COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 012156-09**

Beth Gradziel	Employee
Berkshire Medical Center	Employer
Berkshire Health Care Systems, Inc.	Self-insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

The case was heard by Administrative Judge Poulter.

APPEARANCES
Marnie Sommer, Esq. for the employee at hearing
J. Norman O'Connor, Jr., Esq., for the employee at hearing and on appeal
Frederica H. McCarthy, Esq., for the self-insurer

CALLIOTTE, J. The employee appeals from a decision allowing the insurer's complaint to modify her §35 benefits. The employee argues the judge erred by basing her earning capacity on full-time employment, when she was only working part-time at the time of her injury and thereafter. We affirm the decision.

The parties filed a Revised Agreed Statement of Facts, which the judge adopted. (Dec. 3; Ex. 5.) The employee, a fifty-one year-old registered nurse, had worked for the employer for twenty-four years on the oncology/medical floor. For twelve years prior to her industrial injury, she worked twenty-four hours a week in three eight-hour shifts, earning $42 per hour plus a shift differential. Her undisputed average weekly wage was $1,011.37. (Ex. 5.)

On January 18, 2009, the employee injured her left ulnar nerve while lifting a patient. She continued to work twenty-four hours a week in a light duty capacity until she had surgery on May 19, 2009. The self-insurer paid § 34 benefits until July 15, 2009, when she returned to work, again performing light duty for twenty-four hours per week. In accordance with the employer's policy to limit the duration of temporary light duty

work, the employee bid on a permanent light duty job. On September 20, 2009, she accepted a twenty-four hour per week telemetry position involving electronic monitoring of patient data. The telemetry position was "consistent with her permanent restrictions relative to repetitive use, pushing, pulling and lifting no greater than 10 lbs." (Ex. 5.) In contrast to her former nursing position, which paid approximately $42 per hour, the telemetry job paid $22.90 per hour. Based on her actual wages of $548.64 in that part-time position, the insurer paid the employee § 35 partial incapacity benefits at the rate of $277.06 per week. (Ex. 5.)

Subsequent to the employee beginning work in the twenty-four hour per week telemetry position, the employer posted full-time telemetry positions for thirty-six hours per week. However, the employee elected not to apply for a full-time position. (Ex. 5.) In December 2011, the insurer filed a complaint for modification, which was denied following a § 10A conference.[1] The insurer appealed, maintaining that the employee's earning capacity should be calculated based on a thirty-six hour work week, at the hourly rate she was earning in the telemetry job. (Dec. 2.)

On July 8, 2012, Dr. Charles Kenny examined the employee pursuant to § 11A. Dr. Kenny opined that the employee was permanently partially disabled, with lifting restrictions of twenty pounds occasionally and ten pounds frequently.[2] (Stat. Ex. 1.) He further opined that the employee could work at her current telemetry job thirty-six hours per week, and that she could work forty hours per week at a job within the physical restrictions set by her physician. (Dec. 4; Stat. Ex. 1.) The parties agreed "[t]he impartial physician opined that there is no limitation on the number of hours the employee may work per week so long as the position complied with the permanent physical restrictions

[1] We take judicial notice of documents in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[2] The judge stated that Dr. Kenny indicated the employee could lift 10 pounds "constantly." (Dec. 4.) This error is not critical given the parties' agreement that "the telemetry position was consistent with her permanent restrictions relative to repetitive use, pushing, pulling and lifting no greater than 10 lbs." (Ex. 5.)

arising from her injury of not lifting more than 10 lbs. with her left arm and with no repetitive activity as determined by her physician." (Ex. 5.)

Following the hearing, the judge adopted Dr. Kenny's opinion. Applying G. L. c. 152, § 35D(4),[3] she found the employee capable of working thirty-six to forty hours per week earning $22.90 per hour, her rate of pay at the telemetry job. The judge wrote: "Ms Gradziel may choose to work under 36 hours per week, but her capacity is that of a full-time worker, with limitations. . . ." (Dec. 4.) Assigning her a weekly earning capacity of $824.40 (her hourly wage in the telemetry job multiplied by thirty-six hours),

[3] General Laws c. 152, § 35D, provides in relevant 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:
>
> (1) The actual earnings of the employee during each week.
>
> (2) The earnings that the employee is capable of earning in the job the employee held at the time of injury, provided, however, that such job has been made available to the employee and he is capable of performing it. The employee's receipt of a written offer of his former job from the employer, together with a written report from the treating physician that the employee is capable of performing such job shall be prima facie evidence of an earnings capability under this clause.
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> (3) The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it. The employee's receipt of a written report that a specific suitable job is available to him together with a written report from the treating physician that the employee is capable of performing such job shall be prima facie evidence of an earnings capability under this clause.
>
> (4) The earnings that the employee is capable of earning.
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> (5) . . . For purposes of this chapter, a suitable job or employment shall be any job that the employee is physically and mentally capable of performing, including light work, considering the nature and severity of the employee's injury, so long as such job bears a reasonable relationship to the employee's work experience, education, or training, either before or after the employee's injury.

the judge ordered the insurer to modify its payment of § 35 benefits from $277.00 to $112.18 per week beginning on July 17, 2012.[4] (Dec. 5.)

On appeal, the employee argues that her post-injury earning capacity should be based on a twenty-four hour work week, consistent with the hours she worked before and after her injury. She contends she has suffered a diminution in her earning capacity due to the fact she could not earn the same hourly rate as before the injury, and that requiring her to increase her hours post injury would place a significant burden on her. Further, she maintains, the judge failed to perform an adequate vocational analysis, as required under § 35D(4). The employee dismisses § 35D(2) and (3) as inapplicable, while arguing the telemetry job was not "suitable" under § 35D(3) or (5). She concludes that, pursuant to § 35D (1), her actual post-injury earnings, working twenty-four hours per week, should be the basis for establishing her earning capacity. We disagree.

It is well-established that "[a]ctual earnings are but one factor in assessing earning capacity under § 35D and may establish the floor—not the ceiling—for the assignment of that figure." Perez v. Work Inc., 20 Mass. Workers' Comp. Rep. 117, 118 (2006) (footnote omitted). Accordingly,

> [t]he actual wages the employee earns are not dispositive of [her] earning capacity. Hicks v. Commonwealth Registry of Nurses, 17 Mass. Workers' Comp. Rep. 375, 376-377 (2003). Section 35D directs judges to use the greatest of the amount of the employee's actual earnings, § 35D(1), or the amount [she] is capable of earning with a reasonable use of all [her] faculties, § 35D(4). Bahr v. New England Patriots Football Club, Inc., 16 Mass. Workers' Comp. Rep. 248, 251 (2002).

Sullivan v. Phillips Analytical, Inc., 18 Mass. Workers' Comp. Rep. 183, 189 (2004). The employee cites no case law since the enactment of § 35D in 1985, and we are aware of none, holding that the post-injury earning capacity of an employee who was working part-time prior to her injury must be determined based on her earning capacity working

[4] The judge actually found the employee had an earning capacity of $916.00 per week, based on a forty-hour week. (Dec. 4-5.) However, because the insurer sought to modify the employee's weekly benefits based on a thirty-six hour week, the judge ordered § 35 benefits based on the shorter work week. (Dec. 2, 3, 5.) The insurer did not appeal and does not argue error in the judge's earning capacity assignment.

the same part-time schedule.[5] See Modica v. Suffolk County Sheriff's Dep't, 27 Mass. Workers' Comp. Rep. 149 (2013)(judge erred by assigning an earning capacity based on employee's actual twenty-hour work week, without addressing whether employee was capable of earning more than his actual post-injury wages).

Moreover, we have found no cases, nor has the employee cited any, which base an employee's lost earning capacity solely on the diminution of her hourly wage. Although it is undisputed that the employee cannot earn the hourly wage she earned prior to her injury, § 35D(4) provides that an employee's earning capacity be based on "the earnings the employee is capable of earning," with the "*reasonable* use of all [her] faculties." Sullivan, supra; Bahr, supra. Here, the employee "does not dispute that she is 'capable of performing' the responsibilities of a full time telemetry position," (Employee br. 6), or that she is capable of earning $22.90 per hour. Furthermore, she has presented no evidence that an increase in her hours from twenty-four to thirty-six, would be a hardship for her, or would require an unreasonable use of her faculties.[6]

Finally, the employee contends that the judge must perform a vocational assessment taking into account her medical impairment, as well as relevant vocational factors such as education, age and experience and the nature of the jobs available.

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[5] The employee cites the Supreme Judicial Court's holding in Sjoberg's Case, 394 Mass. 458 (1985) in support of her position that her earning capacity should not be based on a requirement that she work more hours than before her injury, even if she is able to do so. In Sjoberg, the court held that an employee's overtime hours at his post-injury light duty job could be disregarded in determining earning capacity, and rejected the insurer's argument that the employee's actual post-injury earnings were controlling, noting that, "the Legislature has not specified a method for computing 'the average weekly wage [the employee] is able to earn thereafter.' " Id. at 460. Section 35D, enacted a few months after the court's decision in Sjoberg was issued, clearly specifies four alternative methods for computing post-injury earning capacity, thus effectively replacing the holding in Sjoberg, supra. Healey v. Richard Burbridge, 24 Mass. Workers' Comp. Rep. 159, 160 (2010); Nason, Koziol & Wall, Workers' Compensation, § 18.11 (3rd ed., 2003).

[6] Although the parties agreed that the employee had worked twenty-four hours per week prior to her injury on January 18, 2009, "because of family obligations and conflicting schedules with her husband," (Ex. 5), no evidence was presented that such conditions prevented her from working thirty-six hours per week as of July 17, 2012, the date on which the judge allowed the insurer's complaint to modify her § 35 benefits. (See Dec. 5.)

(Employee br. 7.) Given her own admission that she can perform the telemetry job on a full-time basis, and the judge's adoption of the parties' agreement that the impartial physician opined she can work forty hours per week in a job within her restrictions, no further vocational analysis is required. See Schwarzenberg v. Fresenius Med. Co., 26 Mass. Workers' Comp. Rep. 151, 152-153 (2012)(where all medical and vocational opinion evidence established employee could work full-time, which board understands to mean a common, forty hour work week, there was no "factual basis" in the record for judge's finding she was capable of working only thirty hours per week).[7]

Accordingly, the judge properly determined the employee's earning capacity by multiplying the reduced hourly rate she can earn post injury, by the number of hours she is reasonably capable of working, rather than by the number of hours she was actually working, or the number of hours she was working before her injury. The decision is affirmed.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **November 19, 2015**

[7] As the employee correctly points out, § 35D(3), which requires that a "particular suitable job" be made "available," is inapplicable because it requires an actual job offer. See Raczkowski v. Center for Extended Care at Amherst, 18 Mass. Workers' Comp. Rep. 289, 292 (2004). Regardless, the lack of a job offer for the thirty-six hour telemetry job does not mean the judge could not use the employee's admitted ability to perform that type of position on a full-time basis as a "factual source or reasoned explanation" for her earning capacity assignment. See Dalbec's Case, 69 Mass. App. Ct. 306, 316 (2007).