COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 009426-01 011191-99**
Frederick Rhodes	Employee
Massachusetts Turnpike Authority	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Costigan)

APPEARANCES
Paul V. Shannon, Esq., for the employee
Karen A. Laughlin, Esq., for the self-insurer

MCCARTHY, J. The employee challenges an administrative judge's failure to increase his average weekly wage for his second work-related injury by applying the principles enunciated in Louis's Case, 424 Mass. 136 (1997). The employee claims that, even though the parties stipulated to an average weekly wage for each of his two work injuries, the judge should have determined his average weekly wage for his second injury by adding the amount of the weekly § 35 partial incapacity benefits ordered at hearing for his first work injury to his part-time earnings at the time of his second injury. We agree that Louis's Case, supra, is applicable and, for the following reasons, recommit the case to the administrative judge to give him the opportunity to apply it.

Frederick Rhodes, a college graduate with a master's degree in education, was seventy years old at the time of the hearing. Prior to working for the employer, he had held a number of substantial sedentary to light duty jobs, including owning and running a roofing company, serving as executive assistant for a Massachusetts House of Representatives committee, serving as administrative assistant to a United States Congressman, and as a congressional aide for another congressman. In 1996, he began working for the employer as a toll collector. (Dec. 5.)

On March 26, 1999, Mr. Rhodes injured his left knee at work. He underwent a partial medial meniscectomy and physical therapy, and returned to work on a reduced schedule on October 26, 1999. (Dec. 6.) The self-insurer accepted liability for the injury and paid weekly § 34 temporary total incapacity benefits from April 2, 1999 to October 25, 1999, and weekly § 35 partial incapacity benefits from October 25, 1999 to March 25, 2000. (Dec. 4.) The employee filed a claim to have his § 35 benefits reinstated as of March 26, 2000. That claim was denied at a conference held on April 3, 2001. The employee appealed to a hearing de novo. (Dec. 2.)

On March 17, 2001, shortly before the conference on his first claim was held, the employee suffered a second injury at work, this time to his right knee. He continued to work with pain in both knees until September 22, 2001.[1] Again, he had surgery and physical therapy, but did not return to work. (Dec. 6.) He filed a claim for § 34 temporary total incapacity benefits, which the self-insurer denied. Following a conference held on May 13, 2002, the judge ordered the self-insurer to pay § 34 benefits from September 22, 2001 to date and continuing. The self-insurer appealed to a hearing de novo. (Dec. 2.)

The appeals on both claims were joined at hearing. (See Dec. 2; Tr. 7.) Pursuant to § 11A, Dr. Anthony Caprio examined the employee on May 31, 2001 for the 1999 injury, and on August 6, 2002 for the 2001 injury. He opined that the two injuries at work were a major cause of the employee's chronic bilateral knee problems. He further opined that, as of the first § 11A examination on May 31, 2001, the employee was able to work eighteen hours per week, and by his second examination on August 6, 2002, the employee was unable to perform his job as a toll collector. The judge adopted the opinion of Dr. Caprio. (Dec. 7.)

The judge credited the employee's testimony that his right knee pain became progressively worse, and that the pain in both knees caused him to stop work on September 22, 2001. Accordingly, the judge found the employee partially incapacitated

[1] The judge stated at one point that the employee worked until September 23, 2001, (Dec. 6), but everywhere else indicated that he stopped work on September 22, 2001. (Dec. 7, 8, 9.)

from March 26, 2000, (the date the self-insurer terminated his § 35 benefits), until September 22, 2001 (the date the employee left work). (Dec. 7.) The judge awarded the employee § 35 benefits for that period of a year and a half based on his stipulated full-time average weekly wage of $506.17 at the time of his first injury, March 26, 1999, and his actual earnings, provided that, if there were weeks when the employee worked fewer than eighteen hours, his § 35 rate should be based on earnings for eighteen hours a week.[2] (Dec. 4, 7-9.)

The judge found Mr. Rhodes totally incapacitated from September 22, 2001 until the second impartial examination on August 6, 2002. He awarded him § 34 temporary total incapacity benefits for that eleven-month period, based on his stipulated part-time weekly earnings of $353.15 at the time of his second injury on March 17, 2001. The judge found that after August 6, 2002, though the employee could not return to his job as a toll collector, he could work part-time earning $200.00 per week. The judge reasoned that, given the employee's high level skills and experience in a number of sedentary jobs, and the fact that he could conduct a normal life as long as he did not stand or walk for long periods of time, he would be a valuable employee in sales or consulting in the development of a business. Because of Mr. Rhodes' age (seventy), the judge did not believe the employee would be marketable as a full-time employee, but felt he would be able to secure part-time work. The judge based the employee's ongoing partial incapacity benefits on his stipulated part-time average weekly wage of $353.15 and the $200.00 weekly earning capacity he assigned. (Dec. 4, 7-9.)

The employee appeals, arguing that the judge erred as a matter of law in his computation of the employee's average weekly wage for the purpose of determining his

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[2] General Laws c. 152, § 35, as amended by St. 1991, c. 392, § 63, provides, in relevant part:

> While the incapacity for work resulting from the injury is partial, during each week of incapacity, the insurer shall pay the injured employee a weekly compensation equal to sixty percent of the difference between his or her average weekly wage before the injury and the weekly wage he or she is capable of earning after the injury, but not more than seventy-five percent of what such employee would receive if he or she were eligible for total incapacity benefits under section thirty-four.

weekly benefits after September 21, 2001. (Employee brief, 2-3.) The employee maintains that the judge should have determined his average weekly wage by adding the weekly § 35 partial incapacity benefits the judge ordered at hearing to his part-time earnings during the period prior to his award of § 34 benefits. Louis's Case, supra. Though the parties stipulated to average weekly wage, we vacate the stipulation with respect to the March 17, 2001 date of injury and recommit the case to the judge for him to apply the holding in Louis's Case. The employee also argues that the judge did not make adequate subsidiary findings to support his award of a $200.00 per week earning capacity after August 6, 2002. We summarily affirm the decision on that issue.

"Both appellate and trial courts have the power to 'vacate a stipulation made by the parties if it is deemed improvident or not conducive to justice.' " Crittendon Hastings House of the Florence Crittendon League v. Board of Appeal of Boston, 25 Mass. App. Ct. 704, 712 (1988), quoting Loring v. Mercier, 318 Mass. 599, 601 (1945). See also Hill v. Dunhill Staffing Sys., Inc., 14 Mass. Workers' Comp. Rep. 350, 351 (2000). The request to vacate a stipulation needs to be made " 'in the course of a single action.' " Hill, supra at 351, quoting Grant v. APA Transmission, 13 Mass. Workers' Comp. Rep. 247, 252 (1999). While the employee did not explicitly request that we vacate the stipulation as to average weekly wage for his second date of injury, we understand his argument that the employee's weekly partial incapacity benefits be added to the employee's "average weekly wage on September 22, 2001 in determining an appropriate Section 34 Order," (Employee brief, 5), to be a de facto request for such. Though the employee did not raise the issue at hearing, he did raise it on appeal, which is within a single action. Compare Hill v. Dunhill Staffing Sys., Inc., 16 Mass. Workers' Comp. Rep. 460, 461 (2002)("As the employee did not appeal the judge's original decision which assigned that same earning capacity, and he did not move to join the issue of earning capacity at the hearing on recommittal, he cannot properly raise that issue now"). Moreover, since the employee did not actually *receive* the § 35 benefits in question until after the judge issued his decision, he could not have specifically claimed that his average weekly wage should be calculated by including those benefits until this appeal. While it

would have been preferable for the employee to have alleged the applicability of Louis's Case in the event § 35 benefits were awarded for the period in question, we do not think his failure to do so, or his stipulation as to "average weekly wage," is a waiver of his claim on appeal.

For this reason, and because of the strong statement of public policy issued by the court in Louis's Case, we are persuaded that justice would not be served by refusing to vacate the stipulation. In Louis's Case, the court held that partial incapacity benefits paid to an employee while she was working part-time at a light duty job should be added to her actual earnings to determine her § 1(1) "average weekly wage" for a subsequent industrial injury. "*It is precisely because these* [§ 35] *benefits are awarded to compensate the employee for earnings they* [sic] *would have received but for an industrial injury* [citation omitted] *that we are willing to include* [them] *within the definition of § 1(1*)." Supra at 140. (Italics in original; footnote omitted.) In support of this holding, the court cited with approval the employee's argument that using only an employee's part-time earnings, while he is receiving § 35 benefits, as a basis for determining average weekly wage for a second injury " 'unjustly penalize[s] an employee who in good faith returned to work in an effort to minimize [his] disability.' " Id. at 139. Indeed, G. L. c. 152, § 37,

> expresses a legislative policy to encourage employees to return to work and helps alleviate disincentives which might prevent their being rehired. [citation omitted.] Including partial incapacity benefits within an employee's average weekly wage comports with the purpose behind § 37 and the "policy that the industry should bear the burden of industrial accidents."

Id. at 142, quoting Mizrahi's Case, 320 Mass. 733, 736 (1947). In light of the court's strong statement in support of including § 35 benefits in an average weekly wage determination, we think it would be improvident to affirm the decision based on the stipulations of the parties as to average weekly wage.

We therefore vacate the stipulation of the parties as to the employee's average weekly wage for his second injury of March 17, 2001, and recommit the case to the judge for the application of the principles enunciated in Louis's Case. We point out that § 1(1)

refers to "the earnings of the injured employee during the period of twelve calendar months immediately preceding the *date of injury.*" Thus, though the employee continued to work for six more months after his second injury, until September 22, 2001, his earnings during that time period are not relevant to the average weekly wage calculation. We also note that the average weekly wage for the second injury will apply not only to the § 34 benefits awarded by the judge, but also to the ongoing § 35 benefits he ordered. If further testimony is needed to establish the employee's actual earnings, the judge may take it.[3]

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **March 9, 2004**

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

[3] The employee does not argue that the stipulation of $353.15 is inaccurate as to the employee's *earnings* as of March 17, 2001. Rather, he argues that $353.15 should not be considered the employee's average weekly wage. However, on recommittal, the judge should clarify whether the stipulated figure does, in fact, represent the earnings of the employee for the twelve-months prior to the injury (absent, of course, the § 35 weekly payment).