COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 026747-99

Clifford LaPointe	Employee
Souliere and Zepka Construction Co., Inc.	Employer
Credit General Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and McCarthy)

APPEARANCES
J. Norman O'Connor, Jr., Esq., for the employee
Stephen J. Brown , Esq., for the insurer

HORAN, J. This sixty-eight year old employee appeals the decision of an administrative judge denying his claim for permanent and total incapacity benefits or, in the alternative, partial incapacity benefits. The judge found the employee capable of performing many types of non-trifling work, and thus denied his § 34A claim.[1] (Dec. 3.) We summarily affirm that finding. The judge based his denial of § 35 benefits by applying § 35E.[2] Id.

[1] The employee, a carpenter, lost most of the sight in his left eye when a nail struck it at work on July 19, 1999. (Dec. 2.)

[2] General Laws c. 152, § 35E, provides, in pertinent part:

> Any employee who is at least sixty-five years of age and has been out of the labor force for a period of at least two years and is eligible for old age benefits pursuant to the federal social security act or eligible for benefits from a public or private pension which is paid in part or entirely by an employer shall not be entitled to benefits under sections thirty-four or thirty-five unless such employee can establish that but for the injury, he or she would have remained active in the labor market. The presumption of non-entitlement to benefits created by this section shall not be overcome by the employee's uncorroborated testimony, or that corroborated only by any of his family members, that but for the injury, such employee would have remained in the labor market.

The judge's treatment of § 35E is contrary to law. Accordingly, we reverse that part of the decision and recommit the case for further factual findings consistent with this opinion.

The judge found the following facts relevant to the § 35E inquiry:

> [The employee] testifies that he did not intend to retire at age 65. He was 63 when he was injured. He says that he didn't feel Social Security was going to be enough for him and he wanted to build it until he reached the age of 70. His wife corroborates that the [employee] had not discussed retirement at 65 and planned to keep working. His supervisor and a coemployee both testify that he never mentioned any retirement plans to their knowledge. The supervisor, John Zepka, states that there was no company policy to retire at age 65, and they would have kept him if he so chose.

(Dec. 2-3.)

The judge stated: "The statute [§ 35E] requires that the employee show his intention to remain active in the labor market through evidence other than the uncorroborated testimony of either himself or his family members." (Dec. 3.) This is a misstatement of the caselaw construing § 35E. In Tobin's Case, 424 Mass. 250 (1997), the court stated, "[t]estimony by the employee and his family members concerning his life, environment, and present and future work goals is certainly permissible under § 35E and should be considered by the administrative judge." Id. at 254. The court further endorsed and approved our construction of § 35E, quoting from our analysis in Harmon v. Harmon's Paint & Wallpaper, 8 Mass. Workers' Comp. Rep. 432 (1994):

> "[Section] 35E does not say that an administrative judge should ignore all of an employee's testimony which bears on whether he intended to retire at age sixty-five. Indeed, much of that testimony is also relevant to the issue of diminution of earning capacity and motivation to return to work. Section 35E by its plain language simply says that the employee's testimony that he would have continued to work past age sixty-five - standing alone - will not carry the day and rebut the presumption of retirement. Either party may bring witnesses or documents to verify or disprove the employee's testimony."

Tobin, supra at 254-255, quoting Harmon, supra at 437. (Emphasis in original.)

St. 1991, c. 398, § 66

Post Harmon, we have consistently maintained the employee's, or a family member's, testimony may provide corroborative evidence sufficient to rebut the § 35E retirement presumption. As we explained in Quinlan v. Marois Construction Co., 10 Mass. Workers' Comp. Rep. 51, 54 (1996): " Harmon holds that testimony from the employee and family as to circumstances may be the basis for a finding by an administrative judge that 'but for the injury such employee would have remained active in the labor market.' " (Emphasis in original.) We iterated our position in Divisano v. United Liquors Co., 10 Mass. Workers' Comp. Rep. 438, 439-440 (1996):

> Where . . . an employee testifies on background facts and circumstances which, if found credible, support a finding as to his state of mind that he intended to continue working after the age sixty-five, or that he "would have," no corroboration is necessary. It is only "uncorroborated selfserving testimony by an employee with respect to his state of mind regarding retirement at age sixty-five," which is insufficient to overcome the § 35E presumption. [Harmon] at 436. The judge's interpretation of § 35E , that all testimony by an employee and his family bearing on whether the employee would have remained active in the labor market requires corroboration before it may be considered, does not follow the precedent set by Harmon.

See also Gladu v. Massachusetts Turnpike Auth., 9 Mass. Workers' Comp. Rep 223, 225 (1995)(same); Fralick v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 518, 519-520 (1995)(same).

Because the judge held the employee could defeat the retirement presumption only by introducing evidence beyond his own testimony, or that of a family member, his conclusion to bar benefits based on § 35E is contrary to law. G. L. c. 152, § 11C.

Accordingly, we reverse and recommit this case for further findings on the insurer's defense of § 35E. We otherwise affirm the decision.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: May 20, 2005