COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 025188-10**

Thomas Frederick	Employee
L. Guerini Group, Inc.	Employer
Travelers Casualty Company of Connecticut	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Harpin)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Kristopher S. Stefani, Esq., for the employee
Edwin W. Barrett, Esq., for the insurer at hearing
David G. Braithwaite, Esq., for the insurer on appeal

HORAN, J. The insurer appeals, arguing that the judge improperly calculated the employee's average weekly wage.[1] We affirm.

The case was tried on a joint stipulation of facts. (Ex. 3.) Based on those facts, the judge found that in the fifty-two weeks prior to his injury, the employee "was employed as a concrete pump operator." (Dec. 4.) She also found that:

1) At the time of hire, [the employee and the employer] contemplated that [the employee's] employment would be full-time and year round.

2) During the winter months [the employee] performed snow-plowing for [the employer].

3) In the twelve months preceding the work-related injury [the employee] worked 29 out of 52 weeks.

4) He worked from one to several weeks followed by a lay-off period of from one to several weeks.

[1] The only issue at the hearing was the amount of the employee's average weekly wage on his date of injury. (Dec. 3.)

> 5) At the time of each lay-off [the employer] told [the employee] that the lay-off was temporary, and instructed him to call in every week to see if there was any work available.
>
> 6) [The employee] was paid wages of $30.34 per hour when he worked and he received unemployment benefits during the lay-off periods.
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> 7) [The employee] earned $35,362.80 from [the employer] in the twelve months preceding the work-related injury for 29 weeks of work.

(Dec. 4-5.)

The employee argued that his average weekly wage be determined by subtracting the number of weeks he received unemployment benefits as time lost,[2] thus dividing $35,362.80 by twenty-nine, whereas the insurer argued that it be determined by dividing the employee's earnings by fifty-two. (Dec. 7.)

The judge agreed with the employee, and set his average weekly wage at $1,219.40. She noted the insurer's methodology would cause the employee's average weekly wage "to be calculated as if he were a seasonal employee." (Dec. 7.) See Defelice v. Derbes Bros., Inc., 16 Mass. Workers' Comp. Rep. 422 (2002); Bunnell v. Wequasset Inn, 12 Mass. Workers' Comp. Rep. 152 (1998).

> Because of the cyclical nature of their work, some employees, such as gardeners, do not work during certain periods of the year. For these employees, their lay-offs are predictable and commonplace and

[2] See General Laws c. 152, § 1(1), 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.

> they are free to seek other employment during non-work time periods. The court has determined that the category for these workers is "seasonal employees". For employees deemed seasonal, the court has found that weeks not worked do not constitute "time lost."
>
> If earnings are from seasonal work, where the job has always been of a determinate duration and could never become continuous, the off-season time can not be considered as part of the on-going employment relationship, and so periods not worked can not therefore be "time lost" from the employment.

(Dec. 7.) The judge then explained why, given the facts as stipulated, it would be erroneous to determine the employee's average weekly wage by treating his employment as akin to seasonal work. She noted the employee:

> was hired to perform full-time, year round work. He was continuously employed through the year, working during part of each of the months of the calendar year preceding his work-related injury.
>
> . . .
>
> Each lay off was temporary, and [the employee] was instructed to call on a weekly basis to see if he could return to work. He was not free to seek other employment for any predictable period of time.

(Dec. 8.) The judge also rejected the insurer's argument that to subtract the weeks the employee received unemployment benefits as time lost violated public policy by imposing "a double burden on the employer," reasoning that "[u]nemployment benefits are provided under a different statute with a different purpose from the [Workers' Compensation] Act." (Dec. 8.)

On appeal the insurer advances the same arguments; we find them unpersuasive. The cases cited by the insurer are distinguishable from the facts of this case. The employees in two of the cases cited were engaged in seasonal employment. Defelice, supra; Bunnell, supra. Stated another way, the employments in those cases were "of a determinate duration." Bunnell, supra at 155. Not so here. (Dec. 8.) Herbst's Case, 416 Mass. 648 (1993), is also distinguishable. There, the court rejected the argument that the computation of a teacher's average weekly wage should be made without including his thirteen week summer vacation period. Id. The court held that dividing the employee's

earnings by fifty-two weeks was justifiable because, as the board noted, 1) he was free to work elsewhere during this period and, 2) he was ineligible for unemployment benefits during that time. Id. at 650. "It is within the teacher's discretion whether he works during the summer vacation period. We see no reason to disturb the board's findings." Id. Here, the employee was effectively tethered to his employment for the year prior to his injury, obliged to call his employer "on a weekly basis to see if he could return to work." (Dec. 8.) The employee "was not free to seek other employment for any predictable period of time." Id.

The insurer's reliance upon Szwaja v. Deloid Assoc., 2 Mass. Workers' Comp. Rep. 40 (1988), is misplaced. The employee in Szwaja, a carpenter, was injured after working only two-and-one-half weeks for his employer. Id. at 42. Therefore, his average weekly wage was determined in accordance with the second sentence of § 1(1), which provides for reference to the earnings of "a person in the same grade employed at the same work by the same employer." Szwaja, supra at 44; See n.2, supra. Szwaja did not address whether the weeks that an employee received unemployment compensation should be counted as "time lost" under § 1(1).

Finally, the insurer renews its argument that to exclude from the calculation of his average weekly wage the weeks the employee received unemployment benefits imposes an impermissible "double burden" on the employer. It relies on Mike's Case, 73 Mass. App. Ct. 44 (2008), further appellate review denied, 452 Mass. 1110, in support of this contention. In Mike, the court held that unemployment benefits received by an employee prior to his injury "cannot be used in determining" his average weekly wage, as they are not earnings. Mike, supra at 49. The court cited Pierce's Case, 325 Mass. 649, 658 (1950), for the proposition that "it was not intended that industry should be saddled with the double burden of *paying* [unemployment] benefits and [workers' compensation] benefits *during the same period* in which the employee is not earning wages."

Mike, supra at 49 (emphasis added), See G. L. c. 152, § 36B. That is not the case here. No "double burden" is imposed upon the employer by subtracting the weeks a non-seasonal worker received unemployment compensation, prior to his injury, from the calculation of his average weekly wage. Indeed, adoption of the insurer's position would operate as a double burden on the employee, as the *exclusion* of unemployment benefits received prior to his injury, combined with the *inclusion* of the number of weeks he received those benefits, would combine to depress his average weekly wage. In light of the plain and unambiguous language of § 1(1), and the beneficent design of our workers' compensation act, we do not believe the legislative scheme countenances such a harsh result.

Here, given the nature of the employment relationship, the judge determined the employee's average weekly wage by the standard method prescribed in the first sentence of § 1(1).[3] She did not err by concluding, on these facts, that the best way "to arrive at as fair an estimate as possible of [the employee's] probable future earning capacity," Morris's Case, 354 Mass. 420 (1968), was to subtract as "time lost" the weeks the employee received unemployment compensation. (Dec. 8-9.)

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay a fee to employee's counsel in the amount of $1,563.91.

So ordered.

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[3] This is the standard way to calculate the employee's average weekly wage. "While G. L. 152, Section 1(1), does permit alternative methods of calculation, these methods are generally limited to occasions where the shortness of employment, the terms of the employment, or the nature of the employment makes it 'impracticable to compute' in the standard way." Herbst, supra at 650 (and cases cited). Here, the statutory predicates for the plain application of the first sentence of § 1(1) were met. The employee was employed by the employer for fifty-two weeks prior to his industrial accident, and while willing and able to work during that period, "lost more than two weeks' time during such period." See footnote 2, supra. Accordingly, it was proper for the judge to determine the employee's average weekly wage by dividing his earnings "by the number of weeks remaining after the time so lost has been deducted." Id.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **November 15, 2012**