COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 63698-91**

Stephen Olejnikow	Employee
Omni Plumbing and Heating	Employer
Hanover Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll & Wilson)

APPEARANCES
William H. Murphy, Esq., for the employee at hearing
Paul M. Moretti, Esq., for the employee on brief
Terence O'Neill, Esq., for the insurer

LEVINE, J. The employee appeals from the decision of an administrative judge denying the employee's claim for § 34A benefits and instead ordering the payment of § 35 benefits. Because the decision fails to address or acknowledge one of the claims made by the employee, we recommit the case.

The employee was forty years old at the time of the hearing. He has an eleventh grade education; he is both a licensed sprinkler installer and a licensed journeyman sprinkler mechanic. (Dec. 753.)

On October 31, 1991, the employee was working at a school in Worcester. As the employee descended a ladder, he stepped on a pipe, spraining his ankle and fracturing his left tibia. He has suffered pain since and walks with a cane. Several pain medications and participation in a pain clinic have not alleviated his pain. (Dec. 754.)

The insurer accepted liability, paying § 34 temporary total incapacity benefits. Subsequently, the insurer filed a complaint to discontinue or modify those benefits. Following a § 10A conference in 1995, the complaint was denied and the insurer appealed to a full evidentiary hearing. Pursuant to § 11A, the employee was examined by Dr. John Ritter. Neither party deposed Dr. Ritter and his report was entered into evidence. At the lay hearing, the administrative judge declared the medical issues

complex, allowing the parties to submit additional medical evidence. The administrative judge left the department without issuing a decision, and the case was assigned to a different judge for a hearing de novo. (Dec. 752-753.)

The second judge confirmed the medical complexity ruling and allowed the employee's § 34A claim to be joined.[1] In his decision following the hearing, the judge found the employee to be partially incapacitated, capable of performing part time sedentary work. He ordered the insurer to pay § 35 benefits, based on a weekly earning capacity of $165.00 and an average weekly wage of $940.00, from October 23, 1996 to date and continuing. (Corrected Dec. 762.)

The employee raises several issues on appeal. One has merit. The employee argues that the judge failed to decide all the issues presented. Section 11B states, in pertinent part, "Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision." In his decision, the administrative judge listed the issues as disability, extent of disability and causal relationship. (Dec. 751.) However, the employee also raised the issue of average weekly wages. (Ex. 1.) Because the decision is silent as to this claim, the case must be recommitted for findings.

On June 29, 1999, the first day of the hearing, the judge reserved to the parties the right to raise the average weekly wages issue at the second day of hearing. However, the judge stated that if that issue was not raised during that second hearing date, the judge would deem that the parties stipulated the average weekly wages to be $940.00. (Tr. I[2], 3.) On October 6, 1999, the second day of the hearing, the average weekly wages issue was litigated. The employee apparently sought a higher average weekly wage based on

[1] During the pendency of the dispute resolution process, the employee received the maximum benefits to which he was entitled under § 34. Thereafter, the parties entered into a series of agreements under which the employee received § 35 benefits. (Dec. 752.)

[2] The first day of testimony, June 29, 1999, is referred to as "Tr. I."

the prevailing wage law.[3] Robert Prezioso, who oversaw the administration of the prevailing wage law in Massachusetts, testified to the prevailing wage rates in the Worcester and Boston areas. (Tr. II[4], 6-13.) His affidavit on prevailing wage rates pertaining to sprinkler fitters was admitted in evidence as Exhibit 9. (Tr. II, 8; Dec. 752.) The employee testified that he expected to be paid based on the prevailing wage. (See, e.g. Tr. II, 14, 23-24.) The issue of the employee's average weekly wages thus was raised. See McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285, 288-289 (1997)(discussing the effect of prevailing wage statutes on average weekly wages). Although the judge discussed the average weekly wages testimony in his decision, (Dec. 753-754), he neither listed it as an issue nor made a decision on it. On recommital, he must make findings and decide the average weekly wages issue. Thompson v. Sturdy Memorial Hosp., 13 Mass. Workers' Comp. Rep. 427, 429 (1999).

The employee also argues that the judge failed to list or decide a second issue; namely, an increase in average weekly wages pursuant to § 51, the so-called "young worker" provision. Section 51 states, in pertinent part:

> Whenever an employee is injured under circumstances entitling him to compensation, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, in the open labor market, his wage would be expected to increase, that fact may be considered in determining his weekly wage.

The employee listed § 51 as a claim on his hearing sheet. (Ex. 1.) He argued its applicability in the written memorandum he submitted to the judge after the hearing. However, even though the issue was raised, the evidence in the record does not support the applicability of § 51. Increases in average weekly

[3] The legislature has mandated that the " 'wages of employees on certain public jobs, shall not be less than the wages earned by unionized employees.' " McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285, 289 (1997), quoting Constr. Indus. of Mass. v. Comm'r of Labor and Indus., 406 Mass. 162, 167-168 (1989).

[4] The second day of testimony, October 6, 1999, is referred to as "Tr. II."

wages under § 51 "are only due when the projected wage increases are 'related to skill acquisition,' rather than 'purely inflationary.' " Etienne v. G.M.C. Masonry Co., Inc., 14 Mass. Workers' Comp. Rep. 51, 53 (2000). There is no "evidence in the record that would support the proposition that the employee's claims for wage increases . . . was based in anything related to skill acquisition." Etienne, supra. The evidence on wages here was solely the evidence of prevailing wage rates. Although there is evidence that the employee had been a licensed journeyman sprinkler fitter for only about eight months prior to going to work for the present employer, (Tr. II, 14), that evidence, standing alone, would not warrant applying § 51. And prevailing wage rates are not the equivalent of expected wage increases, "under natural conditions, in the open labor market," § 51, of a worker of the employee's age and experience. Etienne, supra. Therefore, on recommittal, the judge need not make findings as to the § 51 claim.

As to the employee's appeal of the earning capacity finding, we summarily affirm the decision.

We recommit the case to the judge to make findings on the issue of average weekly wages. On all other issues, the decision is affirmed.

So ordered.

Frederick E. Levine
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

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Filed: **March 8, 2001**