COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 033040-11**

Vikki L. Harris	Employee
Massachusetts General Hospital	Employer
Partners Healthcare System, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Levine and Calliotte)

The case was heard by Administrative Judge Taub.

APPEARANCES
Honey Polner, Esq., for the employee
Christina Schenk-Hargrove, Esq., for the insurer

HARPIN, J. The self-insurer appeals from a decision awarding the employee § 34 benefits, utilizing an average weekly wage based on higher wages the employee would have earned in a new position, rather than based on the fifty two weeks of wages earned prior to the industrial accident. We reverse so much of the decision as awards the higher benefit, and affirm the remainder.

The employee began working for the employer on December 13, 2010, as a Radiology Service Representative II. Her average weekly wage (AWW) in that position, for the fifty two weeks preceding her December 20, 2011industrial accident, was $703.56. (Dec. 4.) Prior to her accident the employee learned she had received a promotion to Patient Service Representative II. She was scheduled to begin working in that position on December 26, 2011, at which time her weekly wage would have increased to $730.00, in line with other employees in that position and on her shift. (Dec. 4.)

In order to ensure a smooth transition during the days leading up to the change in position, the employee worked with her replacement to familiarize her with the responsibilities of the job. (Dec. 4, 8). On December 20, 2011, while working with her replacement, the employee slipped on wet flooring and landed

on her left knee. She sustained a fractured kneecap, followed by her receipt of appropriate medical treatment. (Dec. 4.) The self-insurer accepted liability and paid the employee § 34 benefits from December 21, 2011, through May 19, 2012, with § 35 benefits paid thereafter. The benefits were based on an AWW of $703.56. (Dec. 2.)

The employee filed a claim in June, 2012, seeking the retroactive adjustment and reinstatement of her §34 benefits, based on her anticipated future AWW of $730.00. (Dec. 2.) After a conference order awarded the § 34 benefits at the AWW claimed, the self-insurer appealed, and the claim came on for hearing. (Dec. 2.) On September 23, 2014, the judge issued his decision, in which he awarded § 34 benefits from December 21, 2011, and continuing, based on the higher AWW.[1] He found the employee's promotion was a certainty and that it would have taken place on December 26, 2011. In awarding the benefits based on what the employee would have earned, the judge wrote:

> The possibility of out-of-the ordinary circumstances occurring is precisely why there is some modest flexibility built into § 1(1). Here I find that the nature and terms of Ms. Harris' changing employment situation render the customary use of the prior 52 weeks as an inadequate and impracticable method of calculating the cost to her of the industrial injury. For that reason I find the wages over the prior 52 weeks of a comparable employee in the position that she was about to enter, stipulated to be $730.00 per week, as the fair measure

[1] The judge also ordered the payment of § 35 benefits once the § 34 benefits were exhausted, unless the parties agreed otherwise or a judge ruled differently. (Dec. 10.) At oral argument the attorney for the self-insurer noted that it agreed to continue paying the employee a benefit equivalent to the awarded § 34 benefit, until a conference was held on the employee's claim for § 34A benefits. (Oral Argument Tr. 19, 21.) That conference was held on February 17, 2015, at which time the judge ordered the § 34A benefits sought. (Conference Order of February 18, 2015; Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of board file). Thus, while one of the issues raised by the self-insurer in this appeal was whether the judge erred in awarding § 35 benefits during a period that he found the employee to be totally incapacitated, see Marino v. MBTA, 7 Mass. Workers' Compensation Rep. 140 (1993), in fact no such benefits were ever paid. The self-insurer's attorney acknowledged as much at the oral argument; thus we consider that issue to be moot. Sheremeta v. Barton's Angels, 27 Mass. Workers' Comp. Rep. 155, 157 (2014).

> of Vikki Harris' lost capacity to earn attributable to the industrial injury.

(Dec. 8-9.)

The self-insurer appeals, arguing, in part, that the judge erred in awarding benefits based on the higher AWW, on the ground that the judge's interpretation of G. L. c. 152, § 1(1), was contrary to law. We agree.[2]

An employee's AWW, on which her benefits depend, is determined with reference to G. L. c. 152, § 1(1). [3] The plain meaning of the statute, Hashimi v. Kalil, 388 Mass. 607, 609 (1983), makes the determination of the AWW dependent on wages earned *prior* to the employee's industrial accident. The wages are either those earned by the employee in the twelve months "immediately preceding the date of injury," or, when the employee has not worked that length of time, wages earned by another employee working in the same grade in the same class of employment "during the twelve months previous to the injury." The statute itself does not contemplate usage of *prospective* wages in a position in which the employee was not working at the time of her injury.

The courts and this board have considered the effect an accident has on an employee's life after the injury. In Gunderson's Case, 432 Mass. 642, 644 (1996), the Supreme Judicial Court held: "The entire objective of wage calculation is to

[2] We find the other issue raised by the self-insurer to be without merit.

[3] General Laws c. 152, § 1(1), states, in part:

> (1) "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; . . . 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.

arrive at a fair approximation of claimant's probable future earning capacity." In order to make such a valid approximation, courts, and this board, have allowed use of only four weeks of past wages to determine the employee's future earning capacity, Sullivan v. Phillips Analytical, Inc., 18 Mass. Workers' Comp. Rep. 183, 188 (2004); two weeks of past full time wages; Bembery v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 476 (2003); and even just one day of full time wages, Morris's Case, 354 Mass. 420, 425-426 (1968)(employee's change from part-time to permanent full-time employment on the day of his accident). However, in each case the employee was working in the new position *at the time of the accident*. The wages received, no matter how brief, were not prospective, but were actually being earned at the time of the injury. It is the position held at the time of the accident which governs, not some prospective plan in the future which may or may not come to fruition.[4] We do not believe that the definition of AWW can be stretched so far as to cover wages that have yet to be earned in a position not yet held.

There is only one means of utilizing *prospective* wages in determining an AWW, and that is through the medium of § 51. At the hearing the employee raised the applicability of § 51 as another basis for an increase in her AWW, but the judge did not address in his decision whether the section applied. The employee has asserted, in her brief in this self-insurer's appeal and without filing a cross-appeal, that § 51 constitutes an alternate basis on which to award the higher AWW (Oral Argument Tr. 37-39). While an appellate court may affirm a decision on any ground supporting it, regardless whether a cross-appeal has been filed, Nat'l Lumber Co. v. Canton Inst. for Sav., Bank of Canton, 56 Mass. App. Ct. 186, 187 n.3, (2002), and Fay v. Federal Natl. Mort. Assn., 419 Mass. 782, 789 n. 12, (1995), we find that § 51 is inapplicable to the facts of this case. The primary

[4] Judge Levine points out: "There is many a slip twixt cup and lip." See Cambridge Idioms Dictionary (2d ed. 2006).

requirement for the application of § 51 is that the employee "must demonstrate that [s]he was on a path before h[er] injury that, for a person of h[er] age and experience under natural conditions, likely would have led to a wage increase in the open labor market based on the acquisition or development of skills, education, or work experience, or from anticipated job progression such as the transition from an apprentice to a journeyman to a master." Wadsworth's Case, 461 Mass. 675, 682 (2012). Age is thus a factor to be considered, as are the on-going acquisition of skills or work experience. A simple promotion well into a career does not qualify as a likely wage increase under this statute.[5]

Although the determination of the AWW is usually a matter of fact, More's Case, 3 Mass.App.Ct. 715 (1975), we hold that, as a matter of law, the alternative methods of determining the AWW are applicable only when an employee's injury occurs while she is performing the duties of her position, even if that performance is as short as one day. Duties which are to begin after the accident do not result in a fair estimate of the employee's future earning capacity.

The dissent argues that our "bright line" ruling restricts a judge's discretion to fashion a reasonable wage calculation. We have taken into account an employee's likely future earnings by allowing the extension of an employee's *present* earnings, without requiring that the full fifty two weeks of prior earnings be utilized. To bar a judge from considering prospective earnings that have not yet been realized is not a restriction on discretion, but merely makes clear the legal limitations on determining an AWW.

[5] A recommittal for further findings by the judge on § 51 is not appropriate, as such a recommittal runs afoul of the lack of a cross appeal by the employee. We may consider the applicability of § 51 as an alternative ground to affirm a decision, Nat'l Lumber Co., supra., but cannot consider it as a basis for recommitting that decision, in the absence of the employee's appeal. Goodwin v. The Emporium, 28 Mass. Workers' Comp. Rep. 157, 158 n. 3(2014) (failure of employee to appeal decision makes issues that could have been raised moot).

We thus reverse the finding of the judge as to the employee's AWW on the date of her injury, and hold instead that her AWW was $703.56. The award of the § 34 benefit of $486.66 is reversed, and an award of a § 34 benefit of $469.04 is substituted in its place, retroactive to December 21, 2011.[6] The self-insurer may avail itself of the remedies of G. L. c. 152, § 11D(3), as necessary.

So ordered.

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William C. Harpin
Administrative Law Judge

Filed: September 3, 2015

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Frederick E. Levine
Administrative Law Judge

CALLIOTTE, J., concurring in part and dissenting in part.

I disagree with the majority's decision that the employee's average weekly wage may not be based on the wages of an employee in the position to which she had been promoted. I also disagree with its holding that, as a matter of law, § 51 does not apply to the facts of this case, in the absence of any findings or analysis by the administrative judge addressing § 51. Therefore, I dissent on those issues. I agree with the majority's disposition of the other issues raised by the self-insurer.

As a threshold matter, we will not disturb a judge's findings of fact unless they are arbitrary and capricious or vitiated by error of law. MacEachern v. Trace Constr. Co., 21 Mass. Workers' Comp. Rep. 31, 35-36 (2007), citing Buck's Case, 342 Mass 766 (1961). Here, the judge found, "there was no uncertainty that [the promotion] was to take place." (Dec. 8.) The insurer had stipulated both to the promotion and to the wages of a comparable employee. (Dec. 2.) The employee's

[6]The § 34A benefit awarded in the subsequent claim (see *supra*, note 1), will also need to be recalculated, in light of our decision.

start date at the higher-paying position was less than a week away, and she was actually in the process of training her replacement at the time of her injury. (Dec. 2, 8.)

With these facts in mind, the judge found that, while "past earnings experience is most often the best and fairest predictor of what the employee would have continued to earn but for her injury," here "that calculation would produce an unfair result and would fail to fully compensate the employee for the earning capacity of which she was deprived due to her industrial injury." (Dec. 8.) Accordingly, due to the *"nature and terms of [her] changing employment situation,"* the judge found it was *"inadequate and impracticable"* to base the employee's average weekly wage on her prior 52 weeks of earnings. Id. (Emphasis added.) He then determined that the method of calculating her average weekly wage which would most nearly approximate her future earning capacity was to use the wages of a comparable employee in the position to which she had been promoted. The factual underpinnings of the judge's decision, and his analysis, were neither arbitrary nor capricious, and, in my view, his decision reflects no error of law.

> As the court and this board have pointed out:
>
> " 'The entire objective of wage calculation is to arrive at a fair approximation of claimant's *probable future earning capacity*.' " "[The employee's] disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of its impact on probable future earnings perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis" (footnote omitted). 2 A. Larson, Workmen's Compensation § 60.11(f) at 10-647-10-648 (1996).

Gunderson's Case, 432 Mass. 642, 644 (1996)(emphasis added); Bemberry v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 476, 478 (2003); see also Sellers's

Case, 452 Mass. 804, 810-811, 812-813 (2008). In accordance with the statute,[7] the courts have endorsed an "interpretive" approach to determining average weekly wage, see Gunderson, supra, and have approved alternative methods of calculating it, to be used where "*the terms of employment, or the nature of the employment makes it 'impracticable to compute'* [average weekly wage] in the standard way." See Herbst's Case, 416 Mass. 648, 650 (1993)(emphasis added), and cases cited. The use of an alternative method is not, as the majority states, limited to situations which are due to "the shortness of the time during which the employee has been in the employment of his employer." § 1(1). Here, the judge reasonably applied such an alternative method.

The decisions cited by the majority—Morris's Case, supra, Sullivan, supra, and Bemberry, supra—support the judge's decision. In Bemberry, supra, the judge could easily have based the average weekly wage calculation on the employee's prior 52 weeks of wages at his old job, because he had been working for the employer for over 2 ½ years before his industrial injury. Instead, the judge chose to use the employee's projected earnings at the full-time position he had held for only two weeks, because it would serve " 'to arrive at as fair an estimate as possible of an employee's probable future earning capacity.' " Id. at 477, quoting Szwaja v. Deloid Assocs., 2 Mass. Workers' Comp. Rep. 4, 443 (1988). We affirmed, holding that the judge's reasoning was in harmony with that in Morris's Case, supra, where the court based the employee's average weekly wage on his projected full-time hourly rate, even though he had worked less than a full

[7] G.L. c. 152, § 1(1), provides, in relevant part:

> *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 . . . .

(Emphasis added.)

day when he was killed on the job. Bemberry, supra at 477-478. In Sullivan, supra, we affirmed a judge's determination that the best way to compute average weekly wage to reflect the probable future earning capacity of a temporary employee who had been working for the employer for only one month, and who testified he was " 'under the impression' " he would " 'probably be hired full time,' " was to look to his wages for the brief time he worked for the employer. Id. at 188. Although the employee here had not officially begun her duties in her new position, her probable future earning capacity was at least as definite and ascertainable as the earning capacities of the employees in Morris, Bemberry and Sullivan.

The judge's approach is also consonant with that taken by the California courts and workers' compensation board, which have held that wage increases that were "scheduled or reasonably anticipated" at the time of the injury may be considered in determining average weekly wage. Grossmont Hosp. v. Workers' Compensation Appeals Board, 59 Cal.App.4th 1348, 1363-1364 (1997).[8] In cases where the promotion is "speculative," the court will not consider the employee's wages at the new position. See Davido v. Workers' Compensation Appeals Board, 78 Cal. Comp. Cases 1359 (Cal.App.2 Dist.)(2013)(court declined to base employee's average weekly wage on wages of position to which he claimed he was to be promoted in one month, holding the promotion was "speculative" because the employee had not cleared the required criminal background check, and, in fact, had a criminal record). Here, there was nothing speculative about the employee's promotion or her wages in her new position. Rather, her promotion

[8] This holding was based, in part, on a statutory provision that "average weekly earnings are 100 percent of the average weekly earning capacity of the worker 'at the time of his or her injury.' " Grossmont, supra, at 1361, quoting Cal. Lab. Code § 4453, subd. (c)(4). Insofar as the California law bases average weekly earnings on "earning capacity," it is consistent with the expressed goal of wage calculation in Massachusetts to " 'arrive at a fair approximation of claimant's probable future earning capacity.' " Gunderson's Case, supra

was a fait accompli, with the accompanying wage increase scheduled to begin in a few days.

In holding that, as a matter of law, the judge erred in his average weekly wage determination, the majority draws a bright line, which may accomplish the goal of approximating future earning capacity in the majority of circumstances. However, in rare instances, such as those presented here, it unduly restricts the judge's discretion to determine average weekly wage by eliminating from his consideration "the nature or terms of the employment," as the statute allows. See § 1(1). The amount of an employee's average weekly wage is a question of fact. More's Case, 3 Mass. App. Ct. 715 (1975); Stone v. All Seasons Painting & Decorating, 28 Mass. Workers' Comp. Rep. 137, 139 (2014); Sullivan v. Phillips Analytical, Inc., 18 Mass. Workers' Comp. Rep. 183, 187 (2004). The judge's findings are supported by the evidence, and the method he used is consistent with the "entire objective of wage calculation" to approximate the employee's "probable future earning capacity." Gunderson, supra. Consistent with the accepted premise that the workers' compensation act is to be construed broadly in light of its humanitarian purpose, Wadsworth's Case, 461 Mass 675, 687 (2012), and the "liberal" and "encompassing" approach for interpreting the statute endorsed by the courts, specifically with respect to estimating an employee's earning capacity, Sellers's Case, supra at 812-813, I would affirm the decision on the facts found, and for the reasons stated, by the judge.

Alternatively, I would recommit the case for the judge to make findings of fact on the applicability of § 51[9] to the average weekly wage determination. The

[9] General Laws c. 152, § 51, as appearing in St. 1991, c. 398, § 78, reads:

> 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. A determination of an employee's benefits under

employee raised and argued § 51 at hearing, (Dec. 2; Tr. 5-7), and presented testimony in support of her argument. (Tr. 72, 76-77.) However, in his decision, the judge failed to address § 51 at all. "It is the settled duty of the hearing judge to make such specific and definite findings based upon the evidence reported as will enable this board to determine with reasonable certainty whether correct rules of law have been applied." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993), citing Zucchi's Case, 310 Mass. 130, 133 (1941). See G.L. c. 152, § 11B ("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"). The judge here not only failed to conduct any legal analysis regarding § 51, but also failed to make factual findings which would allow us to conduct meaningful appellate review.[10] See Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993)(duty of judge to address issues in case in a manner enabling board to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found). Accordingly, I would hold it "appropriate" to recommit the case for the judge to make "further findings of fact," G. L. c. 152, § 11C, on the applicability of § 51 to the employee's average weekly wage.[11]

> this section shall not be limited to the circumstances of the employee's particular employer.

[10] The employee also argued on appeal and at oral argument before this board that § 51 applied to increase her average weekly wage.

[11] I disagree with the majority's holding that the employee's failure to file a cross appeal precludes recommittal for findings on § 51. Where the employee has prevailed on her average weekly wage argument under § 1(1), I would excuse her failure to cross appeal on her alternative § 51 argument, which the judge did not address. In Commonwealth v. Humberto H., 466 Mass. 562, 571 (2013), the court explained:

> "As a general rule, an appellate court considers only questions of law raised by a party who has appealed; it does not address issues argued by a non-appealing party seeking to have the lower court's decision revised." H.J. Alperin, Summary of Basic Law § 4.29 at 574 (4th ed. 2006) (Alperin). However, "[w]hile

For the above reasons, I respectfully dissent.

Carol Calliotte
Administrative Law Judge

Filed: September 3, 2015

> the general rule states that an appellee . . . may not secure modification of a judgment unless she has filed a cross appeal, this is a rule of practice and is not jurisdictional." Hartford Ins. Co. v. Hertz Corp., 410 Mass. 279, 287-88 (1991). See O'Connor v. City Manager of Medford, 7 Mass. App. Ct. 615, 617-618 (1979); McLaughlin v. Amirsaleh, 65 Mass. App. Ct. 873, 875 n.18 (2006). We have the discretion to consider issues raised by a party who fails to cross-appeal and, where "circumstances compel it," to take appropriate action. Id.

See also 4 C.J.S. Appeal and Error § 21 (2015)("A party has no obligation to file a cross appeal where it is content with the court's final order. Thus, a cross appeal is not necessary when the appellee wins the case below and merely asks that the judgment be affirmed on a different basis" [footnotes and citations omitted]). Here, the majority makes a ruling of law based on inadequate factual findings on an issue the judge failed to address. The "appropriate action" Humberto H., supra, is recommittal for findings on an issue raised and argued below, and on appeal.