COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018409-08**

William Stone	Employee
All Seasons Painting & Decorating	Employer
Hartford Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Rose.

APPEARANCES
Katherine Lamondia-Wrinkle, Esq., for the employee at hearing
Garret Harris, Esq., for the insurer

KOZIOL, J. The employee appeals from a decision determining that he was an employee of Robert Beaumier, an uninsured independent subcontractor of All Seasons Painting & Decorating, and awarding him a closed period of § 34 total incapacity benefits at a rate of $153.85 per week based on an average weekly wage of $153.85.[1] The sole issue raised on appeal is the employee's claim that the judge erred in determining his average weekly wage.[2] We affirm.

[1] Previously, we affirmed so much of another judge's decision as determined the employee was not a direct employee of All Seasons Painting and Decorating and that Mr. Beaumier was an independent subcontractor of All Seasons Painting and Decorating. Stone v. All Seasons Painting and Decorating, 25 Mass. Workers' Comp. Rep. 227, 235 (2011). Because that judge no longer served at the department, we recommitted the matter for a hearing de novo before a different judge, regarding the nature of the relationship between Mr. Stone and Mr. Beaumier, and, if necessary, the applicability of § 18. Id. We also authorized the new judge to address any remaining issues raised by the parties. Id.

[2] General Laws c. 152, § 1(1), defines "average weekly wages," in pertinent part, as,

> 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

On May 29, 2008, while painting the exterior of a home, the employee fell from a ladder and was injured. The judge found the employee was entitled to incapacity benefits as a result of that injury. (Dec. 7.) However, the evidence pertaining to the issue of average weekly wage was sparse and rather vague. The employee's initial agreement with Mr. Beaumier contemplated that he would receive payment of half of the $2,080 All Seasons Painting & Decorating was paying Mr. Beaumier to paint the exterior of the home. (Dec. 6.) When injured, the employee had worked at that particular job for only one and one half days. (Dec. 6.) After the injury, Mr. Beaumier fired the employee, (Dec. 6, 7), and there was no dispute Mr. Beaumier paid him $500 for his work. (Tr. 69-70, 131, 150.) The judge made the following findings:

> Average Weekly Wage
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> As discussed by Chief Justice Marshall in Seller's Case, 452 Mass. 804, 808-811 (2008), a core principle of Chapter 152 is a determination of a fair approximation of an injured worker's future earning capacity. The work season for house painting generally runs from spring to October (Transcript p. 157). I accept and adopt the employee's testimony that he earned approximately $8000.00 house painting the year prior to his injury. Given the limited evidence on average weekly wage, I find a fair approximation of the employee's future earning capacity to be based on what he earned in the past as a house painter. I therefore calculate his seasonal earnings at $153.85 per week (8000 ÷ 52).

(Dec. 7-8.)[3]

> 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.

[3] A seasonal employee's average weekly wage is determined by dividing his earnings over the previous year by fifty-two weeks, rather than by the number of weeks actually worked. Bunnell v. Wequasset Inn, 12 Mass. Workers' Comp. Rep. 152, 154-155 (1998).

The employee argues the judge erred in determining the work was seasonal, because there was no evidence that: 1) the employment was for a determinant duration of time; 2) the employee received unemployment benefits during part of the year; or, 3) the nature of the work was anything less than continuous. (Employee br. 4-6.) The employee seeks reversal of the average weekly wage determination, and the establishment of an average weekly wage of $1,777.78. Id. at 7. He arrives at that figure by calculating his hourly rate of pay at $44.44 per hour, based on the $500 paid for the one and a half days he worked, and assuming a forty-hour work week. Id. at 6-7. He also points out that prior to his injury, he worked for Mr. Beaumier on one other job for one week and was paid $1,250. Id. at 7.

"The amount of the average weekly wage of an employee is a question of fact." More's Case, 3 Mass. App. Ct. 715 (1975). Here, the judge could not use the statutory methods of computing the employee's average weekly wage because of the brevity of his employment with Mr. Beaumier, see Carnute v. Stockbridge Golf Club, Inc., 17 Mass. Workers' Comp. Rep. 214 (2007), and the lack of evidence of wages of other workers employed by Mr. Beaumier,[4] or others employed in the same class of employment in greater Springfield, where the accident occurred. Gillen v. Ocean Accident & Guarantee Corp., 215 Mass. 96 (1913). When the statutory methods cannot be used, the judge may use alternative methods to compute average weekly wage. Herbst's Case, 416 Mass. 648, 650 (1993); Sullivan v. Phillips Analytical, Inc., 18 Mass. Workers' Comp. Rep. 183, 187 (2004). In choosing an alternative method of computation, "the judge may use a common-sense method to determine average weekly wages," Carnute, supra, at 219, while remaining mindful that "[t]he entire objective in computing average weekly wage is to arrive at as fair an estimate as possible of an employee's future

[4] Mr. Beaumier testified that after the employee was injured, he hired another individual, Michael Campbell, to finish the job, and paid him $400. (Tr. 58, 62, 73.) The evidence did not reveal the length of time Mr. Campbell worked on that job, or whether he worked for Mr. Beaumier before or after.

earning capacity." Szwaja v. Deloid Assocs., 2 Mass. Workers' Comp. Rep. 40, 43 (1988).

The employee argues the evidence shows he would have continuous employment as a painter because his work was not of a determinative duration or a "determinative on and off season." (Employee br. 5.) "Continuous employment" is defined as "substantially uninterrupted work in a particular employment." Gillen, supra, at 97; Szwaja, supra,at 43. The evidence did not require a finding that the employee had "substantially uninterrupted work in a particular employment" prior to his injury. The employee testified, and the judge found, that immediately prior to working for Mr. Beaumier, he worked for three months as a sales technician for Weed Man, a lawn fertilizing company. (Tr. 125-126; Dec. 4.) The judge found that prior to working for Weed Man, the employee worked for one year for Letendre Painting, where he met Douglas Guyette.[5] (Dec. 3.) The employee testified that in 2007, he worked for Letendre Painting for "one season," starting "in the spring and ending in the fall, like October," and earning $12 per hour. (Tr. 126-127.) He testified that Mr. Guyette "was a subcontractor to [Letendre Painting]," and that he was paid for his work by Mr. Guyette.[6] (Tr. 127). In 2007, the employee earned $8,000 as a painter. (Tr. 159; Dec. 8.) There was no evidence that the employee performed any other work for the remainder of the fifty-two weeks prior to his injury.[7]

[5] The employee's biographical data sheet does not list Letendre Painting as an employer, indicating instead that the employee worked for "Guyette Painting" from May of 2007 through November 2007. (Ex. 2.)

[6] Mr. Guyette testified that in 2007, he operated a painting subcontracting business under the d/b/a Guyette Consulting, and that he worked as a subcontractor for Letendre Painting. (Tr. 89.) He testified he issued the employee a Form 1099 for the employee's work from July through October of 2007, reporting the employee's total earnings as $4,673. (Ex. 7; Tr. 107.) Mr. Guyette is also the owner and operator of All Seasons Painting and Decorating. Stone, supra, at 229.

[7] The employee's Biographical Data Sheet showed no employment between the years 2004 through the spring of 2007, when he began working as a painter. (Ex. 2.)

The evidence also does not support, much less require, a finding that the employee could expect "continuous employment" painting for Mr. Beaumier or anyone else. Although Mr. Beaumier testified that inside painting work is done in the off-season, when exterior house painting cannot be performed, viewed in light of the remainder of the evidence, his testimony did not require a finding that the employee could expect "substantially uninterrupted work" through this employment. Mr. Beaumier testified he earned approximately $11,000 painting in 2008; that it was a "sad" year; and that he didn't know how a good year would be because, "I haven't painted for a continuous year. I've ventured off onto other projects." (Tr. 74.) Mr. Guyette testified that in 2008, he formed All Seasons Painting & Decorating, Inc., subcontracting painting jobs to others based on "availability," and doing other painting work himself. (Tr. 92-94.) He testified his busiest months were April to October: "[i]t's more busy in the summertime than the wintertime. It is seasonal, like [Mr. Beaumier] said, but very, very limited in the wintertime. Inside work is very scarce." (Tr. 95.) Even the employee acknowledged that house painting "can be" a seasonal-type job. (Tr. 157.)

There is no merit to the employee's argument that because he did not receive unemployment benefits during part of the year, he was not a seasonal employee. The employee's assertion that he was not paid unemployment benefits lacks support in the record. The employee did not testify as to whether he ever applied for, much less was denied, or otherwise failed to receive, such benefits. In any event, just as the receipt of unemployment benefits alone, does not require a finding that the employment was seasonal in nature, Frederick v. L. Guerini Group, Inc., 26 Mass. Workers' Comp. Rep. 309 (2012), we do not view the lack of payment of unemployment benefits to require a finding that the employment was continuous in nature. This is especially true in a case such as this, where the nature of the employment relationship formed a major threshold issue in dispute because neither Mr. Guyette nor Mr. Beaumier admitted Mr. Stone was their

"employee." On this record, the judge did not err in determining the work was "seasonal" in nature and in using the employee's previous year's earnings to compute his average weekly wage.

Lastly, we observe that the average weekly wage found by the judge should not "put the employee in a better position than he was in prior to the injury." Herbst, supra, at 651. The employee's proffered method of calculating the average weekly wage would do just that. The employee seeks application of a $44.44 hourly rate projected over a forty-hour work week, yielding an average weekly wage of $1,777.78. (Employee br. 6-7.) Such an average weekly wage would provide a § 34 benefit of $1,066.67 per week, or $55,466.74 per year. This proposed average weekly wage, and its resultant benefit rate, far exceeds the employee's earnings prior to the injury,[8] as well as his employer's earnings for the year the employee was injured,[9] and does not produce "an honest approximation of his probable future earning capacity." Szwaja, supra, at 43.

The judge's findings, firmly grounded in the scant evidence provided, showed he used a common-sense approach to arrive at an average weekly wage that fairly approximated the employee's future earning capacity. Accordingly, we affirm the judge's finding that the work was seasonal employment, yielding a $153.85 average weekly wage.

So ordered.

[8] There was no evidence of the employee's wages earned at Weed Man. The proposed hourly rate of $44.44 is nearly four times the $12.00 hourly rate the employee testified he earned painting houses in 2007. (Tr. 127.) Moreover, the yearly § 34 benefit rate is far out of proportion with the $8,000 the judge found the employee earned as painter during the year 2007. (Tr. 159.)

[9] Mr. Beaumier testified he earned approximately $11,000 painting during the year 2008. (Tr. 73.) He further testified that in 2008, he performed approximately eight painting jobs for All Seasons Painting & Decorating over a three month period. (Tr. 43-45.) Mr. Guyette provided Mr. Beaumier with a Form 1099 for 2008, reporting $7,791 in earnings. (Ex. 8, Tr. 85-86, 90-91.)

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **August 21, 2014**