COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 016796-10**

Angel Montes	Employee
Liberty Construction Services, LLC	Employer
Chartis Property and Casualty Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Levine)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Jeremy T. Theerman, Esq., for the employee
John C. White, Esq., for the insurer
Richard W. Jensen, Esq., for the insurer on appeal

KOZIOL, J. The insurer appeals from a decision ordering it to pay the employee a closed period of § 34 total incapacity benefits followed by ongoing § 35 partial incapacity benefits, as a result of the employee's May 10, 2010, work-related injury.[1] We address the insurer's claim of error regarding the judge's assignment of a minimum wage earning capacity to the employee, and affirm the decision.[2]

At the time of the hearing, the employee was a fifty-one year old high school graduate. He worked at a variety of unskilled jobs until 1997, when he entered a three month training program designed to assist minority workers in entering the construction trades. (Dec. 5.) After completing that program, he joined the Laborer's Union and began working in the construction industry as a working foreman. In 2006, he began working for the employer as a working

[1] The judge found that on May 10, 2010, the employee sustained work-related injuries to his left shoulder and his right wrist/hand, but that he was disabled only as a result of the left shoulder injury. (Dec. 15-16.)

[2] We summarily affirm the decision as to the insurer's remaining allegation of error concerning the judge's credibility findings and weighing of videotape evidence.

foreman. (Dec. 5.) As a working foreman, the employee directed and supervised construction laborers, performed daily documentation, and also " 'jump[ed] in' to do actual work with a jackhammer, sawsall, sledgehammer and/or compressor gun to break concrete." (Dec. 6.)

The judge adopted Dr. Ronald J. Nasif's July 2, 2011, opinion that the employee's left shoulder injury permanently disabled him from all "laborious" activities. (Dec. 10.) She also adopted Dr. Nasif's opinion that the employee was prohibited from "even moderate lifting," reaching above shoulder level, pushing and pulling, and he was limited to directing manpower, overseeing job performance, record keeping and performing "dexterity work" with his hands. (Dec. 10, 11.) The judge made the following observations and findings regarding the employee's incapacity and his resultant earning capacity:

> [T]he only evidence available on the issue of employability and earning capacity is the employee's lay testimony that he believes he could perform the administrative functions of the job of working labor foreman, and Dr. Nasif's expert deposition testimony that while the employee could probably perform the supervisory functions he could not perform any of the associated heavy physical labor. The only evidence regarding whether such purely administrative foreman work is available is the employee's testimony that he contacted the employer seeking such work but was "blown off."
>
> Based on Dr. Nasif's credible testimony, I find that the employee is capable of performing the job of a non-working foreman in the construction industry. Although the employee testified that a working foreman in the construction industry can earn $31.50 per hour, there is no expert evidence on this or about what a *non*-working foreman could earn. In any event, there is no expert vocational evidence that a non-working foreman job exists and there *is* evidence that the employee's attempts to secure such a position with the employer have been "blown off". Consequently, I do not find that the employee can re-enter the labor market as a non-working foreman in the construction industry. However, based on the employee's and Dr. Nasif's credible testimony, and based on the employee's education, training, work experience, age and his physical limitations, I find that the employee is capable of working 8 hours per day and 40 hours per week in a light duty or "non-laborious" capacity, and earning $8.00 per hour for a weekly wage of $320.00.

(Dec. 13-14; emphasis in original.)

The insurer alleges the judge erred in assigning the employee an $8.00 hourly, or minimum wage, earning capacity because the employee must be bound by his testimony that a working foreman in the construction industry earns $31.50 per hour. The insurer argues that as a foreman, the employee's job duties were limited to the supervisory and reporting duties which the employee admitted he is able to perform, and to the extent the employee performed any laboring duties it was his own voluntary decision to do so. Thus, it asserts the judge's assignment of a $320.00 weekly earning capacity violates § 35D(4).[3] We disagree.

The judge found that in addition to performing the administrative and supervisory functions of a foreman, the employee performed the laboring work "at his own discretion." (Dec. 6.) While the employee may have used his discretion to determine when to perform laboring work, the judge was not required to conclude, as a matter of law, either that the employee's job as a working foreman was actually limited to performing supervisory and administrative tasks, or that the employer expected him to perform only those tasks.

"The essential facts need not be proved by direct evidence but may be established by reasonable inferences from the facts shown to exist." Sawyer's Case, 315 Mass. 75, 76 (1943). Moreover, " '[t]he goal of disability adjudication is to make a *realistic appraisal* of the medical effect of a physical injury on the individual claimant and award compensation for the resulting impairment of earning capacity, discounting the effect of all other factors.' " Scheffler's Case,

[3] General Laws, c. 152, § 35D provides, in pertinent part:

> For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following: -
>
> * * *
>
> (4) The earnings that the employee is capable of earning.

419 Mass. 251, 256 (1994), quoting from, L. Locke, Workmen's Comp. § 321 at 375-376 (2d. ed. 1981)(emphasis supplied).

The judge drew reasonable inferences from the evidence and her findings of fact to conclude that the employee's job, and the $31.50 hourly pay which he testified he earned as a foreman, was for the job of a working foreman, not a non-working foreman limited to performing supervisory and administrative duties. Specifically, she found that "on the day of the incident [the employee] had 'jumped in' to work because it was a rush job at a flooded Shaw's supermarket."[4] (Dec. 6.) The employee was injured while using a "heavy piece of equipment that was both a jackhammer and a pneumatic compressor hammer with a chisel end" in order to cut concrete. (Dec. 6.) After visiting a physician who failed to diagnose any medical problem, the employee "returned to work doing jack-hammering." (Dec. 6.) The employee knew of no foreman who refrained from performing laboring work, and testified that all the foremen were working foremen. (Tr. 80-81.) The judge noted the employee, "testified that he believes he can perform the job duties related to working as a labor foreman in the construction industry as long as he did not have to do actual heavy labor," and that "since April of 2011 he began asking the employer to consider him for such a position, but the employer has been unwilling to consider it." (Dec. 7; Tr. 31-32.) She ultimately found, "[t]he only evidence regarding whether such purely administrative foreman work

---

[4] The employee also testified:

> Q: And what was your position with Liberty Construction?
> A: I was a labor foreman.
> Q: And can you tell us what your job duties entailed?
> A: Labor foreman. And my job duty was to direct the manpower where to work, how to do the job, and make sure the job got done.
> Q: And what were the types of work that you would do, apart from your foreman responsibilities?
> A: I also jumped in with the guys to work on top of my responsibility. If I needed to jackhammer, that's what I did.

(Tr. 12.)

is available is the employee's own testimony that he contacted the employer seeking such work but was 'blown off'." (Dec. 13.) This finding combined with the other evidence, supported the inference that no such job existed.

The insurer also takes issue with the judge's statements that she lacked any evidence regarding: 1) the availability of jobs within the employee's physical restrictions and within a reasonable commuting distance; 2) whether non-working foreman jobs even exist in the open labor market; and, 3) if such jobs do exist, what the hourly rate of pay is. (Dec. 13-15.) The insurer contends these statements show the judge was impermissibly shifting the burden of proof to it to produce evidence above that of minimum wage. (Ins. br. 17.) We disagree.

At hearing, the employee claimed only total incapacity benefits and the insurer denied liability as well as disability and the extent thereof. (Dec. 3-4.) The only witnesses were the employee and Dr. Nasif, who testified by deposition. (Dec. 1.) Under the circumstances, the judge was allowed to use her own judgment and knowledge in arriving at an earning capacity so long as she supported that determination by explaining its "source and application" as well as the "factual source" for the monetary figure. Dalbec's Case, 69 Mass. App. Ct. 306, 317 (2007).

The judge found the employee had prior work experience in unskilled jobs as a store clerk, housekeeper and handyman. (Dec. 13.) The employee testified at length about his previous employment as a housekeeper at Brigham and Women's Hospital and as a cashier at Store 24, testifying that although his injury would prevent him from performing all of the housekeeping duties, he could perform his prior work as a cashier on a full time basis. (Tr. 41-43.) The judge's comments regarding the lack of vocational evidence were contained in her discussion and findings pertaining to the employee's job prospects in the open labor market and the wage he could be expected to earn. Specifically, the judge explained that the employee's testimony regarding his rebuffed attempts to secure work with his employer as a non-working foreman, combined with the lack of any evidence that

such positions actually exist in the open labor market, led her to conclude the employee could not re-enter the labor market as a non-working foreman in the construction industry. (Dec. 14, 15.) She further explained this conclusion, combined with her consideration of the employee's "age, education, background, and prior work experience," led her to conclude that the employee "has a full-time (40-hour) earning capacity equal to the state minimum wage of $8.00 per hour." (Dec. 15.) Her statements merely reflected the state of the evidence and made clear the basis for her assignment of the minimum wage earning capacity. See, Eady's Case, 72 Mass. App. Ct. 724, 726, 728 (2008). The judge's conclusions regarding the employee's employability and earning capacity were grounded in her findings of fact. Because reasonable inferences drawn from the evidence presented provided an identified factual source for the assigned earning capacity, we affirm the decision.[5] Accordingly, pursuant to G. L. c. 152, § 13A(6), the insurer shall pay employee's counsel an attorney's fee in the amount of $1,563.91.

So ordered.

_____
Catherine Watson Koziol
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

Filed: ***May 28, 2013***

[5] We also reject the insurer's remaining assertion that the judge's assignment of the minimum wage earning capacity was the product of her erroneous reliance upon depressed economic conditions. (Ins. br. 19.) Nothing in the record or the judge's decision supports or provides any basis for this contention.