

COMMONWEALTH OF MASSACHUSETTS

**DEPTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 015203-07

Jean Anitus
Naratone Security Corporation
AIM Mutual Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Koziol, McCarthy and Horan)

APPEARANCES

Robert L. Noa, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee on appeal
Michael K. Landman, Esq., for the insurer

The case was heard by Administrative Judge Hernández.

KOZIOL, J. The employee appeals from a decision ordering payment of a closed period of § 34 total incapacity benefits, followed by a closed period of § 35 partial incapacity benefits ending on March 12, 2008, the date of the § 11A impartial medical examination. The judge ordered the termination of weekly benefits based on his conclusion the employee had attained the capacity to earn his pre-injury average weekly wage of \$1,277.73. On appeal, the employee argues the judge erred by failing to provide a factual source to support the conclusion that he has the capacity to earn his pre-injury average weekly wage. *Eady's Case*, 72 Mass. App. Ct. 724 (2008); *Dalbec's Case*, 69 Mass. App. Ct. 306 (2007). We agree, and recommit the case for further findings of fact.

On August 26, 2004, during the course of his employment as an armed security guard for the employer, the employee sustained physical and psychiatric injuries as a result of being assaulted while attempting to disperse a riotous mob armed with knives, baseball bats, and batons. During the melee, the employee drew his gun, and ordered these individuals to the ground. A rioter wielding a car battery struck the employee in the left side of his chest, causing him to fall, strike

his head on the ground, and lose his handgun. The intervention of another security guard prevented further injury.¹

In May 2005, the employee attempted to return to work for a different employer in an armed security guard position, but was unsuccessful because of his psychiatric injury. (Dec. 6.) The employee was unemployed and actively seeking employment from January 1, 2006 through April 1, 2006. (Dec. 6.) On April 2, 2006, the employee began working as a concierge for Asset Protection Associates, earning \$10.00 per hour for twenty-four to thirty hours per week. (Dec. 6-7.) On October 16, 2006, the employee began working forty hours per week as a driver for “The Ride,” transporting elderly people from their homes to various appointments and earning \$11.69 per hour. (Dec. 6.) In April of 2007, while continuing to work forty hours per week as a driver for “The Ride,” he returned to work as a concierge with Asset Protection Associates for an additional twenty-four hours per week, earning \$10.00 per hour. (Dec. 6.) At the time of the hearing, the employee continued to perform both jobs, working a total of approximately sixty-four hours per week, and earning up to \$890.00 per week. (Dec. 7.)

The judge found that the employee had been capable of full time employment in a variety of vocations since May 2005, with weekly earnings ranging from \$486.00 to \$890.00. (Dec. 9.) The judge concluded the employee had a weekly earning capacity of \$486.00 per week from May 16, 2005 through October 14, 2006, and a weekly earning capacity of \$890.00 per week from October 15, 2006 through March 12, 2008.² (Dec. 13.)

On March 12, 2008, the employee was examined by a § 11A impartial medical examiner, Dr. Michael W. Kahn, who opined the employee suffered from

¹ The employee sustained injuries consisting of cuts to his right hand and chin, and post traumatic stress disorder. (Dec. 5, 7.)

² The employee does not challenge the assignment of these earning capacities.

post traumatic stress disorder causally related to the August 26, 2004, incident at work. Although Dr. Kahn opined the employee's post traumatic stress disorder was in remission and he was no longer medically disabled, he also opined the employee remained restricted from carrying a handgun. (Dec. 7.)

Adopting the medical restriction on carrying a handgun, the judge found:

Based upon the functional impairment, for which there is no objective evidence, I find that the Employee is suitable to work in any job in which [sic] does not involve using a handgun. Based upon the medical evidence and the Employee's testimony, I find that the work limitations and restrictions would only include that the Employee refrain from working in a position that required carrying a weapon.

(Dec. 8.) Adopting Dr. Kahn's opinions, the judge concluded that after March 12, 2008, the employee was no longer incapacitated, and could earn his pre-injury wage of \$1,277.73. (Dec. 13.)

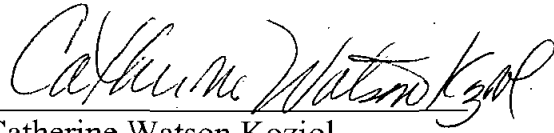
The employee earned the \$1,277.73 pre-injury wage as an armed security guard, a job that required him to carry a handgun, which is a task the judge found he can no longer perform. The judge also found the employee's post-injury earnings have not approached that rate of remuneration,³ but he made no findings identifying the factual source supporting his conclusion that despite this restriction, the employee was able to perform work in the open labor market earning his pre-injury wage. "A monetary figure cannot emerge from thin air and survive [appellate] scrutiny as a mystery." Dalbec, supra at 317. Without findings as to how the employee's individual vocational profile, Scheffler's Case, 419 Mass. 251, 256 (1994), combines with his restriction from gun usage and the overall labor market to support the conclusion that the employee can earn his pre-

³ The employee's highest post-injury earnings, \$890.00, are based on his concurrent employment at two jobs with respective hourly wages of \$10.00 and \$11.69, and a sixty-four hour work week. (Dec. 6-7.)

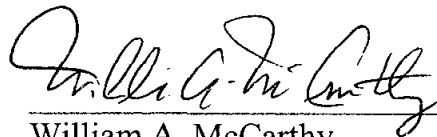
injury wage, the discontinuance of § 35 benefits cannot stand. See Eady, supra at 727.

Accordingly, we reverse so much of the decision as terminated the employee's weekly § 35 benefits as of March 13, 2008, and recommit the case for further findings consistent with this opinion.⁴

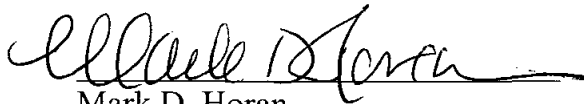
So ordered.



Catherine Watson Koziol
Administrative Law Judge

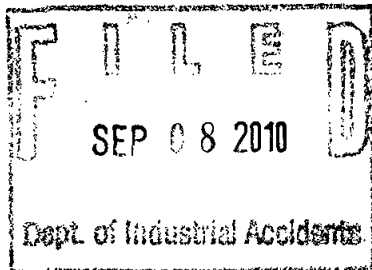


William A. McCarthy
Administrative Law Judge



Mark D. Horan
Administrative Law Judge

Filed:



⁴ The employee also requests the matter be assigned to a different administrative judge. We deny the request as it is not accompanied by supporting argument explaining why such extraordinary relief is appropriate in this case.