COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 014727-11**

Jeffrey A. Goodhue	Employee
Federal Express	Employer
Federal Express Corporation	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Rose.

APPEARANCES
David J. Kneeland, Esq., for the employee at hearing
John K. McGuire, Jr., Esq., for the employee on appeal
Susan F. Kendall, Esq. for the self-insurer at hearing
John J. Canniff, Esq. for the self-insurer on appeal

FABRICANT, J. The employee appeals from a decision denying ongoing weekly benefits, and ordering recoupment to the self-insurer in the amount of $5,434.00. The employee argues the judge improperly used income generated through self-employment in determining benefit entitlement and overpayment. We find no error and affirm the decision.

On June 10, 2011, the employee sustained an injury to his left major wrist while working as a package handler for Federal Express. (Dec. 4.) In addition to his job at Federal Express, the employee was self-employed in a seasonal sprinkler business named Interstate Irrigation, which he has operated as a sole proprietorship since 1986. (Dec. 3-5; Tr. 19, 43.) Because the employee had not procured workers' compensation insurance for Interstate Irrigation at the time of his accident, his work for that company cannot be considered "concurrent employment" pursuant to G. L. c. 152 § 1(1)[1] and thus, any

[1] General Laws c. 152, § 1(1) states, in relevant part:

income derived from that work may not be factored into the calculation of his average weekly wage.[2] (Dec. 6.) Accordingly, the parties stipulate that the employee's average weekly wage is $226.79, derived solely from wages earned from employment at Federal Express. (Tr. 5.)

The insurer seeks recoupment for benefits paid to the employee when he was receiving income from Interstate Irrigation and/or from snowplowing,[3] including during any period when the employee had an earning capacity exceeding the stipulated average weekly wage of $226.79. (Tr. 9-14.)

Based on the opinion of the § 11A examiner and the employee's credible testimony, the judge found the employee could not perform his heavy work for Federal Express. (Dec. 5-6.) However, the judge also found that, since his injury, the employee had continued to operate his seasonal sprinkler business approximately six months of the year, and had earnings from snowplowing during the winter months.[4] (Dec. 5-6.)

> In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several *insured* employers and self-insurers shall be considered in determining his average weekly wages.

(Emphasis added.)

[2] Abebe v. Lowe's home Center, 21 Mass. Workers' Comp. Rep. 75 (2007). See Lubofsky v. Lowe's Home Centers, Inc., 29 Mass. Workers' Comp. Rep. __ (7/22/15); see also Findlay's Case, 77 Mass. App. Ct. 108 (2010)(sole proprietor who failed to elect coverage was not entitled to workers' compensation coverage for work-related injury).

[3] Based upon the employee's credible testimony, the judge found that he plowed snow, or could have plowed snow, from December 1, 2012 through March 1, 2013, earning $250 per snowfall. The judge further found: "I reasonably infer that during those periods that the employee had earnings, or could have found similar employment from another contractor of $250 per week pursuant to § 35D (4)." (Dec. 6.)

[4] In adopting the § 11A examiner's opinion that the employee has been partially disabled from performing the heavy lifting and carrying required by his Federal Express job, the judge stated: "I do not find that the employee's side business and the seasonal snow plowing evidences a work capacity/earning capacity beyond the period of actual earnings." (Dec. 6.)

The judge found the following periods of disability based upon the employee's testimony: 1) from the date of injury, June 11, 2011, through September 11, 2011, the employee was out of work and was paid § 34 total disability benefits by the insurer, without prejudice;[5] 2) the employee returned to work until his first surgery on August 24, 2012,[6] at which time he was again placed on § 34 total disability benefits until July 7, 2013; and, 3) the employee was totally disabled[7] for two months after his first surgery, for two weeks following his second surgery on October 9, 2012, and for three weeks following his third surgery on May 8, 2013. (Dec. 5-6.) The judge concluded the employee was entitled to no further weekly benefits, and ordered the insurer be allowed to recoup $5,434.00 in overpayments. (Dec. 6.)

The sole issue before us on appeal is the employee's argument that, in order to determine his earning capacity, the judge improperly performed "an average weekly wage calculation" with the income derived from Interstate Irrigation and from operating a snowplow. (Employee br. 4-6.) Essentially, the employee argues that, because the judge found the employee's post-injury work with Interstate Irrigation and his snow plowing jobs was seasonal employment, these earnings should be averaged over the course of a year, as they would be in determining average weekly wage, rather than over the actual number of weeks worked. The employee is mistaken.

Initially, we observe that the judge's decision details very specific, though somewhat confusing,[8] calculations of the employee's benefits during the claimed periods

[5] Based on the employee's actual earnings during this time, the judge found an overpayment of $61.89 per week during this period. (Dec. 5.)

[6] Based upon earnings from Interstate Irrigation of $7,145.00 over a 27-week period beginning in the spring of 2012, the judge calculated the actual weekly earnings of the employee to be $264.63. (Dec. 6.)

[7] The judge found he was totally disabled for two months from "both jobs," presumably referencing his job at Federal Express as well as his self-employment at Interstate Irrigation. (Dec. 5.)

[8] Indeed, the judge notes that although he requested that the parties submit briefs detailing calculations of potential overpayments or recoupments, neither party submitted the requested

of disability. (Dec. 4-6.) Because neither party has challenged the accuracy of the judge's calculations regarding payments made by the insurer and the claimed periods of disability,[9] we focus only on the judge's method of determining earning capacity.

It appears that the employee has confused "average weekly wage" with post injury earning capacity and/or actual earnings of the claimant. "Average weekly wages" are defined in c. 152 §1(1) as, inter alia, the earnings of the employee during the twelve months *preceding* the date of injury, divided by fifty two. This calculation of earnings serves as the basis for determining the entitlement to benefits during any period of disability *after* the date of injury. If at any time after the date of injury an employee is able to earn his established average weekly wage, he is no longer entitled to receive weekly incapacity benefits. See, e.g., Eason v. Symmetricom Corp., 21 Mass. Workers' Comp. Rep. 123 (2007).

In determining the employee's earning capacity, the judge is to use the greatest amount derived from the four methods set out in G.L. c. 152, § 35D. These include the "actual earnings of the employee during each week," § 35D(1), and "[t]he earnings that the employee is capable of earning," § 35D(4). The judge clearly found that the employee's actual earnings at his sprinkler business represented the greatest amount he could earn during the period of operation. (Dec. 6.) Tax records and the employee's own testimony provided the evidence required for the judge to base his findings of actual income earned during the claimed disability period. (Dec. 5.) The fact that these earnings may have been the result of so-called "seasonal" employment is of no

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brief, leaving the judge to sort through the evidence on his own in order to resolve "unclear claims" from both parties. (Tr. 4; Dec. 5.)

[9] The employee's brief to the reviewing board references the judge's decision as "a little bit difficult to follow," and "not clear that the judge addressed all time periods." (Employee br. 4.) Nevertheless, the sole issue presented by the employee is whether the judge erred in not treating the employee's snowplowing work and his work for Interstate Irrigation as "seasonal," and instead "treating it as regular employment for the purpose of performing an average weekly wage calculation." (Employee br. 4, 6.)

consequence. The judge has appropriately performed an analysis that includes the actual earnings of the employee during specific periods of time.[10]

The lack of documentary evidence of winter employment was overcome by the employee's own testimony regarding his snowplowing activity during that time.[11] (Dec. 6, Tr. 44-47.) That testimony provided the judge with enough evidence to reasonably infer an earning capacity pursuant to § 35D(4).

We discern no error in the judge's findings. The decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

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[10] The employee bears the burden of production regarding evidence of actual wages. Because there was no evidence of specific weekly earnings, the most appropriate method of calculation available to the judge was dividing the reported aggregate earnings by the total number of weeks. Cf. Cassola's Case, 54 Mass. App. Ct. 904 (2002)(denial of § 35 benefits during "bad" earning weeks appropriate where fluctuating wages found to be "the nature of the business.")

[11] See footnote 3, supra.