COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 038128-16 034148-16**
Ozildo Goncalves Cordeiro	Employee
Carlos Painting	Employer
Workers' Compensation Trust Fund	Insurer
Proshield Exteriors	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Calliotte and Long)

This case was heard by Administrative Judge O'Neill.

APPEARANCES
Seth J. Elin, Esq., for the employee
Mary C. Garippo, Esq., for the Workers' Compensation Trust Fund

KOZIOL, J. The employee appeals from a hearing decision ordering the Workers' Compensation Trust Fund (WCTF) to pay him § 34 benefits at a rate of $301.37 per week based on a concurrent average weekly wage of $502.28 for incapacity resulting from a work-related injury sustained on September 23, 2016, while working for Carlos Painting. On appeal, the employee takes issue with the judge's average weekly wage determination. Although we affirm the judge's average weekly wage finding regarding Carlos Painting, we vacate the judge's determination of the employee's average weekly wage at the Sagamore Inn Restaurant and her related calculation of the employee's concurrent average weekly wage.

There is no dispute that the employee was injured while employed by Carlos Painting on September 23, 2016. The sole issues at hearing were average weekly wage, and the WCTF's defense of joint employment with Proshield Exteriors, a defense that

was ultimately rejected by the judge. At the outset of the hearing,[1] the judge listed the parties' stipulations on the record:

> There are two board numbers with different employers, but the same date of injury.
> The parties have stipulated that the date of injury is September 23, 2016.
> The Trust Fund has paid benefits via the conference order from September 30, 2016 to date and continuing.
> The accepted injury is the left lower extremity.
> The parties also stipulate that the employee is disabled.
> And the final stipulation is that there is concurrent employment at the Sagamore Inn Restaurant where the employee worked approximately 15 hours per week and his average weekly wage was $226.25.

(Tr. I, 4-5.) Both parties agreed that the judge correctly recited the stipulations and stated that they did not have anything to add. (Tr. I, 6-7.)

The judge made the following findings of fact regarding average weekly wage.

> The Employee testified that he worked for Carlos as a painter and was paid in cash in addition to his job at the Sagamore Inn Restaurant. I credit the Employee's testimony regarding the hours he worked on a weekly basis in the summer of 2016. I find the employee made approximately $700 per week while working for Carlos. However, this clearly was seasonal work as was the Sagamore Inn Restaurant job as testified to by the Employee himself.
>
> Accordingly, a seasonal employee's average weekly wage is determined by dividing his earnings over the previous year by fifty-two weeks, rather than by the number of weeks actually worked. The Employee testified that the restaurant was open from March until late October, so that would be thirty[-]five weeks which would amount to $7,918.75 (35 x $226.25 = $7,918.75) as the total wages earned as a dishwasher. Thus the average weekly wage that he earned working as a seasonal employee at the Sagamore Inn Restaurant was $152.28 ($7,918.75 ÷ 52 = $152.28). Moreover, the Employee testified that his work as a painter was also seasonal, six months a year, from summer until December. Accordingly, that would be twenty[-]six weeks, which would amount to $18,200.00 (26 x $700 = $18,200.00) as the total wages earned painting. Therefore, it appears that a reasonable approximation of the Employee's average weekly wage that he earned from Carlos would be $350.00 ($18,200.00 ÷ 52 = $350). So the Employee's

[1] The hearing took place over two days. The transcript for the first day of hearing, June 21, 2018, is hereinafter referred to as "Tr. I," and the transcript for the second day of hearing, July 31, 2018, is hereinafter referred to as "Tr. II."

> concurrent average weekly wage would be $502.28 ($152.28 + $350.00 = $502.28).

(Dec. 9-10.) On appeal, the employee acknowledges that at the hearing, he raised the issue of average weekly wage (AWW) pursuant to §1(1), arguing his concurrent wage was $926.25, and that the insurer "raised the defenses/issues of a disputed § 1(1) AWW, arguing a discrepancy in the number of hours/days worked." (Employee br., 2.) The employee asserts, however, that he was denied due process of law because the insurer "never raised the issue/defense of seasonal employment" prior to or at the hearing "and attempted to use closing arguments as a backdoor route to raise the issue of seasonal employment for the first time." (Employee br., 8, 11-12.)

Insofar as the employee takes issue with the judge's rulings regarding his work at Carlos Painting, we find his argument lacks merit. The employee acknowledges that the issue of average weekly wage, pursuant to § 1(1), was in dispute in this case. General Laws, Chapter 152, §1(1) states, in pertinent part:

> '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.

It has long been established that where the employment is seasonal in nature, the weeks of the year when the employee is not engaged in such employment, are not subject to the "time lost" exclusion because the job itself is "of a determinate duration. In no event would the employee have actually worked the year at this job." Bunnell v. Wequassett Inn, 12 Mass. Workers' Comp. Rep. 152, 155 (1998). The employee cannot be entitled to a deduction for time lost where the off-season time is not part of the employment relationship. Mike's Case, 73 Mass. App. Ct. 44, 48 (2008). As this board noted in Bunnell, to treat the off-season as "time lost" would be to treat the employee's seasonal employment "effectively. . . as year-round employment." Id.

In addition, despite the employee's assertion to the contrary, the matter was addressed squarely at the hearing. The employee testified that his work for Carlos Painting involved painting the exterior of houses. (Tr. I, 13.) On cross-examination of the employee, the following exchange took place:

> Q: But you worked for Carlos for three months before [the date of accident]?
> A: Yes, I did.
> Q: Is it your understanding that this painting is just a seasonal business?
> A: Yes.
> Q: And what is the season? Are you familiar with what the season is?
> A: When the summer starts until maybe about December, five or six months.
> Q: That's the nature is from September through - - would you repeat that the season is from?
> A: He said when the summer starts until about December.

(Tr. I. 32.) Mr. Carlos Costa, owner of Carlos Painting testified he paints about 20 houses per year (Tr. I, 41), and that the year before the accident, the employee worked with him, "every day of the week about three months in the summer." (Tr. I, 43; Tr. II, 5-6.) Mr. Bruce Wheeler, the owner of Proshield, also testified that painting the exteriors of houses is a seasonal business, "April through November." (Tr. I, 71-72.) Thus, the testimony of all the witnesses confirmed that painting houses' exteriors, as performed by the employee at Carlos Painting, is work that is seasonal in nature.

The seasonal nature of the employment is relevant solely to the issue of average weekly wage. Indeed, the employee admits "the Trust Fund raised the issue of AWW, disputing the number of hours/days that [the employee] worked for Mr. Costa." (Employee br. 11.) The concept that the nature of the employee's work was limited to a specific number of months during the year, or seasonal employment, goes directly to the heart of the "hours/days" that the employee worked. Thus, where average weekly wage was clearly an issue in dispute, no special pleading was necessary.

We observe that the employee raised no objection to the WCTF's questions regarding the seasonal nature of the painting business at any point during the testimony of any of the witnesses, including during cross-examination of the employee. The record also shows the employee exercised his right to examine the witnesses at hearing and

provides no indication that this right was curtailed in any way. Employee's counsel questioned Mr. Costa extensively about the employee's hours of work and his employment relationship with Carlos Painting. (Tr. II, 4-39.) In particular, he asked Mr. Costa about the months worked by the employee "during the summer[s]" of 2015 and 2016. (Tr. II, 5-6). Because the judge's handling of the average weekly wage issue concerning the employee's wages at Carlos Painting evinces no due process violation, we affirm so much of judge's decision as concluded that the employee's average weekly wage at Carlos Painting was $350.00 per week.

We do agree, but for different reasons than advanced by the employee on appeal, that the judge's average weekly wage determination regarding the wages earned by the Sagamore Inn Restaurant must be vacated and the matter recommitted for further findings of fact. The hearing transcript shows that the parties stipulated to the amount of the employee's average weekly wage at the Sagamore Inn Restaurant; specifically, "that there was concurrent employment at the Sagamore Inn Restaurant where the employee worked approximately 15 hours a week and his average weekly wage was $226.25." (Tr. I, 5.) The parties agreed on the record that the judge correctly recited this stipulation. (Tr. I, 6.) Nonetheless, in her decision, the judge altered the stipulation stating, "[t]he Employee was concurrently employed at the Sagamore Inn Restaurant, where he worked about fifteen hours per week and his average weekly wage *for those fifteen weeks at this Employer* was $226.25/week." (Dec. 4; emphasis added.) She then used the stipulated figure, based on thirty-five weeks of work, to further calculate the employee's average weekly wage at the Sagamore Inn Restaurant as $152.28. (Dec. 9-10.)

The employee argues the judge erred by ignoring the parties' stipulation and improperly modifying the employee's average weekly wage for the Sagamore Inn Restaurant to $152.28. On this point, we agree. The employee argues, however, that the judge erred because she lacked authority to alter the parties' stipulation, which he claims is an "agreement" that may only be modified on the grounds of "mutual mistake" or

"fraud" and then, only by a justice of the Superior Court. (Employee br. at 14-16.) We disagree.

Section 19 specifically applies to agreements for the payment of compensation and provides that, "[a]ny other questions arising under this chapter may be so settled by agreement." G.L. c. 152, § 19(1). "Section 19 requires that compensation agreements be written and subject to DIA approval in order to be enforceable in the Superior Court." Weitzel v. Travelers Ins. Co., 417 Mass. 149, 153 (1994). The agreement must conform to those same statutory requirements, in order for a party to be able to "file a complaint with the superior court to vacate or modify such agreement on grounds of law or equity." G. L. c. 152, § 19(2). The record, however, contains no written § 19 agreement signed by the parties and approved by the department.

A stipulation made on the record at a hearing, however, is not such an "agreement." This board has previously dealt with the issue:

> A stipulation of the parties may be vacated if a court deems it "improvident or not conducive to justice," Long v. Mercier, 318 Mass. 599, 601 (1945); the court should consider whether a stipulation "would work an injustice against one of the parties." Grant v. APA Transmission, 13 Mass. Workers' Comp. Rep. 247, 252 (1999). The request to vacate a stipulation needs to be made "in the course of a single action." Id. at 253.

Hill v. Dunhill Staffing Systems, Inc., 14 Mass. Workers' Comp. Rep. 350, 351 (2000). In this concurrent employment case, by stipulating to the employee's average weekly wage at the Sagamore Inn Restaurant, the parties established, and presumably settled that issue, and there was no need for any further analysis of the employee's wages at that employment. Indeed, in order to arrive at the employee's average weekly wage from his concurrent employments, the judge only had to add the stipulated average weekly wage at the Sagamore Inn Restaurant, $226.25, to the average weekly wage she determined, for the employee's work at Carlos Painting.

The stipulation did not state how the parties calculated the $226.25 figure and our review of the Exhibit 4, "Wage Statement from the Sagamore Inn Restaurant," does not

readily show how they arrived at that amount. (Dec. 2.) Also, there was no motion by the WCTF to vacate the stipulation. Instead, in its written closing argument, filed the day the record closed, the WCTF argued that "the only wages stipulated to were in the amount of $226.25 working 15 hours a week at the Sagamore Inn." (Dec. 2, Ex. 13, at 6, 9); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file). The WCTF then referred to the employee's testimony[2] and made only the vague request that "the wage ordered at conference,"[3] should be modified "given that the wages he earned at both the Sagamore Inn as well as when he was painting were seasonal in nature." Id. Thus, there was no motion to vacate the stipulation. Nonetheless, the judge essentially vacated the stipulation by ignoring it and making further findings of fact altering the average weekly wage at the Sagamore Inn Restaurant. The judge however, provided neither party with any notice that she was not going to use the stipulated average weekly wage at the Sagamore Inn Restaurant as the employee's average weekly wage at that employment. Thus, the judge erred, not only

[2] During cross-examination, the following exchange took place:

> Q: Okay. Thank you. Also this restaurant that you worked at, that's called the Sagamore?
> A: Yes.
> Q: Is it near the Sagamore Bridge?
> A: Yes.
> Q: Is that restaurant opened year-round?
> A: No. It closes in the winter too.
> Q: So that's - -
> Do you know what the season is for the restaurant?
> A: No, I don't. I would only start working in March until about September more or less.
> Q: So you worked from March until September?
> A: As soon as they got chilled, maybe October. Probable late October.

(Tr. I, 32-33.)

[3] The average weekly wage ordered at conference was $800.00, resulting in a § 34 benefit of $480.00/week. (Dec. 2.)

because she failed to make findings showing she engaged in the proper legal analysis in accordance with Hill, supra, but also because,

> [I]t was not within the judge's discretion to discharge the stipulation and fix a new average weekly wage without notifying the parties and providing them an opportunity to submit further evidence. Given the parties' stipulation, the [employee] had no reason to think any evidence on average weekly wage [at the Sagamore Inn Restaurant], *including the employee's testimony*, was being considered by the judge, and therefore, it had no reason to submit evidence on that issue. By vacating the stipulation without notice, and making findings on an issue [the employee at least] considered resolved, the judge essentially violated the due process rights of the [employee] . . . to know the evidence against [him] and to have the opportunity to rebut that evidence. See Haley's Case, 356 Mass. 678, 681-682 (1970); Anderson v. Lucent Technologies, 21 Mass. Workers' Comp. Rep. 93 (2007).

Guzman v. Act Abatement Corp., 23 Mass. Workers' Comp. Rep. 291, 297 (2009)(emphasis added). Because the employee was denied this opportunity, the judge's findings that the employee's average weekly wage was $152.28 at the Sagamore Inn Restaurant and, therefore, the employee's concurrent wage was $502.28, must be vacated.

Accordingly, we affirm the judge's findings and rulings regarding the employee's average weekly wage at Carlos Painting. We recommit the matter for the judge to make further findings of fact and rulings of law concerning her reasons for vacating the stipulation regarding the employee's concurrent wages at the Sagamore Inn Restaurant, and to allow the employee to produce evidence in response to that action. Id. at 298. We note that because the WCTF did not appeal, it cannot advocate for a lower concurrent average weekly wage than that arrived at by the judge ($502.28), which represents the floor below which the judge's determination of concurrent average weekly wage on recommittal cannot fall. "We reinstate the conference order, pending receipt of the judge's decision on recommittal." Carmody v. North Shore Medical Center. 33 Mass. Workers' Comp. Rep. ___ (4/17/19), citing Lafleur v. Department of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board, for review, a duly executed fee agreement between the employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is reviewed and approved by this board.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: September 20, 2019