

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 040532-06

Robert Dawson
D. Cronin's Welding Co.
Arbella Protection Ins. Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Koziol, McCarthy and Fabricant)

The case was heard by Administrative Judge Bean.

APPEARANCES

Paul A. Danahy, Esq., for the employee
Teri A. McHugh, Esq., for the insurer at hearing and appeal
Robert J. Doonan, Esq., for the insurer at deposition

KOZIOL, J. The employee appeals from a decision awarding him weekly incapacity and medical benefits for a December 27, 2006 injury.¹ His appeal challenges the determination of his average weekly wage as \$389.57. The employee claims the judge not only erred as a matter of law in computing that figure, but also failed to resolve issues of witness credibility and make necessary findings of fact. We agree with both contentions.

The employee began working as a welder for the employer in July 2006. (Dec. 263.) On December 27, 2006, he sustained a work-related injury to his lower back. (Dec. 264.) At hearing, the employee claimed that throughout this entire period, he worked forty to forty-four hours per week for the employer and was paid at a rate

¹ The employee was awarded § 34 total incapacity benefits from December 27, 2006 through May 28, 2007, and § 35 partial incapacity benefits from May 29, 2007 and continuing, based on a \$300.00 weekly earning capacity and an average weekly wage of \$389.57. (Dec. 269.)

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of \$20 per hour. (Dec. 263.) The employer claimed the employee initially was employed part-time, working sixteen hours per week, and in November 2006, at the conclusion of his probationary period, his hours doubled to thirty-two hours per week. (Dec. 264.)

In evaluating the employee's average weekly wage, the judge recited the testimony of the employee, co-workers Jon Henry, James Maloney and Daniel Tello, and the president of D. Cronin's Welding Co., David Cronin, Jr. (Dec. 263-264.) The judge also stated, "[t]he employer's payroll service records, entered into evidence as exhibit 5, show that the employee was paid \$20 an hour for 16 hours of work from July through the third week of November. But for his last five weeks of employment, he worked 32 hours, according to the payroll records." (Dec. 263-264.) Under the heading "General Findings," the judge made the following statements and rulings:

There is a stark dispute between the parties concerning the employee's average weekly wage. After listening to, and considering the testimony of the several witnesses on this subject, and reading the parties' briefs and rebuttal briefs, I am left without a strong preference for one party's argument over the other's. I find no witness to be so credible as to cause me to reject the testimony of the other witnesses. The employee's testimony, to be accepted, must cause me to accept that substantial "under the table" cash payments had to have been made to him over the course of several months, in the face of documentary evidence to the contrary. He did not support his position with any documentary evidence of his own. Bank deposit records could have been quite helpful if they existed. However, I am aware through my past experience that off the books cash payments are not unheard of in such occupations as welding. In the end, I base my average weekly wage determination on my assumption that no one associated with this case has violated any state or Federal law. That being the case, the employee's wages can be determined by using the Federal W-2 form upon which he based his 2006 tax payments. His W-2 form establishes that he earned \$8640 during his 23 weeks of employment with the employer. But the insurer accepted the slightly higher wage statement figure of \$8940 in its brief. As that party has accepted that higher figure, I will use it to determine the employee's average weekly wage.

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\$8940 divided by 23 weeks = \$389.57.²

(Dec. 268.)

The employee argues that as a matter of law, the lowest average weekly wage the judge could have found is \$640 per week, representing the figure the employer contended it began paying the employee after he became a full-time employee in November 2006. Bemberry v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 476, 478 (2003)(where employment status changed from part-time to permanent full-time work, benefits properly based on full-time wages). In its brief, the insurer agrees the judge erred in determining the employee's average weekly wage and stipulates the \$640 figure is the employee's accurate average weekly wage. (Insurer br. 4.) The insurer argues, however, that recommitment is not required because the judge's decision contains adequate findings of fact. We disagree.

The judge not only failed to make any credibility determinations or findings resolving the highly factual issue of average weekly wage, but he arrived at conclusions that are internally inconsistent. Despite expressly refusing to adopt the position of either party and stating he was not going to make any credibility determinations, the judge assumed, "no one associated with this case has violated any state or Federal law," and concluded, "the employee's wages can be determined by using the Federal W-2 form upon which he based his 2006 tax payments." (Dec. 268.) By relying on the form W-2, generated by the employer, the judge appears to have made a *de facto* credibility determination, adopting the employer's position in direct contradiction to his earlier statement. Yet, notwithstanding his apparent ruling that the form W-2 should be used to determine the employee's average weekly wage, the judge ultimately accepted a higher figure, set forth in a "wage statement," as representing the total payments received by the employee through his employment with the employer. (Dec. 268.) To the extent this figure does not coincide with the employee's form W-2, the judge's assumption, upon which his reliance on the form W-2 purports to be based, founders.

² In fact, \$8940 divided by 23 weeks = \$388.70.

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The flaws in the judge's reasoning are the direct result of his failure to find facts upon which to base his conclusions. It is the hearing judge's function to make credibility and fact findings that resolve the conflicts in the evidence and provide the required foundation for a reasoned application of the law. Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 369-370 (2005)(credibility findings are sole province of hearing judge who must resolve conflicts in the evidence); Beverly v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 621, 624-625 (2003)(mere recitations of testimony insufficient). Having made no such findings, the judge failed to perform this function and we are unable to perform a meaningful review of the decision. Praetz v. Factory Mut. Eng'g Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

We cannot say the \$640 figure represents the employee's actual average weekly wage in the absence of a resolution of the underlying factual disputes. Rather, \$640 represents the floor below which that calculation may not fall, should the judge resolve all fact and credibility issues in the insurer's favor. Accordingly, we reverse so much of the decision as determined the employee's average weekly wage is \$389.57 per week, and recommit the matter for further findings of fact and calculation of the employee's average weekly wage in a manner consistent with this opinion. While the matter is pending on recommitment, the insurer is ordered to pay the employee's compensation based upon the "floor" average weekly wage of \$640 per week, retroactive to December 27, 2006.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: ***March 23, 2009***