COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 052080-95 030478-96**
Elizabeth Fitzgerald	Employee
Special Care Nursing Service	Employer
Reliance National Indemnity	Insurer

REVIEWING BOARD DECISION

(Judges Maze-Rothstein, Levine and Carroll)

APPEARANCES

Thomas C. Regan, Esq., for the employee
Kevin M. Carroll, Esq., for the insurer, Reliance National Indemnity
William R. Maher, Esq., for the insurer, Cigna Property and Casualty

MAZE-ROTHSTEIN, J. The insurer appeals from a decision that awarded the employee closed periods of partial and temporary total incapacity benefits, and ongoing partial incapacity benefits. The insurer argues that including travel reimbursements along with an additional hourly wage paid in lieu of that travel payment, in the employee's average weekly wage was contrary to law. The insurer also argues that the calculation of the employee's earning capacity for the purposes of the G.L. c. 152, § 35 awards – which the judge based on the employee's actual earnings for each week – is erroneous. We recommit the decision for the following reasons.

Elizabeth Fitzgerald worked as a traveling nurse. She visited as many as six patients in their homes every day. In addition to her regular compensation, the employer paid the employee's work-related travel, by mileage, the employer paid Ms. Fitzgerald a fixed sum for each mile of related driving. Moreover, if Fitzgerald spent her whole workday in one location, she was given an additional $0.31 per hour to make up for the lost mileage payments. Ms. Fitzgerald worked up to sixty hours per week. Her average weekly wage without the travel payments, both mileage and the $0.31 per hour adjustments, was $455.19; her average weekly wage, when it included that travel

component and the $0.31 adjustment, was $505.31. (Dec. 3; 5/10/99 Stipulation to Reviewing Board.)

Ms. Fitzgerald suffered two industrial injuries. The first was an injury to her right leg on December 15, 1995, and the second was to her right knee on August 12, 1996. (Dec. 2.) She returned to work after both injuries, with her work restricted to light duty for no more than forty hours per week. (Dec. 4.) The insurer accepted liability for these injuries and defended the employee's claim on the basis of extent of incapacity and continuing causation. (Dec. 2, 5.) As there are no medical issues raised on appeal, suffice it to say that the § 11A physician opined that, given the employee's work related impairments, she should limit her work to light duty for no more than forty hours week. (Dec. 4-5.)

Adopting the medical opinion, the judge concluded that the employee could not work her usual sixty-hours a week, (Dec. 6), thus, her earning capacity was reduced by the work injuries. (Dec. 7.)

Germane to the issues the insurer argues on appeal are the following conclusions and orders:

> The parties contend over whether the mileage payment should be included in the computation of the average weekly wage. I believe the question turns on whether the mileage payment is a "reimbursement," which is not considered compensation or an "allowance" which may be part of compensation. Bradley v. Commonwealth Gas Co., 11 Mass. Workers' Comp. Rep. 439, 441-442 (1997). While payments are ordinarily "reimbursement," in this case the employer paid the employee an additional $.31 per hour when she did not travel to make up for the lost mileage. Under these circumstances, I think the travel payment was a form of remuneration of the employee and should be included in the average weekly wage.
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> 1. The insurer shall pay the employee compensation pursuant to § 34 at the rate of $303.19 based upon an average weekly wage of $505.31 from August 12, 1996 to August 21, 1996.

> 2. The insurer shall pay the employee compensation pursuant to § 35 equal to sixty percent of the difference between her actual earnings and the average weekly wage of $505.31 from February 22, 1996 to August 12, 1996, and from August 22, 1996 and continuing.

(Dec. 6-7.)

The insurer contends on appeal, that inclusion of the travel component payments within average weekly wage was error, because those payments were just a reimbursement of business expenses, not remuneration constituting real economic gain to the employee. See 5 A. Larson, *Workmen's Compensation Law*, § 60.12 (a) (1997). Cases distinguishing business reimbursements from actual pay call for an exacting analysis of the facts of the industrial case. Here, the characterization of the employee's travel-related earnings as strictly reimbursement is inaccurate. The parties submitted a stipulation to the reviewing board, which provided:

> With respect to the two average weekly wage figures to which the parties stipulated ($505.31 and $455.19), only the higher figure of $505.31 included the additional $0.31 an hour pay increase to which the employee Elizabeth Fitzgerald testified she received during the weeks she did not use her car to visit patients. Said higher figure is the average weekly wage if the travel component to the employee's remuneration is included. The employee did not pay taxes on either the travel component or the additional $0.31 an hour pay increase.

Some ambiguity as to what each of the previously stipulated figures contained was thereby resolved. The "travel component" in the $505.31 average weekly wage figure that the judge awarded contained both reimbursement for work-related miles traveled, and also a direct $0.31 per hour increase in the employee's wages in lieu of the travel money, when no travel was required. (Dec. 3.) Overall this was, therefore, more than mere out-of-pocket reimbursement. A portion of it was extra remuneration that constituted real economic gain and was also consistently paid. As such, finding the employee's travel payment an "allowance" contained within her average weekly wage was, at least in part, sound. Cf. Bradley v. Commonwealth Gas Co. 11 Mass. Workers'

Comp. Rep. 439, 441 (1997)("[u]nlike an allowance *which is paid consistently* . . . these [meal] reimbursements seem to have been due when triggered by work conditions, and supported by an expense voucher. Here the employer payment was limited by the amount the employee actually spent; it was a reimbursement of an out-of-pocket expense which could not exceed a fixed dollar amount." [Emphasis added.]) However, it appears, another part of the travel allowance was an actual reimbursement of specific miles traveled and reported. (Tr. 33.) On recommittal, to the extent that specific travel reimbursement is found as fact, said monies are not includable in the § 1(1) average weekly wage calculus. See Bradley, supra. What then remains unresolved by the decision and the parties' stipulation, is the employee's average weekly wage figure including only the $0.31 hourly allowance, but not the out of pocket specific travel reimbursement.

The insurer's further contention that this case is governed by our construction of "earnings" under the § 1(1) definition of "average weekly wages" in Dawson v. Captain Parker Pub, 11 Mass. Workers' Comp. Rep. 84 (1997), is misplaced. There we examined a specific provision of the unemployment compensation law, G.L. c. 151A, in order to inform our analysis of whether a bartender's tip income, unreported to his employer and the Internal Revenue Service, should be included in his average weekly wage. Id. at 86. General Laws c. 151A has several particular exclusions, for the purposes of computing unemployment compensation, including such unreported tips. See G.L. c. 151A, §1(s)(A)(6). We considered that, in the specific circumstances of that case, the c. 152 "average weekly wages" should be read consistently with the unemployment compensation law, and that the failure of the employee to report his considerable tip income equitably barred its inclusion in his average weekly wages. Id. at 87. It is stipulated that the employee did not pay taxes on either part of the travel component of her pay. Nevertheless, we are not persuaded that the Dawson construction should be expanded beyond its particular application to unreported tip income, in light of the

specific statutory provision that governed its facts. Compare G.L. c. 152 § 1(1) with G.L. c. 152 § 1(9).[1]

The insurer also argues that ordering § 35 compensation in an amount "equal to sixty percent of the difference between her actual earnings and the average weekly wage of $505.31 . . . ." was error. (Dec. 7.) Without reference to any authority on point, the insurer contends that the judge was obligated to use the greatest weekly amount that the employee had earned post-injury and set her earning capacity in accordance with that figure. The insurer's proffered earning capacity calculation runs afoul of the unambiguous words of § 35D(1):

> For the purposes of section[] . . . 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*.

The judge, in her order, authorized the insurer to tabulate the employee's § 35 compensation for each week by looking at the employee's earning for each week, which certainly comports with § 35D(1). On recommittal, the judge can also explore the application of § 35D(4) the "earnings that the employee is capable of earning." G.L. c. 152, § 35D(4).

Accordingly, we recommit the decision for a closer parse of the employee's average weekly wage and any further evaluation of the employee's earning capacity as the case may warrant.

So ordered.

Susan Maze-Rothstein
Administrative Law Judge

Filed: October 25, 1999

[1] Moreover, the insurer points to no other pertinent authority, nor do we see any, that would exclude this type of remuneration from "earnings" under § 1(1).

Martine Carroll
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge