COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034547-08**

Richard Goulette	Employee
National Bath Systems	Employer
Hartford Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Levine)

The case was heard by Administrative Judge Preston.

APPEARANCES
Brian C. Cloherty, Esq., for the employee
Christine M. Harding, Esq., for the insurer

HORAN, J. The insurer appeals from a decision awarding the employee §§ 13, 30 and 34 benefits. It argues that its due process rights were violated when the employee's attorney failed to provide it with copies of the medical records and reports he submitted to the judge as additional medical evidence under § 11A(2). It also challenges the judge's determination of the employee's average weekly wage. We reverse the decision, vacate the award of benefits, and recommit the case for further proceedings on the medical evidence, and further findings on the average weekly wage issue, consistent with this opinion.

The employee injured his back and right shoulder while working as a bath installer on October 28, 2008. (Dec. 3, 5.) The employee filed a claim for §§ 13, 30 and 34 benefits, which were awarded following a § 10A conference. Both parties appealed from the conference order. (Dec. 2, 3.)

At the hearing, the judge found the § 11A impartial medical examiner's report to be adequate, but authorized the parties to submit additional medical evidence due to the complexity of the medical issues. (Dec. 2-3.) See G. L. c. 152, § 11A(2). The employee's attorney provided the judge with records and reports authored by the employee's treating physicians, Doctors Samuel D.

Gerber, Atul L. Bhat and John A. Ragucci. (Dec. 8-11.) The judge adopted their opinions and awarded the employee ongoing § 34 benefits, based on an average weekly wage of $1,054, medical benefits and an attorney's fee. (Dec. 8-11, 15.) It is undisputed that employee's counsel failed to provide copies of the employee's additional medical evidence to the insurer prior to the close of the evidence.[1] (Employee br. 8.) This was a clear violation of the insurer's due process rights:

> Fundamental requirements of due process entitle parties to a hearing at which they have an opportunity to present evidence, to examine their own witnesses, to cross-examine the witnesses of other parties, to know what evidence is presented against them and to have an opportunity to rebut it, as well as to develop a record for meaningful appellate review.

Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 386 (2001), citing Haley's Case, 356 Mass. 667 (1972). Because the insurer was deprived of the opportunity to address the employee's medical evidence, by cross-examination or otherwise,[2] we reverse the decision, vacate the award of benefits, and recommit the case for further proceedings consistent with this opinion.

The insurer also argues the judge's assignment of the employee's average weekly wage, based on a similar employee's weekly wage of $1,054.43 in the fifty-two weeks prior to the industrial injury, was arbitrary and capricious. We recommit the case for further findings of fact on this issue.

The employee's work history with the employer spanned only a few weeks, making the standard § 1(1) calculation of average weekly wage impracticable.[3]

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[1] There is no evidence to suggest that the judge knew the insurer had not been provided with copies of the employee's additional medical evidence.

[2] We reject the notion, advanced in the employee's brief, that because the reports of these doctors "mirrored" their office notes, (which were allegedly provided previously to the insurer), his failure to provide the insurer with copies of this additional medical evidence was "harmless." (Employee br. 8.)

[3] General Laws c. 152, § 1(1) provides, in pertinent part:

> Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature of terms of the

(Dec. 5.) The judge found the employee to have significant experience in the field of bath installation, and to have graduated successfully from the initial hourly wage segment of the employment to the stage of payment-per-installation by contract. The employee was also authorized to work alone and without supervision. (Dec. 4-5.) The judge found the employee's skill sets "match[ed] up perfectly with a similar employee of National Bath, Mr. Frank Wallace." (Dec. 5.) "[I]n the prior 52 weeks before October 28, 2008, [Mr. Wallace] had an average weekly wage of $1,054.43. . . ." (Id.) The judge equated the employee's previous work experience and "exemplary" performance to Wallace's years of experience, id., even though Wallace was an over five-year company veteran. (Tr. 55.)[4] The judge did not credit "any contradictory testimony that suggests the Employee's work performance was deficient before this accident." (Dec. 6.) Accordingly, the judge used Wallace's earnings to establish the employee's average weekly wage. (Dec. 5-6, 14.)

Although the judge's findings as to the quality of the employee's work were based on his credibility determinations, and therefore generally immune from appellate review, Rezendes v. City of New Bedford Water Dept., 21 Mass. Workers' Comp. Rep. 47 (2007), they cannot, standing alone, support the judge's conclusion that but for his injury the employee would have earned, in his first year of work, as much as Frank Wallace. Nor do they support the judge's conclusion that the two men, although "employed at the same work," were also "in the same grade." This is because 1) Wallace had been an employee of National Bath Systems for over five years, (Tr. 55), whereas the employee was a new hire; and 2)

> employment, it is impracticable to compute the average weekly wages, as above defined, [fifty two weeks preceding the date of injury] 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. . . .

[4] Transcript references herein are to the first day of hearing on June 14, 2010. The hearing concluded on July 8, 2010.

there was uncontroverted testimony that employees who had been with the company for five or more years were paid a commission rate of 8.5%, (Tr. 54), rather than the 6.5%, (Tr. 32), or 6.0% (Tr. 54), rate payable to employees, such as Mr. Goulette, with under five years of service.[5] "The court has strictly construed the meaning of 'same grade' and 'same work' to ensure that the earnings taken as a vicarious standard be truly representative of the wages the employee would have earned if he had been employed over a longer period of time." Nason, Koziol & Wall, Workers' Compensation, § 18.3 (3rd ed. 2003 & Supp. 2010), citing Colantonio's Case, 296 Mass. 140, 143 (1936). The "same grade" has less to do with the quality of an employee's work, which was the judge's focus, and more to do with the level of compensation for the work performed. See Evansek v. Allied Systems, Inc., 19 Mass. Workers' Comp. Rep. 129 (2005)(without more, judge erred in finding co-worker whose seniority consistently gave him opportunity to earn higher wages was comparable employee under § 1[1]). Accordingly, we recommit the case for the judge to reconsider the "similar employee" evidence, and to make findings anew as to the employee's average weekly wage under § 1(1).

The decision is reversed, the award of benefits is vacated, and the case is recommitted for further proceedings consistent with this opinion.

So ordered.[6]

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Mark D. Horan
Administrative Law Judge

[5] The 6.5% rate was supposedly reflected on the employee's "new hire setup form" which was shown by employee's counsel to the employer's keeper of the records, but not offered into evidence. (Tr. 12-13.) The employer's September 12, 2008 job offer letter to the employee, (Ex. 8), cites a commission rate of 7.8%. This discrepancy is not addressed or explained anywhere in the evidentiary record but, in any event, both of those rates are lower than the 8.5% commission rate paid to Frank Wallace.

[6] In the interim, we reinstate the conference order which awarded the employee § 34 benefits at the rate of $390.46 per week, based on an average weekly wage of $650.76, from February 5, 2009 to date and continuing.

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Patricia A. Costigan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **July 25, 2011**