COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.** 043823-05

Charles Hartnett	**Employee**
Hogan Regional Center	**Employer**
Commonwealth of Massachusetts	**Self-insurer**

REVIEWING BOARD DECISION

(Judges Fabricant, Costigan and Horan)

The case was heard by Administrative Judge Preston.

APPEARANCES

Peter Georgiou, Esq., for the employee at hearing
Howard H. Swartz, Esq., for the employee on appeal
Terence H. Buckley, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals from a decision awarding the employee a closed period of § 34 benefits, and ongoing § 35 benefits, based on an earning capacity reflecting the employee's actual wages earned from his concurrent employment as a substitute teacher. The self-insurer argues the judge failed to correctly apply the provisions of G. L. c. 152, § 35D, in his assessment of the employee's earning capacity. We agree, and recommit the case for further findings on that issue.

On November 23, 2005, while working as a caregiver for the employer, the employee injured his left shoulder. (Dec. 3.) He underwent surgery on December 5, 2006, and has been recovering slowly. (Dec. 6.) At the time of his injury, the employee was concurrently employed as a substitute teacher in Lowell, and he continued to hold this position without restrictions.[1] (Dec. 4.)

[1] The judge found that, "except for the one-week period immediately following surgery of December 5, 2006 to December 12, 2006, he has been able to only perform his work as a substitute teacher in the Lowell school system." (Dec. 6)

Having found that the employee could not engage in the physical exertion required of his job as a caregiver, the judge based his order of § 35 benefits on the following analysis:

> I find that he is only suited vocationally in performing the teaching position and alternative positions do not exist. He works full time as a substitute teacher and there is no available public school, evening or weekend substitute teaching jobs for him to make up lost earnings from [the employer].

(Dec. 6.) Thus, § 35 benefits were ordered with an earning capacity representing the employee's actual earnings from his teaching position. (Dec. 8.) [2]

We agree that the judge's earning capacity findings are sparse and do not reflect the appropriate analysis outlined in § 35D. [3] While the employee's actual earnings are a factor in the determination of earning capacity, the judge should not have ended his analysis there. The judge should have considered whether the employee is capable of earning more than his actual post-injury wages. See § 35D(4). In other words, it does not necessarily follow that the employee's actual earnings from

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[2] The judge found that the employee earned $550.00 per week as a Lowell substitute teacher. However, he deferred "the application of an earning capacity to the actual wages paid him by Lowell if and when such records are produced." (Dec. 7.)

[3] General Laws c. 152, § 35D, requires that the judge assign as an earning capacity the greatest amount derived from the four methods set out:

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. . . .
3. The earnings the employee is capable of earning in a particular suitable job. . . .
4. The earnings that the employee is capable of earning.

teaching accurately reflect his capacity to earn in the open labor market. "Actual 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 (2006).

Here we are left with the question of how much the employee would be able to earn in the open labor market, for example, during periods in which his substitute teaching wage is unavailable, such as during the holiday weeks and summer break. Certainly, the employee's capacity to do work of that nature has not diminished to absolutely nothing during those periods.[4] However, the judge's findings leave no room for any other interpretation. The result is arbitrary and capricious as to the application of § 35D. Recommittal is appropriate under § 11C. See also Eason v. Symmetricom Corp., 21 Mass. Workers' Comp. Rep. 123, 125 (2007)(actual weekly post-injury earnings establish minimum earning capacity for each respective week) .

Finally, even if the actual teaching earnings are found to be the true measure of the employee's earning capacity (see footnote 2, supra), such an indeterminate order that relies on the parties' assigning the earning capacity or capacities is disfavored. See Goroch v. Alec H. Jaret, D.M.D., 22 Mass. Workers' Comp. Rep. 119 (2008); Leary v. M.B.T.A., 19 Mass. Workers' Comp. Rep. 66, 67 (2005).

The self-insurer's only other argument on appeal is that this case should be recommitted to a different administrative judge, because "misstatements as to the evidence by the same judge in two cases involving this insurer is one case too many." (Self-ins. br. 4.) The argument is without merit, and we deny the request.

Accordingly, we recommit the case for further findings on the employee's earning capacity, pursuant to G. L. c. 152, § 35D.

So ordered.

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[4] Under Herbst's Case, 416 Mass. 648 (1993), a teacher's annual wages must be divided by 52 weeks to determine the average weekly wage, not just the 39 weeks of the school calendar.

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Bernard W. Fabricant
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **February 9, 2009**