COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 032052-13**

Jeffrey Spencer	Employee
JG MacLellan Concrete Co.	Employer
Travelers Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Michael D. Kantrovitz, Esq., for the employee
Scott E. Richardson, Esq., for the insurer

KOZIOL, J. The employee appeals from a decision ordering payment of § 34 benefits from the date of injury, November 25, 2013, through May 18, 2015, and § 35 partial incapacity benefits from May 19, 2015, and continuing at a rate of $206.22 per week based on an average weekly wage of $743.70, and a $400 per week earning capacity. The employee argues the judge erred by allowing additional medical evidence to be admitted and assigning an earning capacity that was unsupported by the evidence. We modify the § 35 award and order payment based on the minimum wage in the Commonwealth on May 19, 2015, the date the judge found the earning capacity commenced, through December 31, 2015. Thereafter, the insurer shall pay the employee § 35 benefits at the rate ordered by the judge.

At the time of the hearing, the employee was forty-eight years old and possessed a GED and a CDL. (Dec. 3.) He had experience as a construction worker, tree climber and pruner, and truck driver. Id. The employee worked as a concrete mixer driver for the employer. Id. This job not only required the employee to drive the concrete mixer but also to "mix the concrete, install 60-90 pound metal chutes to deliver the concrete at the worksite, disassemble the chutes, and wash the chutes and truck." (Dec. 3.) There is no dispute the employee sustained a work-related injury to

his right shoulder on November 25, 2013, when he slipped and fell on a wet surface, and "his arm got caught as he fell."[1] (Dec. 3.) The insurer paid the employee without prejudice from the date of injury through April 25, 2014; the employee filed the present claim for § 34 benefits from April 26, 2014, and continuing. A September 30, 2014, conference order required the insurer to pay the employee the § 34 benefits claimed, and the insurer appealed. (Dec. 2.) Meanwhile, the employee received physical therapy and an injection to his right shoulder before undergoing surgery on January 5, 2015. (Dec. 3.)

On March 26, 2015, the employee was examined by Dr. Victor A. Conforti pursuant to § 11A(2). (Dec. 4.) The judge found Dr. Conforti offered the following diagnosis and related opinions:

> status post decompression of the right shoulder with probably distal clavicle resection that he causally relates to the November 25, 2013 industrial accident. The surgery has improved his condition but he believes that the employee needs another two or three months of physical therapy. Total recovery, he believes could take as much as a year, post-surgery. He limited his activities to lifting no more than five pounds up to waist level.

(Dec. 4.) The hearing was held on May 26, 2015, and the insurer moved to submit additional medical evidence for the time period following Dr. Conforti's report. The insurer made the following offer of proof:

> Obviously, Doctor Conforti the medical examiner saw him post-surgery, but medical notes from the treating surgeon after –generated after the impartial medical examination, indicates [sic] that there may have been some additional recovery subsequent to the impartial medical examiner's evaluation, and thus I would argue that the report is inadequate to address the employee's present disability at this time. So on that premise, we did have an independent medical evaluation conducted to either confirm or refute that suspicion and I would like to offer both the IME report and the two most recent, and I believe two out of the potential three post 11A encounters by the surgeon with the employee to address present disability.

[1] The judge found the employee "throws and shoots right handed but writes left handed." (Dec. 3.)

(Tr. 3-4.) The employee objected, alleging Dr. Conforti's report was adequate as he answered all the questions required by the statute. In addition,

> Dr. Conforti examined the employee with [sic] a sufficient period of recovery, where he was not in a cast or sling at the time of the examination. Dr. Conforti opined that the recovery could take up to one year. The reports that are coming in or the update on the disability is only five weeks, three weeks post his exam.

(Tr. 4.) The judge noted the insurer conceded the employee was "not a hundred percent back and is not looking for a complete discontinuance, only a modification."[2] (Tr. 5.) He ruled that he would "allow [the insurer] to make that argument and so I'm going to allow the gap medicals in." (Tr. 5.) The judge then recounted the parties' discussion prior to going on the record regarding what medical records should be admitted, and accepted the May 4, 2015, report of the insurer's examining physician, Dr. Suzanne Miller, and the notes of the employee's surgeon, Dr. Barry T. Bickley. (Dec. 2, Exs. 4, 5; Tr. 6.) The judge expressly stated the employee "reserved his right to submit additional medical evidence," and told both parties they were free to submit "further medical evidence," including depositions. (Tr. 6.) No further medical evidence was received. The record closed on June 19, 2015. (Dec. 2.)

The judge found the employee benefitted from the physical therapy he received after his surgery, but that his pain increased with activity. (Dec. 3.) Relying on Dr. Bickley's May 19, 2015, note the judge found the doctor "recorded that the employee has regained shoulder motion and is doing 'fairly well' but still experiences some weakness. He 'is not having much in the way of pain in the shoulder' except when stressing the shoulder." (Dec. 4.) The judge found the employee "can lift 10-15 pounds waist high near his body and just four pounds out away from his body." (Dec. 3.) He also found that "[Dr. Bickley] has released the employee from his care with instructions to come back as needed." (Dec. 3, 4.)

The judge then engaged in the following analysis:

[2] The judge stated, on the record, the insurer "conceded total [incapacity] through May 3rd, 2005, [sic] which is the day before the report of Dr. Miller. So what we have at issue is the level of the employee's disability beginning May 4th, 2015." (Tr. 7.)

> I find that the employee was totally disabled from the date of his industrial accident, November 25, 2015 to May 18, 2015 the day before he was released from treatment by Dr. Bickley. Since that time he has been partially disabled, as he still has difficulty with his shoulder with heavy use. In making these determinations, I rely on the credible testimony of the employee and the persuasive medical opinions of Doctors Bickley and Miller. Dr. Bickley released the employee from his care on May 19th and Dr. Miller stated her belief that he would reach maximum medical improvement and be able to return to work at the point six months post-surgery, July 5, 2015. I rely on the employee's complaints of pain, my observations of him in the courtroom as noted above, and Dr. Bickley's report noting increased shoulder pain with use to determine that the employee has a work capacity that does not include heavy work that he performed for the employer. Given his still somewhat youthful age 48, with a GED and CDL I find that he can earn $10 an hour, or $400 a week.

(Dec. 5-6.)

The employee asserts the judge erred by admitting additional medical evidence without finding inadequacy or medical complexity. The employee's argument fails to acknowledge that the insurer's motion was for a finding of inadequacy on the issue of present disability. (Tr. 3-4.) The insurer argued Dr. Conforti's report was inadequate, because it failed to account for changes in the employee's medical condition due to his continued progress in his post-surgery recovery, thereby making Dr. Conforti's opinions regarding present disability stale. After the insurer presented an offer of proof to back up its contentions, the judge stated he was allowing the motion. By allowing the motion on that ground, and limiting the additional medical evidence to reports generated after the impartial medical examination, the judge's findings were clear on the record. We view his statement, "I'm not at this point, certainly, ready to comment on whether the [insurer] is right or not, but I'm going to allow [the insurer] to make the argument and so I'm going to allow the gap medicals in," to mean he had not made up his mind regarding the ultimate issue of the extent of disability. This statement was entirely appropriate as the judge, at that point in the proceedings, had not heard any of the employee's testimony, and the medical record remained open after the close of the lay testimony.

The employee argues that medical records generated 39 days post-impartial examination are too close in time to the impartial examination for admission as "gap medicals," and "[i]f 39 days between opinions in this case is to be considered a "[g]ap," then nearly every claim filed with the Department of Industrial Accidents has a "[g]ap," which he alleges violates the plain language of §11A(2). (Employee br. 9.) The employee ignores the fact that the impartial medical examination was conducted less than three months after the employee's surgery, during his active recovery period. He also ignores the insurer's submission of an appropriate offer of proof to support the allegation that the employee's condition had changed.

Lastly, we find unpersuasive the employee's argument that it was error to adopt gap medicals for a post-examination time period because " 'gap' medicals are generally admitted to cover the pre-examination period, as this is the period of time for which the Impartial Examiner may have difficulty discerning the extent of the Employee's disability." The whole idea of admitting "gap medical evidence" is to address an inadequacy in an impartial medical examiner's report for a given timeframe. We have never limited "gap medicals" to the period prior to the examination, and indeed, where there has been a significant change in the employee's condition after the impartial medical examination, we have upheld the judge's decision to allow "gap" medicals for the post-examination period as well. See Morini v. Wood Ventures, Inc., 17 Mass. Workers' Comp. Rep. 427, 433-434 (2003)(acknowledging "post-§11A examination gap period" may exist). The relevant question is whether the judge, in this case, erred as a matter of law or abused his discretion in allowing the "gap" medicals to be admitted in evidence. The record shows the judge soundly exercised the discretion bestowed on him by § 11A(2) when he granted the insurer's motion.

We agree with the employee, however, that the earning capacity assigned by the judge, $10 per hour for forty hours per week, or $400.00 per week, is arbitrary and cannot stand because "[t]he administrative record contains no factual source or reasoned explanation for [that] figure." Dalbec's Case, 69 Mass. App. Ct. 306, 316

(2007). We observe that there was no expert vocational evidence presented in this case, and that the minimum wage in the Commonwealth of Massachusetts on May 19, 2015, the date the assigned earning capacity commenced, was $9.00 per hour. G. L. c. 151, § 1, as amended by St. 2014, c.144, § 28 (2014). We also observe that as of January 1, 2016, the minimum wage in the Commonwealth of Massachusetts is now $10.00 per hour. G. L. c. 151, § 1, as amended by St. 2014, c. 144, § 29 (2014).

The judge's findings show that he believed the employee could be employed on a full-time basis, at forty hours per week, earning at the lower end of the wage scale. Mulcahy's Case, 26 Mass. App. Ct. 1, 3 (1988)("finding that the employee has an earning capacity of $100 per week is tantamount to a statement that the evidence leaves the [judge] unpersuaded that the employee is precluded by his condition from doing any types of work at the lower end of the wage scale"). Without evidence in the record establishing that rate at $1.00 above the hourly minimum wage, the amount of the partial disability award must be modified. Eady's Case, 72 Mass. App. Ct. 724, 728 (2008)(there must be a "reasoned computation of that amount" of the earning capacity which must be accompanied by "a reference to the factual source(s) for the monetary figure").

We acknowledge that the minimum wage in the Commonwealth establishes the floor below which the hourly earning capacity rate assigned by the judge cannot fall. Because there was no evidence in the record to support a wage above the minimum rate, we modify the award and order the insurer to pay the employee § 35 benefits at a rate of $230.22 per week, based on an earning capacity of $9.00 per hour for forty hours, or $360.00 per week, from May 19, 2015, through December 31, 2015. From January 1, 2016 and continuing, the insurer shall pay the employee § 35 benefits at the rate ordered in the judge's decision. The insurer should credit itself with § 35 benefit payments already made.

Because the employee prevailed in part on his appeal, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board, for review, a duly executed fee agreement between the employee and counsel. No fee

shall be due and collected from the employee unless and until the fee agreement is reviewed and approved by this board.

So ordered.

_____
Catherine Watson Koziol
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge

_____
Carol Calliotte
Administrative Law Judge

Filed: ***June 9, 2016***