COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 026100-95**
Charles Siever	Employee
Commonwealth Electric Company	Employer
Commonwealth Energy Systems	Self-Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Wilson and Smith)

APPEARANCES
John T. Foynes, Esq., for the employee
Michael A. Fager, Esq., for the self-insurer

MCCARTHY, J. Charles Siever, a high school graduate with one year of college, worked as a lineman for Commonwealth Electric Company (Commonwealth). He had previously worked as a truck driver and laborer, and as a grounds keeper at a country club. Over the course of fourteen years, Siever worked his way up to a first class lineman's position after first being hired by Commonwealth as a janitor. On July 10, 1995, while pulling wire from a reel, he felt a snap in his back with pain radiating down his left leg. He was seen at the emergency room, and remained out of work for approximately one week. On July 18, 1995, he returned to light duty inspecting poles for illegal telephone hook-ups. (Dec. 3.) This job required Siever to drive a truck through often rough, wooded territory, which caused his back to become uncomfortable. (Dec. 4.) At some point Commonwealth became suspicious of the employee and hired a private detective agency to investigate his working hours activities. Id. On October 5, 1995, he was suspended from his light duty position for alleged dereliction of duty and misappropriation of company property. (Dec. 3, 7.) Following a hearing, the employer terminated his employment. (Dec. 5.)

From July 18, 1995 until April 5, 1996, the self-insurer paid Mr. Siever weekly

§ 35 partial incapacity benefits. Before the self-insurer unilaterally stopped paying weekly benefits, the employee filed a claim for payment of medical expenses. Following a conference on March 12, 1996, the judge ordered the self-insurer to pay for various diagnostic studies. The conference order did not include an increase in the weekly benefits; the employee appealed and the case came back to the administrative judge for a full evidentiary hearing on December 30, 1996.

Mr. Siever was examined by a § 11A impartial physician who concluded that he was suffering from "chronic low back pain and left leg pain with radicular features in spite of minimal radiographic and physical findings." The impartial doctor causally related these symptoms to the industrial injury. (Dec. 8.) He further opined that the employee had reached a medical end result and had a partial medical disability, which precluded him from returning to work as a lineman. The impartial examiner recommended that Mr. Siever avoid performing work which required bending, twisting, heavy lifting or prolonged sitting. (Dec. 9.)

In his hearing decision the judge found that the employee's light duty job inspecting poles was a "make work position" within the employee's physical capacity to perform. The judge further found that the circumstances surrounding the employee's termination had

". . . no bearing on the employee's current disability." (Dec. 7.) Finding the impartial report adequate (there was no deposition of the impartial physician), the judge concluded that the employee had been totally incapacitated for eight days beginning July 10, 1995, and partially incapacitated from July 18, 1995 and continuing. He determined that, beginning on October 6, 1995, the employee could work in a supervisory or sedentary capacity earning $400.00 per week based on a forty-hour week at $10.00 per hour. (Dec. 11.)

The self-insurer appeals, making three overlapping arguments: 1) the administrative judge failed to perform an appropriate § 35D analysis or explain why § 35D(3) was inapplicable; 2) the administrative judge's failure to calculate the employee's benefits according to § 35D(3) was arbitrary and capricious; and 3) the

administrative judge committed an error of law by failing to admit evidence of the reasons for the employee's termination, which included allegations of criminal misconduct. We find no error and therefore affirm the decision.

The duty of the administrative judge is 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. Beagle v. Crown Serv. Sys., Inc., 10 Mass. Workers' Comp. Rep. 282, 284 (1996); Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). The judge must look to § 35D for guidance regarding the establishment of an earning capacity, Beagle, supra at 285, as well as consider the employee's medical limitations caused by the injury, along with his age, education, training, work experience and other factors relevant to his ability to earn. See Scheffler's Case, 419 Mass. 251, 256 (1994). Here, despite the fact that the judge did not specifically refer to § 35D, clearly he considered the appropriate § 35(D)(3) factors. Section 35(D) 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:—
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> (1) The actual earnings of the employee during each week.
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> . . .
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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. . . .
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> . . .
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> 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. . . .

Section 35D(3) requires a post-injury job to be both suitable and available in order to be used in determining earning capacity. See Thompson v. Sturdy Memorial Hospital, 11 Mass. Workers' Comp. Rep. 663, 667 (1997). The judge specifically found that the employee had the capacity to perform the light duty job he was assigned and in fact did perform it from July 18, 1995 until October 6, 1995; thus the light duty job inspecting

poles for illegal phone hook-ups was demonstrably "suitable" and "available" for that closed period. The judge further found that the employee was suspended from the position on October 5, 1995, and "no longer had the opportunity to perform light duty for the employer. . . ." (Dec. 11.) If an employee is fired, there no longer is a "particular suitable job . . . made available to the employee. . . ." As the administrative judge appropriately considered the relevant § 35D(3) factors, and, since both the suitability and the availability criteria were not met, he was not bound to use the earnings of the employee in his light duty position as determinative of his earning capacity after suspension in October 1995.

The self-insurer's last two issues on appeal are closely related. They boil down to this. Since Mr. Siever got fired from a high paying, available, suitable job, his misconduct should require that he be assigned an earning capacity equivalent to his wages at that job pursuant to § 35D(3), and the judge committed an error of law by refusing to consider the reasons for the termination.[1] This two-part proposition is advanced without citation to case law or other authority.

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[1] The self-insurer points to the following language in the hearing judge's decision:

> At some point, subsequent to his [the employee's] suspension a hearing was held with the employee, representatives from the employer, and the Union representative. As a result of this meeting, the employee's services were terminated. The reasons for the termination apparently have to do with the activities in which the employee was involved during the course of his light duty assignment, however, the facts surrounding this particular issue are not germane to the disability issue.

(Dec. 5-6.) And later the judge makes the following finding:

> Mr. White's testimony when considered in conjunction with the testimony of Andrew Carr, a supervisor from Commonwealth Electric . . . leads to the conclusion that the employee's termination was essentially because of a dereliction of duty. There were also some allegations that the employee may have misappropriated some company property. As mentioned above, these circumstances have no bearing on the employee's current disability.

(Dec. 7.)

We cannot say that the judge erred in holding that the reason for the employee's termination, i.e., dereliction of duty, was irrelevant to the issue of incapacity.[2] The judge focused on the medical disability caused by the work injury as he arrived at his general finding with respect to loss of earning capacity. The self-insurer does not suggest that the employee deliberately set out to get fired so that he could receive higher weekly compensation benefits.[3] Based on the testimony of two supervisory employees of the employer, the judge made the following finding: "[I]t is clear that the light duty job with which the employee was provided was a 'make work position' and that little or no supervision was anticipated by either the employee or the supervisor." (Dec. 7.) Dereliction of duty while performing a make work job with little or no supervision did not persuade the judge that benefits should be discontinued without considering the employee's medical condition. The self-insurer does not argue that the findings with respect to medical disability are erroneous. Refusing to allow the cause or causes for the employee's termination to intrude, the judge pinned his determination that the employee was entitled to partial incapacity benefits on the uncontradicated medical testimony of the § 11A examiner. On the particular facts of this case, we cannot say that the judge erred in doing so.

The decision of the administrative judge is affirmed. The insurer is directed to pay employee counsel a fee of $ 1,193.20 pursuant to the provisions of § 13A.

So ordered.

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William A. McCarthy	Sara Holmes Wilson
Administrative Law Judge	Administrative Law Judge

[2] Negligence of an employee is not a bar to receipt of workers' compensation benefits. Gilbert's Case, 253 Mass. 538, 540 (1925) Even where an employee voluntarily quits his job he may be entitled to weekly partial incapacity benefits. Cotter's Case, 333 Mass. 28 (1955). See L. Locke, Workmen's Compensation §§ 282, 325, (2d ed. 1981), for discussion of negligence and voluntary termination.

[3] General Laws c. 152, § 27, provides that an employee injured by reason of his own serious and willful misconduct shall not receive compensation. As the self-insurer accepted this claim as compensable, it must have been satisfied that the employee was not involved in serious and willful misconduct when injured on July 10, 1995.

SMITH, J. dissenting. The judge erred as a matter of law when he awarded compensation without determining whether the employee's lack of earning opportunity may have stemmed directly from his alleged dereliction of duty and criminal activity,[4] rather than from the effects of his injury. The facts surrounding the employee's termination from his light duty position are relevant and material to the question of his entitlement to compensation benefits. Also relevant and material is the question of the suitability of the job from which he was fired. The case should be recommitted for further findings of fact on these two issues.

Section 35 provides for payment of compensation while "the incapacity for work resulting from the injury is partial." G.L. c. 152, § 35, as amended by St. 1991, c. 398, § 63 (emphasis supplied). The courts have consistently interpreted this language to require a direct causal connection between the employee's wage loss and the effects of his injury. "Inability to secure work arising from any other cause is not the basis of compensation." Driscoll's Case, 243 Mass. 236, 238 (1922). The effects of all other factors must be discounted. Scheffler's Case, 419 Mass. 251, 256 (1994), quoting L. Locke, Workmen's Compensation § 321, at 375-376 (2d ed. 1981). Compensation may not be based upon an employee's voluntary choice not to earn wages. Vass's Case, 319 Mass. 297, 299-300 (1946); Rogers v. Universal Products, Inc., 12 Mass. Workers' Comp. Rep. ___ (April 24, 1998); McNeice v. Berkshire Medical Center, 8 Mass. Workers' Comp. Rep. 246, 247 (1994); Major v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 90 (1993).

The law requires the judge to measure the post-injury earning capacity by the amount an employee would be able to earn with a reasonable use of all his powers, mental and physical. Federico's Case, 283 Mass. 430, 432 (1933); Akins's Case, 302 Mass. 562, 564-565 (1939); Welch v. A.B.F. Systems, 9 Mass. Workers' Comp. Rep.

[4] The parties agree that on January 4, 1999, subsequent to the issuance of the administrative judge's decision and the briefs filed in this appeal, Charles Siever was found not guilty of stealing the employer's property. District Court Department, Wareham Division, No. 9559-CR-3646.

407, 411 (1995). Theft [5] and dereliction of duty are not reasonable. An injured worker, in common with others, must bear the loss resulting from unreasonable activity. No award of benefits can be based on such actions because they do not "result[] from the injury." G.L. c. 152, § 35.

Instead, where conditions unrelated to the injury affect the level of earnings, the judge must follow an analytical process which separates out the impact of the work injury on the earning capacity, from the other factors influencing the employee's level of earnings. That is the approach used by the court where earning opportunities are adversely impacted by a business depression. In Lavallee's Case, 277 Mass. 538 (1931), the court held that the proper measure of post-injury earning capacity was the amount the employee would be able to earn if there were no lack of work. If the amount of wages actually earned post-injury have been diminished by economic conditions, the extent that they have been so lessened must be disregarded in determining the post-injury earning capacity. Pierce's Case, 325 Mass. 649, 656 (1950). A similar approach is used where the earning capacity is affected by unrelated medical conditions. Hummer's Case, 317 Mass. 617, 623 (1945); Anderson v. Norwood Hospital, 12 Mass. Workers' Comp. Rep. 388, 389-390 (1998). Diminished earnings due to advancing age are also disregarded. Foley's Case, 358 Mass. 230, 230 (1970). The judge is required to view the circumstances with something akin to tunnel vision, and to focus narrowly on and determine the extent of loss caused by the work injury and not other causes. Nicholson v. Consolidated Freightways, 11 Mass. Workers' Comp. Rep. 119, 122 (1997); Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682-683 (1995).

Here it is undisputed that the employee has some partial incapacity stemming from the injury. A light duty job had been made available to him that he was capable of performing. (Dec. 7, 11.)[6] He was receiving partial compensation based upon the

[5] See note 4.

[6] Under the union contract, because the employee had worked for ten years, the employer had to provide him with permanent light duty work within his restrictions. (Tr. 58-59.)

difference between his pre-injury average weekly wage and the wages paid by that job.[7] In this proceeding, the employee claimed an increased level of compensation from the date he was fired from that job. The question that the judge failed to resolve is whether the increase in his loss of earnings following the job termination stemmed from his work injury or from other unrelated causes. The employee's post-injury earnings constituted *prima facie* evidence of his actual earning capacity. The judge erred in disregarding them without the proper explanation. Welch, *supra*, 9 Mass. Workers' Comp. Rep. at 411. The instructions we gave in McNeice, *supra*, 8 Mass. Workers' Comp. Rep. at 246-247, another termination case, are equally pertinent here. If the judge finds that the employee was terminated because of lack of effort to do the job, then the conclusion on work capacity may be properly based on the earnings available from that work. If the post-injury job were unsuitable, then it would be improper to calculate benefits on that basis. Id.

The judge characterized the employee's light duty job as a "make work position." (Dec. 7.) However, "make work" is not a legally permissible reason to disregard the earnings it produced. Section 35D(3) permits an employer to make a position for an injured worker in order to restore him to remunerative work. An injured worker is not compelled to perform that offered job; however, his benefits are calculated based upon the wages which the job pays, if those wages are the highest amount that the employee can earn. G.L. c. 152, § 35D. To provide such a basis for the benefit calculation, the job must be "suitable." G.L. c. 152, § 35D(3).

Section 35D(5) defines a suitable job as "any job that the employee is physically and mentally capable of performing, including light work, considering the nature and

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[7] The insurer commenced partial compensation payments within the pay-without-prejudice period. See G.L. c. 152, § 8(1). At conference, the judge did not order an increase in compensation, thus implying, although not specifically ordering, that the partial benefits should continue at their prior level. The employee did not claim that he was terminated because he was physically or mentally incapable of performing the duties required by the job. See the last paragraph of § 8(2).

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 here found that the employee had the physical capacity to perform the job, (Dec. 7,11), but made no finding about whether the work was otherwise suitable. The case should be recommitted for such factual findings.

In conclusion, because the decision lacks findings on key questions of fact, and provides no assurance that the judge correctly applied the law to facts that could properly be found, the case is appropriate for recommittal. G.L. c. 152, § 11C. I would so order.

Filed: February 25, 1999

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Suzanne E.K. Smith
Administrative Law Judge