COMMONEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036538-00**

Robert Bembery	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll and Maze-Rothstein)

APPEARANCES
William J. Branca, Esq., for the employee
Joanne T. Gray, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee benefits for a work injury, based on an average weekly wage that reflected the employee's recent promotion, not his fifty-two weeks of earnings prior to his injury. See G.L. c. 152, § 1(1).[1] As the result obtained was consistent with Morris's Case, 354 Mass. 420 (1968), we affirm the decision.

The only issue litigated was that of the employee's average weekly wage. The judge adopted the parties' agreed statement of facts as her subsidiary findings:

> The employee, Robert Bembery, age 56, was employed by the self-insurer, M.B.T.A., as a bus driver when he suffered an injury in the course of his employment on September 17, 2000. The M.B.T.A. accepted liability for the industrial accident and paid temporary total incapacity compensation at the rate of $316.43 per week under M.G.L. c. 152 section 34 from September 18, 2000 until

[1] The relevant part of that section states as follows:

> (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 impractical 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 . . . .

> February 8, 2001. The parties have stipulated to this period of disability. The only issue involves the calculation of the employee's average weekly wage pursuant to G.L. c. 152, § 1(1).
>
> The employee's average weekly wage for the 52 week period prior to the industrial accident of September 17, 2000 was $527.39. Mr. Bembery had been an employee of the M.B.T.A. for approximately 2½ years prior to the accident date. All M.B.T.A. bus drivers are initially hired on a part-time basis and work "split shifts." Part-time operators work 30 hours per week. When openings for full-time operators become available, part-time operators are promoted by the M.B.T.A. to full-time status. A full-time operator works a guaranteed 40 hour work week at an average weekly wage of $702.21. Mr. Bembery was promoted to full-time status on September 2, 2000, just two weeks prior to the September 17, 2000 accident. He worked on a part-time basis for the 2½ year period prior to the date of his promotion.

(Dec. 2-3.)

The judge concluded that it was impracticable to compute the employee's average weekly wage according to the statutory formula in § 1(1), "the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two." The judge rejected the self-insurer's argument that the determination of the employee's average weekly wage was merely an arithmetic calculation, the change in the employee's work status from part-time to full-time notwithstanding. The judge instead computed the average weekly wage based on the guaranteed forty hour work week of a full-time operator, because that calculation would serve "to arrive at as fair an estimate as possible of an employee's probable future earning capacity." Szwaja v. Deloid Assocs., 2 Mass. Workers' Comp. Rep. 40, 43 (1988). (Dec. 3-4.) As such, the judge awarded the employee's benefits based on his full-time wage of $702.21 per week. (Dec. 5.)

We agree with the judge's reasoning and conclusion. In Morris's Case, supra, the court reasoned that the claimant had introduced sufficient evidence of the decedent employee's average weekly wage at the time of his work-related death to affirm the reviewing board decision.

> The reviewing board could have found that [the employee] was to be a full time employee paid at the rate of $1.25 an hour. He was issued a time card for the first

> time on July 24, 1961, the date of his death. Prior to that day he had been a part time employee paid out of pocket by a corporation officer. [The employee's brother] testified that [the employee] had started working on a full day basis.

Id. at 426. The court affirmed the reviewing board's award of dependency benefits based on the employee's full time average weekly wage, even though the employee had not even worked one full day when he was killed on the job. Id. at 426, 427. With regard to the average weekly wage determination, we see the present case as in harmony with Morris.

Moreover, the court recently revisited the issue of § 1(1) wage calculation, and stated:

> The definition of "average weekly wages" in § 1(1) has been construed to give reasonable scope to ascertainable "earnings": . . . This interpretive approach is used because our workers' compensation act "sets up a system of money payments for the loss of earning capacity sustained by an employee by reason of a work-connected injury." L. Locke, Workmen's Compensation § 301, at 344 (2nd ed. 1981). . . . One frequently cited treatise on workers' compensation law in this area has described the purpose of the earnings calculation as follows: "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; his loss as a result of injury must be thought of in terms of its impact on probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis." (footnote omitted). 2 A. Larson, Workmen's Compensation § 60.11(f), at 10-647–10-648 (1996).

Gunderson's Case, 423 Mass. 642, 644-645 (1996). The court concluded that the new labor agreement governing the employee's position, not in effect on the date of injury, but retroactive in application, should be the basis for calculation of the employee's average weekly wages. Id. at 645. See also Carnute v. Stockbridge Golf Club, Inc., 17 Mass. Workers' Comp. Rep. ___ (May 19, 2003).

The decision is affirmed. Pursuant to § 13A(6), the employee's attorney is awarded a fee of $1,273.54, to be paid by the self-insurer.

So ordered.

_____
Frederick E. Levine
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge

FEL/kai
Filed: **October 1, 2003**