

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 050209-02**

Steven R. Jacuby  
West Newbury Carpentry & Cabinetry  
Granite State Insurance Co.

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges McCarthy, Costigan and Fabricant)

**APPEARANCES**  
Kevin T. Daly, Esq., for the employee  
Eugene M. Mullen, Esq., for the insurer

**McCARTHY, J.** The employee appeals from a decision in which an administrative judge found his pre-injury average weekly wage was \$625, an amount the employee considers insufficient and unsupported by the record evidence. We agree the evidence adduced at hearing does not support that average weekly wage. We therefore recommit the case for further findings of fact.

The pertinent facts found by the judge, based on undisputed testimony, are simple. The employee was hired as a roofer at the rate of twenty dollars per hour for a forty-hour week (\$800) and was injured on his first day of work. (Dec. 4.) The employer testified that the employee's work would have dropped off to twenty-five to thirty hours per week in the winter months and there were no wage records of comparable employees available to be used in the calculation of the employee's average weekly wage. (Dec. 7.) The employer's testimony at hearing was that the alleged work slowdown, in which the employee would have been working twenty-five to thirty hours per week, occurred in the three months from December through February. The employer also testified that a "full work week" for his crew was thirty-six to forty hours. (10/14/2004 Tr. 15-18.) The judge found that "a reasonable approximation of the wages the employee would have earned, on average, over the year," was \$625 per week. (Dec. 7.)

We agree with the employee that the judge's calculation does not comport with the evidence.<sup>1</sup> Even using the employer's lowest figures in evidence for hours per work week nine months of thirty-six hours and three months of twenty-five hours – the resulting average weekly wage would be \$665, forty dollars more than the judge calculated. The finding of a \$625 average weekly wage is simply not supported by the evidence.

We therefore recommit the case to the hearing judge to reconsider the question of average weekly wage and for additional findings of fact on the issue.

So ordered.

Filed: **October 5, 2006**

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William A. McCarthy  
Administrative Law Judge

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Patricia A. Costigan  
Administrative Law Judge

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Bernard W. Fabricant  
Administrative Law Judge

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<sup>1</sup> We do not agree, however, with the employee's argument that his average weekly wage should have been found to be \$800.00. The employee's testimony that he was hired to work forty hours per week, year round, was countered by the employer's testimony, adopted by the judge, that his company's hours decreased in the winter months. (Dec. 4.) "It is the judge's responsibility to provide a fair estimate of the employee's probable future earning capacity." Foreman v. Highway Safety Sys., 19 Mass. Workers' Comp. Rep. 193, 195 (2005), citing Gunderson's Case, 423 Mass. 642, 644-645 (1996).