COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024362-05**

Steven Mike	Employee
Zebra Striping & Sealcoat	Employer
Travelers Indemnity Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Horan)

APPEARANCES
Jonathan R. Harris, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Joseph P. Bernhardt, Esq., for the insurer

FABRICANT, J. The employee, who worked in a seasonal employment from April through November, appeals from a decision in which the administrative judge concluded that unemployment benefits the employee received during the off-season months could not be used in the calculation of his average weekly wage. We affirm the decision.

The judge denied the employee's claim for inclusion of his unemployment benefits in his pre-injury average weekly wage, based on the rule of law that includes the non-income producing, off-season weeks in the average weekly wage calculation of wages earned during seasonal employment. See Bunnell v. Wequasset Inn, 12 Mass. Workers' Comp. Rep. 152 (1998)(off-season time cannot be considered part of the employment relationship, and therefore could not be excludable "time lost" from employment). We agree with the judge that Bunnell provides the foundation for the analysis of unemployment benefits paid during the off-season in this case. However, we have previously decided the very issue that is before us. In Defelice v. Derbes Bros., Inc., 16 Mass. Workers' Comp. Rep. 422 (2002), we held, based on the reasoning in Louis's Case, 424 Mass. 136 (1997), that unemployment benefits could not be used in the calculation of an employee's average weekly wage. In Louis, the court concluded that

§ 35 partial incapacity benefits the employee was receiving for an initial injury could be used in the calculation of her average weekly wage for a subsequent injury, as they represented substitute earnings created by c. 152.[1] Id. at 140-141. In Defelice, we took the next step:

> The court's language is clear: other insurance schemes are not to be brought within the calculation of an injured employee's average weekly wage. Unemployment compensation benefits, which although a form of "substitute earnings," are simply not "created" and "contemplated" by c. 152. To hold otherwise would also fly in the face of the longstanding principle expressed in Pierce's Case, 325 Mass. 649, 658 (1950).

Defelice, supra at 424. The "longstanding principle" in Pierce's Case is this: "[I]t was not intended that industry should be saddled with the double burden of paying [unemployment] benefits and [workers'] compensation during the same period in which an employee is not earning wages." Id. at 658. "The same prohibition against a double burden dictates that workers' compensation benefits not be paid on the receipt of unemployment benefits." Defelice, supra at 425. We also noted that the principle in Pierce's Case "was codified in G. L. c. 152, § 36B(2), which provides that '[a]ny unemployment compensation benefits shall be credited against partial disability benefits payable for the same time period'." Defelice, supra at 425 n.1.

We see no reason to reverse or revisit our conclusion in Defelice.

The decision is affirmed.

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[1] The Louis court also pointed to the following language:

> "[E]xcept as expressly provided elsewhere in this chapter, no savings or insurance of the injured employee *independent of this chapter* shall be considered in determining compensation payable thereunder, nor shall benefits derived from any other source than the insurer be considered in such determination" (emphasis supplied). G. L. c. 152, § 38 (1994 ed.).

Id. at 141 n.7.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **October 17, 2007**