COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	BOARD NO. 042673-06 044138-06
Stephen Hogan	Employee
William Mascioli d/b/a Add-a-Room	Employer
Workers' Compensation Trust Fund	Insurer
Anchor Excavating/Patriot Equipment	Employer
Firemen's Insurance Company of Washington, D.C.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Fabricant)

The case was heard by Administrative Judge McManus.

APPEARANCES
Donald E. Wallace, Esq., for the employee
Jonathan Braverman, Esq., for the employer, William Mascioli d/b/a Add-a-Room
Thomas M. Wielgus, Esq., for the Workers' Compensation Trust Fund
Edward Moriarty, Esq., for the insurer, Firemen's Insurance Company of Washington, D.C.

HORAN, J. In its appeal from an administrative judge's decision awarding § 34 temporary total incapacity benefits, the Workers' Compensation Trust Fund (Trust Fund) challenges only the judge's finding on the issue of average weekly wage.[1] We recommit the case for further findings of fact.

On December 11, 2006, the employee fell from a roof and suffered "left calcaneous and left talus fractures." (Dec. 11.) In her hearing decision the judge concluded the employee was totally incapacitated as a result of his industrial injuries. (Dec. 12-13.) She also found that on his date of injury, the employee

[1] At hearing, the judge dismissed the claim against Firemen's, finding that Anchor Excavating was not the general contractor pursuant to G. L. c. 152, § 18, and that Steven Varasso, a partner of Anchor Excavating, was not Mr. Hogan's employer. (Dec. 19.) Because the Trust Fund does not challenge the judge's dismissal of the claim against Firemen's, this insurer is no longer a party to the case as of the filing date of our decision. See Cappello v. DTR Advertising, Inc., 25 Mass. Workers' Comp. Rep. ___ n.1 (March 23, 2011).

was working for William Mascioli, d/b/a Add-a-Room (employer). Because the employer was uninsured, the judge ordered the Trust Fund to pay the employee § 34 benefits at the rate of $780 per week based on an average weekly wage of $1,300. (Dec. 18, 24.)

In her decision the judge expressly credited the employee's testimony at hearing without exception. He testified he did not work for at least eight months prior to commencing work for the employer in 2006. (Tr.[2] 111-113.) He also testified that for two and a half months late in 2006, he worked for the employer on three projects at three different locations in southeastern Massachusetts. (Tr. 10-17.) The first location was in Bourne, where the employee worked for about three weeks. (Tr. 12.) He did not work for the next week and a half. (Tr. 15.) He then worked at a jobsite in Plympton for two and a half weeks before continuing his work for the employer in Whitman, where his industrial accident occurred. (Tr. 13-15, 55, 58, 115, 121.) The employee testified his employer paid him $30 an hour and another $30 for travel to each worksite. (Tr. 10-15.) Under the heading "Average Weekly Wage," the judge concluded:

> The employee alleges [his average weekly wage] to be between $1,300.00 and $1,400.00 per week. . . . It is, however, accepted that the Employee was paid $30.00 per hour for the work done at the premises in question and for one if not both prior projects. *What is in issue is how many hours and days the Employee worked with* [the employer] *and over what period of time. Having reviewed all of* [the] *submitted evidence, and including the adopted testimony of the Employee, I find the best estimate of what this employee's average weekly wage to be* [is] *that testified to by the Employee. Without further actual and credible evidence on this issue, I therefore find this to be $1,300.00 per week.*

(Dec. 18; emphasis added.)

On appeal the Trust Fund argues the judge's average weekly wage finding is arbitrary and capricious. We agree.

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[2] The hearing took place over four days. Citations to the transcript are to the proceedings held on January 30, 2009, the only day the employee testified.

The determination of an employee's average weekly wage is a question of fact, More's Case, 3 Mass. App. Ct. 716 (1975), and the employee has the burden of proof. Sponatski's Case, 220 Mass. 526 (1915). The employee is correct that his testimony, uncorroborated by documentary evidence, may satisfy his burden of proving his average weekly wage. Sullivan v. Phillips Analytical, Inc., 18 Mass. Workers' Comp. Rep. 183, 187 (2004), citing Radke v. Eastham Founds., 7 Mass. Workers' Comp. Rep. 197, 203-204 (1993); Dawson v. Captain Parker Pub, 11 Mass. Workers' Comp. Rep. 84, 85 (1997). However, even if the determination of an employee's average weekly wage is based solely on his testimony, we still must be able to "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). Though the judge acknowledged the ascertainment of the employee's average weekly wage depended upon an analysis of "the number of hours and days the employee worked with Mr. Mascioli and over what period of time," she made no findings of fact addressing these issues. (Dec. 18.)[3] Rather, the judge based her finding of a

[3] As the Trust Fund points out, the decision does not reveal the methodology used by the judge to address the average weekly wage issue. See General Laws c. 152, § 1(1), which provides, 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. 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 impracticable 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, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

$1,300 average weekly wage on the ground that "[t]he Employee alleges this to be between $1,300 and $1,400 per week."[4] (Dec. 18; Tr. 54-55.)

The problem with the $1,300 amount is that it does not comport with the balance of the employee's testimony respecting the weeks and hours he worked for the employer, and the $30 hourly rate he claimed to have been paid.[5] He testified that he did not work full time for the employer for the two and a half months he was employed prior to his injury. See discussion, supra. Without findings addressing the number of hours and days worked each week during the period of time he was employed by the employer, we cannot "clearly understand the logic behind [the judge's] ultimate conclusion," respecting the issue of average weekly wage.[6] Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). Accordingly, we recommit the case for further findings of fact consistent with this opinion. If necessary, the judge may take additional evidence. See Varano's Case, 334 Mass. 153 (1956)(where neither party offered accurate evidence under § 1(1), case remanded for further hearing on average weekly wages, at which either party may offer additional evidence).

So ordered.

Mark D. Horan
Administrative Law Judge

[4] The employee later acknowledged he did not earn $1,400 per week while working for the employer, and had not filed his 2006 tax returns as of the date of the hearing. (Tr. 138.)

[5] Given the employee's testimony, the judge could not conclude, without additional evidence of the number of hours worked, that the employee earned $1,300 per week for the *entire* time he worked for the employer.

[6] These findings should include the hours and days worked at each jobsite, or be based on evidence to support another method sanctioned by § 1(1) to determine the employee's average weekly wage. Depending upon which statutory approach is taken by the judge on recommittal, she may have to consider the extent to which the employee's average weekly wage was bolstered by his receipt of a $30 daily travel allowance. See McIntyre v. Seymour H. Andrus, D.M.D., P.C., 16 Mass. Workers' Comp. Rep. 222 (2002); Fitzgerald v. Special Care Nursing Serv., 13 Mass. Workers' Comp. Rep. 332 (1999).

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: