COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039037-18**

Gary Dunn	Employee
RI Security	Employer
Everest National Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges O'Leary, Long and Fabiszewski)

The case was heard by Administrative Judge O'Neill.

APPEARANCES
Robert J. Marchand, Esq., for the employee
William Gardner, IV, Esq., for the insurer

O'LEARY, J. The employee appeals from the administrative judge's decision awarding ongoing § 34 temporary total incapacity benefits and § 35 temporary partial incapacity benefits. On appeal, the employee argues that the administrative judge erred in determining an earning capacity based on an incorrect interpretation of the employee's actual earnings. Because the administrative judge did not address the issue in this case in a manner that would enable us "to determine with reasonable certainty whether the correct rules of law have been applied to facts that could be properly found," we vacate the decision and recommit the case for further findings on the issue of the employee's earning capacity. See, Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

We briefly summarize the facts relevant to the issue on appeal. On April 24, 2018, the employee, Gary Dunn, sustained a "crush" injury to his left toe while working for the employer. (Dec. 4, Tr. 12.) He initially treated with injections and medication but eventually underwent surgery, consisting of left great toe dorsal "colectomy"[1] at the MTP

[1] The report contained in the submitted exhibit appears to incorrectly refer to the procedure as "colectomy" which is a procedure involving the colon. We assume the report means to reference a "cheilectomy," a procedure involving the removal of bone spurs.

joint and excision of a large spur across the IP joint. (Ex. 1.) Following surgery, the employee continued to experience problems with his balance and walking, often falling. (Dec. 5.) The employee's claim for compensation was the subject of a § 10A conference on September 11, 2020. A conference order was issued on September 13, 2020, directing the insurer to pay § 34A permanent total incapacity benefits at the rate of $634.72 per week, based on an average weekly wage of $952.08 from September 11, 2020, and continuing. The insurer was also directed to pay §36 benefits in the amount of $5,218.40. (Dec. 2.) The insurer filed a timely appeal.

In January 2022, after a mediation, the employee believed he had settled his case. (Dec. 5.)[2] Though he received his weekly checks, they were not always timely. (Id. 5.) At this time, the employee was also receiving Social Security disability benefits. (Tr. 18.). In April 2022, while still awaiting his settlement check, he visited the Social Security office to inquire as to whether he could try to work because he could not live on his monthly social security disability checks. (Dec. 5.)

On April 7, 2022, he started to perform some delivery work for Eastern Pizza. He subsequently continued to work approximately 10-16 hours per week. After he returned to work and was able to perform the tasks, he notified his attorney. (Dec. 5.) However, he continued to experience problems with his foot, which remains very painful. He is unable to push off on his left foot, has difficulty walking up stairs and needs to hold the railing. He uses a band around his foot to keep the pressure off and needs to rest between deliveries. (Dec. 6.)

The matter came before the administrative judge for a hearing *de novo* on November 15, 2022. (Dec. 2.) At hearing, the employee claimed § 34, temporary total incapacity benefits from the date of injury to April 30, 2022, and § 35 temporary partial incapacity benefits from May 1, 2022, to date and continuing. A motion to modify the

[2] The decision of the administrative judge is the only time there is a reference to a mediation. The employee does not testify to a mediation when discussing his settlement confusion (Tr. 17, 19, 29) and, where asked in the Joint Pre-Hearing Memorandum if the attorneys have attempted to resolve the matter by mediation, the answer is "No."

claim for benefits to §35, at the rate of $428.44 based upon part-time earnings of $130.00 per week from May 1, 2022, and ongoing, was filed on June 21, 2022. (Dec. 3, FN. 1.) The insurer denied disability and extent of incapacity and, by motion allowed on August 4, 2022, joined allegations of fraud, pursuant to § 11D and § 14.[3] (Dec. 3, FN 2.)

After considering testimony and examining the exhibits, the administrative judge awarded the employee § 34 temporary total incapacity benefits at the rate of $571.25 per week, based on an average weekly wage of $952.08 from April 24, 2018, to March 8, 2021, followed by § 35 temporary partial incapacity benefits at various rates, based upon an earning capacity of either the applicable minimum wage at 20 hours per week, or actual wages earned at various rates. The Insurer's claim for fraud was denied and dismissed. (Dec. 11.)

On appeal, the employee argues the administrative judge was prejudiced by her erroneous interpretation of Eastern Pizza's payroll records, which resulted in her finding that the employee could work 20 hours a week. While we agree with the employee that the judge misconstrued the payroll records, we cannot discern from the decision the effect that may have had on the administrative judge's assignment of an earning capacity, and thus, recommit the case for further findings and clarification.

In her decision, the administrative judge addressed the issue of the inconsistency between the employee's testimony and the payroll records twice, noting:

> I find the employee to be somewhat credible and adopt his testimony as relayed above. Though I do note that based upon the wage records from Eastern Pizza, he made between $260.00 and $300.00 per week plus tips not the $130.00 he testified he made. I also find he was capable of performing part-time work earlier than he admitted.

(Dec. 6.)

> I acknowledge that the Employee testified he made $130.00 week after he returned to work, but the records suggest he actually made $260.00 up to $300.00 per week

[3] The insurer did not specify which sections of 11D it was asserting were violated, but did assert violations of §§ 14(1), 14(2) and 14(3). No recoupment was sought.

> plus tips. *Thus*, I find he has been able to make at least minimum wage for twenty hours per week from the time of the §11A exam and continuing.

(Dec. 9-10)(*emphasis added*).

The actual payroll records (Ex. 7.) for the employee's work at Eastern Pizza reveal the employee earned $260.00 bi-weekly, resulting in $130.00 per week in wages for the period in question, with one payment of $300.00 for a two-week period. The judge's finding of earnings of $260.00 per week is not supported by the payroll records, and they appear to have been misread.

The judge's perceived discrepancy between the employee's testimony regarding his earnings and what the wage records revealed may have impacted the findings regarding the number of hours the employee was capable of working, the wages the employee could earn and/or the employee's overall credibility. Without further findings we are unable to determine what effect, if any, that may have had on the judge's determination of an earning capacity. See, Praetz, supra.

We must inquire whether the decision is factually warranted and not arbitrary or capricious for lack of adequate evidentiary and factual support and disclosure of reasoned decision making within the particular requirements governing a dispute. See Dalbec's Case, 69 Mass. App. Ct. 306 (2007), Eady's Case, 72 Mass. App. Ct. 724 (2008)(decision must contain a factual source for the monetary figure with an explanation for earning capacity assigned), see Pobieglo v. Department Of Correction, 24 Mass. Workers' Comp. Rep. 97 (2010)(due process-considerations entitle the parties, in advance of a decision, to have reasonable notice of the evidentiary sources relied upon by the judge to determine the amount of the employee's earning capacity); Mancini v. Suffolk County Sheriff's Dept., 30 Mass. Workers' Comp. Rep. 39 (2016)(amount of partial disability award vacated and matter remanded "for a reasoned computation of that amount," accompanied by "a reference to the factual source(s) for the monetary figure"), quoting Eady's Case, supra. In the present case, we turn to the use of the word "thus" in the decision, where it appears the administrative judge relied upon incorrect findings with regard to the

employee's actual earnings submitted into evidence. (Ex. 7.) As such, the case must be recommitted for further findings consistent with the evidence submitted.

For the foregoing reasons, the decision is vacated and the case is recommitted to the administrative judge for further findings and proceedings consistent with this opinion. Pending the resolution of the issues following recommittal, the conference order is reinstated. See Lafleur v. Department of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014.) Pursuant to G.L. c. 152, § 13A(7), employee's counsel shall submit a fee agreement for our approval.

So ordered.

Kevin B. O'Leary
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Karen S. Fabiszewski
Administrative Law Judge

Filed: **March 1, 2024**