COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032965-06**

Sebastian Blanco	Employee
Alonso Construction	Employer
Continental Casualty Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Costigan and Horan)

The case was heard by Administrative Judge Benoit.

APPEARANCES
Catherine M. Doherty, Esq., for the employee at hearing
J. Channing Migner, Esq., for the employee on appeal
Martin T. Sullivan, Esq., for the insurer

LEVINE, J. The parties cross appeal from a decision awarding closed periods of weekly incapacity benefits. The employee argues for 1) an increase in his average weekly wages based on presumptive earnings under fair wage statutes; 2) a reversal of the termination of benefits; and 3) recommittal for further proceedings on the extent of ongoing incapacity after joinder of a successive insurer. The insurer argues that the employee's average weekly wages should be decreased by subtracting "under the table" payments made by the employer. In so arguing, the insurer advocates that we overturn our decision in McIntyre v. Seymour H. Andrus, DMD, PC, 16 Mass. Workers' Comp. Rep. 222 (2002). As to the present decision, we affirm it in part; but we vacate that part of the decision terminating benefits as of September 16, 2009. We agree with the employee that the administrative judge erred when he determined entitlement to benefits without joining successive insurers and, therefore, without litigating the employee's claim in one proceeding.

The employee sustained an industrial injury on September 22, 2006, for which the insurer accepted liability. (Dec. 2.) It is undisputed that, during the fifty-two

weeks preceding his injury, the employee worked well in excess of forty hours per week, and that all payment for such overtime was made in cash, without state and federal tax withholdings. It is also undisputed that the employer did not pay the employee an increased hourly wage for his overtime work. (Dec. 5.)

The employee claimed § 34 total incapacity benefits from September 15, 2008 through September 16, 2009 and ongoing from November 8, 2009. He also claimed § 35 partial incapacity benefits from September 27, 2009 through November 7, 2009. (Dec. 1.) During this latter period, the employee worked at a different company, Lee Plastics. (Dec. 6.) During the evidentiary hearing, the employee testified that he experienced increased pain after he began working at this subsequent employment. (Dec. 4, 9). Based on that testimony, the judge allowed the insurer's motion to add the successive insurer defense. See Evans's Case, 299 Mass. 435 (1938). Not long thereafter, the employee filed motions to join the two insurers who were potentially on the risk for the alleged new injury.[1] The judge denied these motions. (Dec. 4.)

Regarding the employee's physical condition while working at Lee Plastics, the judge found as follows:

> The employee testified that his subsequent work at Lee Plastics in 2009 caused an aggravation of his condition, from which aggravation he has never fully recovered. I credit the Employee's testimony on this point. The successive insurer doctrine would mandate that for purposes of this case, involving these parties, the insurer is not responsible for payment of any incapacity benefits for a period subsequent to that aggravation. As the employee was not specific as to a starting date for the increased pain, I infer that the starting date was his first day on the job, to wit, September 16, 2009.

(Dec. 9.) As a result, the judge ordered that the weekly benefits being paid by Continental under § 35 terminate as of that first date of employment at Lee Plastics. (Dec. 12.) The judge also awarded benefits based on an average weekly wage

[1] At oral argument, employee's counsel reported that the employee's subsequent employment was for a temporary agency; its insurer, not the insurer for Lee Plastics, would be potentially liable. (Oral argument Tr. 4-5.)

calculation which contemplated an eighty-two and one half hour work week. (Dec. 10.)

Average Weekly Wages

The employee argues that he is entitled to an average weekly wage which reflects the statutory requirement in G. L. c. 151, § 1A, for payment of "time and a half" wages for hours worked in excess of forty per week.[2] However, the issue is governed by our recent decision in Fox v. STG Props., 26 Mass. Workers' Comp. Rep. ____ (April 17, 2012). In Fox, we concluded that the actual wages paid, even if less than and in violation of the state minimum wage law, constituted the employee's § 1(1) average weekly wages. In the present case, we conclude that the employee's actual earnings, paid by the employer, are the basis for his § 1(1) average weekly wage calculation. Id.[3] That the wages in the present case were arguably in violation of labor laws is not a matter for determination in this forum.[4]

The insurer argues on cross appeal that the average weekly wage calculation was erroneous for a different reason. The insurer contends we should reverse our decision in McIntyre, supra, which allowed wages paid "under the table" (without federal and state tax withholdings) to be used for the calculation of the average weekly wage. We decline to do so. The amounts paid in violation of state and federal tax laws were actual wages paid by the employer. Contrary to the insurer's argument, McIntyre-type "under the table" income is distinguishable from "tip" income. As to

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[2] The judge multiplied 82.5 hours per week by $14 per hour to find the employee's average weekly wage to be $1,155. (Dec. 10.)

[3] This is not to say that, in other circumstances, determination of average weekly wages will also be bound by amounts actually paid. See, e.g., § 1(1)(wages of comparable employee); § 51 (expected natural wage increase); Nason, Koziol and Wall, Workers' Compensation, § 18.3 et seq. (3d. 2003).

[4] However, if the employee were successful in pursuing a claim for retroactive payment of wages due under state or federal labor laws, such judgment could be used to reopen the average weekly wage issue. See Gunderson's Case, 423 Mass. 462, 465 (1996)(retroactive increase in pay included in determination of average weekly wage).

the latter, the Appeals Court has affirmed the reviewing board's formulation in Dawson v. Captain Parker Pub, 11 Mass. Workers' Comp. Rep. 84 (1997), in which unreported "tip" income, amounts of which were unknown to the employer, were excluded from determination of the employee's average weekly wage. See O'Connell's Case, 78 Mass. App. Ct. 761 (2011)(reviewing board also properly looked to G. L. c. 151A to exclude unreported tips from calculation of average weekly wage); Fitzgerald v. Special Care Nsg Serv., 13 Mass. Workers' Comp. Rep. 332 (1999)(portion of travel reimbursement was in fact extra remuneration; even though employee did not pay taxes thereon, it was included in average weekly wage).[5, 6]

Successive Insurer

We agree with the employee's argument on the joinder issue regarding the alleged successive injury. Having earlier allowed Continental's motion to add the successive insurer defense, the judge erred in denying the employee's motions to join successive insurers. Although the employee later filed new claims against those insurers, we are concerned that litigation of those claims could be tainted. Here, the judge found that an aggravation, constituting a new injury, occurred at the subsequent employment. (Dec. 9.) But the insurer (see footnote 1, supra) potentially on the risk for that subsequent injury was not joined and thus did not have the opportunity to

[5] If the insurer's argument were adopted, an employee whose entire wages were paid "under the table" would not be entitled to any weekly compensation, a patently unfair result.

[6] As the insurer did not appeal the § 10A conference order, which awarded benefits based on an average weekly wage of $700, the insurer could not properly seek a lower average weekly wage at hearing. See Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep. 415 (2009)(under the terms of § 10A[3], by failing to appeal, the insurer accepted the terms of the conference order; this is consistent with general rule that an appellee cannot achieve a more favorable result by failing to appeal); Gelen v. Vinny Testa's Restaurant, 22 Mass. Workers' Comp. Rep. 221, 223 (2008)(insurer's failure to appeal conference order tantamount to acceptance of liability); Bland v. MCI Framingham, 23 Mass. Workers' Comp. Rep. 283, 289 (2009)(self-insurer could not contest penalty awarded at conference because it failed to appeal the conference order).

present evidence favorable to its position.[7] Yet, the same issue addressed and decided in the present claim -- whether there was a subsequent injury -- ostensibly must be addressed again with the subsequent insurer as a party. The risk is that the outcome in the present case may well infect the new proceeding. While the judge is entitled to deference in administration of the case, here he violated both the due process rights of the parties and the interest of judicial economy. His treatment of the successive insurer issue was arbitrary and capricious. Cf. Mulkern v. Mass. Turnpike Auth., 20 Mass. Workers' Comp. Rep. 187, 192 (2006)("the joinder of claims for disposition in one proceeding is encouraged").[8]

Accordingly, we vacate the order terminating benefits as of the employee's commencement of work with the subsequent employer on September 16, 2009. We transfer the case to the senior judge for reassignment to a different administrative judge for a hearing de novo, with all parties, including the subsequent insurer, present, on the existence, or not, of a new injury and the extent of incapacity beginning on September 16, 2009. We affirm the award of the prior closed periods of weekly benefits and the average weekly wage determination; they are the law of the case and not relevant to the successive insurer claim. Benefits ordered in paragraph 2, at p. 12 of the decision, shall continue pending decision after the de novo hearing.

For prevailing on the insurer's appeal, pursuant to § 13A(6), the employee is awarded an attorney's fee in the amount of $ 1,517.62.

So ordered.

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Frederick E. Levine
Administrative Law Judge

[7] "The issue of the contribution of multiple injuries to a period of incapacity requires expert medical evidence." Spearman v. Purity Supreme, 13 Mass. Workers' Comp. Rep. 109, 112 (1999).

[8] Despite the result in the present case, there may be different circumstances that warrant denial of a motion to join a subsequent insurer.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **July 17, 2012**