otherwise, the judge could not make a finding that causal relationship ceased as of September 1, 2011, based on the surveillance video alone. Without a medical opinion that the surveillance video or other evidence supported a finding that causal relationship of the employee's disability, or need for treatment, was at an end on the date that the judge found it to be so, the conclusion lacks evidentiary support.[10]

---

[10] Had Dr. Morley been presented with the surveillance video, and then ventured an opinion that causal relationship and/or disability had ceased as of September 1, 2011, a

The finding that the employee's industrial injury was not a major cause of need for treatment on or after September 1, 2011 is reversed. As the employee did not appeal the findings as to disability, but only as to causal relationship, there is no need to recommit.

Given that only the employee appealed the hearing decision and has prevailed, an attorney's fee may be due under G. L. c. 152, § 13A(7). Accordingly, the employee's counsel is directed to submit to the undersigned for review, a duly executed fee agreement between employee and counsel. No attorney's fee shall be due and collected from the employee unless and until the fee agreement, and the amount of the fee requested, is approved by this board.

So ordered.

____
William C. Harpin
Administrative Law Judge

____
Bernard W. Fabricant
Administrative Law Judge

____
Carol Calliotte
Administrative Law Judge

Filed: **January 29, 2016**

---

finding based on that opinion could have been supported. Nelson v. Gen. Hosp. Corp., 22 Mass. Workers' Comp. Rep. 295 (2008)(no error in adopting changed opinion of doctor on extent of disability, after viewing of videos).