COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018499-16**

John B. O'Connor	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Koziol)

This case was heard by Administrative Judge Segal.

APPEARANCES
Michael J. Powell, Jr., Esq., for the employee
Mark A. Teehan, Esq., for the self-insurer

LONG, J. The self-insurer appeals from a hearing decision ordering a closed period of § 34 temporary total incapacity benefits, continuing § 35 temporary partial incapacity benefits, and §§ 13 and 30 medical benefits. The self-insurer presents three issues on appeal, two of which require discussion, while the other is summarily affirmed. The first error alleged is the denial of the § 1(7A) defense based on the finding that two injuries in 1981 and 1992, sustained during the employee's prior employment as a Massachusetts State Trooper, were compensable work-related injuries. The self-insurer also claims error with the judge's assignment of partial disability and the earning capacity. Finding merit in the self-insurer's arguments regarding the assignment of a partial disability and earning capacity, we vacate the decision and recommit the case to the administrative judge for further findings of fact consistent with the instructions contained herein.

The employee's claim for indemnity and medical benefits was heard at conference on March 9, 2017, and an order was issued for § 34, temporary total incapacity, benefits from August 13, 2016, through August 12, 2018, along with medical benefits under §§ 13 and 30, which included recommended surgery. (Dec. 3.) The self-insurer's appeal of the

conference order led to a § 11A impartial examination with Dr. Stephen Saris on June 16, 2017. Dr. Saris' report and further addendum were deemed inadequate at the hearing by the judge, who also found the medical issues to be complex. The parties thereafter submitted joint medical exhibits and stipulated that the self-insurer accepted liability for the July 19, 2016, industrial accident, a head-on motor vehicle collision, and to an average weekly wage of $505.97. (Dec. 4.) The March 10, 2020, hearing decision ordered a closed period of § 34 benefits from July 19, 2016, to July 18, 2019, and § 35, temporary partial incapacity, benefits at the maximum partial disability rate of $227.69, to date and continuing. With respect to the medical aspect of the decision, the judge relied primarily upon the expert medical opinion of Dr. Stephen Johnson, the employee's treating physician/neurosurgeon. In so doing, the judge rejected the self-insurer's defense asserted pursuant to § 1(7A).[1]

The judge found:

> The Employee has an impressive work history and educational background. The Employee was a laborer for the MBTA from January 1979 through August of 1979. … The Employee is a 1979 graduate of the Massachusetts State Police Academy and worked as a Massachusetts State Police Trooper from 1980-1996. The Employee was assigned to major crimes investigations, including narcotics and homicide cases. He is a graduate of Northeastern University, having earned an undergraduate degree by attending night school while maintaining employment as a State Police Trooper.
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> The Employee was injured in the line of duty twice during his employ with State Police (1981 and 1992) and has retired from the State Police (medical involuntary retirement) in December of 1996. Much to his credit, the Employee climbed ranks to Sergeant following his returning to work after being shot while executing a search warrant (the first work injury). Again, much to the employee's credit, he continued in academic pursuits, earning a Juris Doctorate degree from New England School of Law in 1999. The Employee then passed the Bar Exam

[1] General Laws c. 152, § 1(7A), states, in relevant part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease is a major but not necessarily predominant cause of disability or need for treatment.

> and became licensed to practice law in the Commonwealth. For the next approximately 10 years, he worked at a small law firm in Quincy, Massachusetts, where his main duties were handling pleadings and depositions. The law firm disbanded and the practice shuttered.
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> In April of 2016, the Employee accepted a part-time bus operator position with the Employer. The Employee worked in this capacity until the date of the industrial accident, July 19, 2016. The Employee has not returned to work in any capacity following this industrial accident.

(Dec. 5-6.)

The self-insurer's § 1(7A) defense was found to be inapplicable by the judge:

> The Self-insurer raised § 1(7A) as a defense. I do not find that § 1(7A) applies to the case at bar because the pre-existing conditions relied upon by the Self-insurer are the result of compensable, work-related injuries. Assuming arguendo that I am incorrect, I have adopted the opinion of Dr. Johnson who opined the motor vehicle crash of July 19, 2016 contributed substantially, and was a major cause of his need to undergo the surgeries that are currently disabling the Employee from returning to work.

(Dec. 14.)[2]

The self-insurer argues that the judge erred when she found the employee's prior injuries, sustained while working as a Massachusetts State Trooper, were "compensable" prior injuries pursuant to M.G.L. c. 152. We agree. The employee's injuries sustained during his prior employment as a Massachusetts State Trooper are not compensable under M.G.L. c. 152 since local and state police officers are compensated for their workplace injuries pursuant to M.G.L. c. 41, § 111F.[3] While "reserve or special police officers" engaged by private contractors to direct or maintain traffic are covered under M.G.L. c. 152, § 1(4),[4] such is not the case for officers injured in the line of duty. The judge's

[2] In a footnote on page 5 of the hearing decision, the judge details the prior injuries sustained by the employee when he was working as a State Police Trooper and concluded, "I find that these workplace injuries are equivalent to injuries compensable under G.L. c. 152."

[3] M.G.L. c. 41, § 111F is titled "Leave Without Loss of Pay for Certain Police Officers and Fire Fighters."

[4] M.G.L. c. 152, § 1(4) provides in pertinent part:

finding that the prior injuries were "compensable" so as to defeat the self-insurer's § 1(7A) defense was error, however; considering her findings in the alternative, relying upon Dr. Johnson's medical opinion, the error is harmless.

Dr. Johnson's disability statement, outlined in his narrative report is as follows:

> It is my opinion that the motor vehicle crash of July 19, 2016 contributed substantially, and was a major cause of his need to undergo the 2 surgeries performed by me in 2017. Stable chronic pain was transformed into acute severe debilitating pain after the accident. Undoubtedly his current disability stems from the extensive surgery that was required in addition to his pre-existing condition.

(Exh. 11Q.)

The self-insurer argues that the judge mischaracterized the medical evidence, because "the opinions of Dr. Johnson, which she adopted still do not defeat a Section 1(7A) defense, as the opinion of Dr. Johnson she adopts on disability is his statement that "…his current disability stems from the extensive surgery that was required in addition to the pre-existing condition." (Self-insurer br. 17-18.) The self-insurer's selective excerpt from Dr. Johnson's opinion, without including *"the motor vehicle crash of July 19, 2016 contributed substantially, and was a major cause of his need to undergo 2 surgeries"* is likely but an oversight on its part, and not the type of mischaracterization of which it complains. While the judge did not recite Dr. Johnson's written opinion word for word in the § 1(7A) portion of the decision, she did so previously in the causal relationship portion of the decision. (Dec. 9, 13.) The finding was further buttressed by the judge

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> Notwithstanding the provisions of section one hundred of chapter forty-one, any reserve or special police officer who is employed by a contractor for the purpose of directing or maintaining traffic or other similar purposes upon any way which is being constructed or reconstructed or upon which other types of construction projects are in progress under contract with the state department of highways or the metropolitan district commission or any city or town, and who is paid directly for such services by a contractor engaged in the performance of such a contract with said department or commission or city or town, shall be conclusively presumed to be an employee of such contractor while so employed and paid; and, notwithstanding any contrary provision of law, the compensation provided by this chapter shall be paid to any such police officer who receives an injury arising out of and in the course of such employment, or, in case of death resulting from such injury, to the persons entitled thereto.

when she also adopted Dr. Johnson's opinion that "…he has reached a medical endpoint and remains disabled by pain and the multiple surgeries have contributed to his requirement for ongoing pain medication." (Dec. 13.) The judge clearly did not mischaracterize Dr. Johnson's opinions whose report and statement reflect a keen awareness of the employee's extensive prior medical history. The doctor's combination injury opinion on causation and current disability readily satisfies the employee's burden of proof to defeat the § 1(7A) defense. As such, the judge's reliance upon Dr. Johnson's opinions in the hearing decision was not error.

The self-insurer also claims the decision is flawed because:

> "[T]here is an absence of specific evidence to support the earning capacity, which the judge finds in this decision. In fact, if anything, the judge goes against the weight of substantial evidence that Mr. O'Connor has an earning capacity far exceeding his stipulated pre-injury average weekly wage of $505.97. In the decision, the judge orders the payment of Section 35 benefits at the rate of $227.69, based on an average weekly wage of $505.97 from July 19, 2019 to date and continuing. (Dec. p. 16). There is no explanation to what amounts to placing the Employee on 'maximum partial' benefits."

(Self-insurer br. 19.) We agree with the self-insurer that the finding of maximum partial incapacity in this case is not supported by proper subsidiary findings. Once the determination of partial incapacity is made, "Section 35D directs judges to use the greatest of the amount of the employee's actual earnings, § 35D(1), or the amount he is capable of earning with a reasonable use of all his faculties, § 35D(4). Bahr v. New England Patriots Football Club, Inc., 16 Mass. Workers' Comp. Rep. 248, 251 (2002). 'An accurate 35D(4) analysis requires specific findings, based on the evidence submitted, as to the actual amount the employee is capable of earning post-injury.' Id. at 252, citing Kelley v. General Elec. Co., 12 Mass. Workers' Comp. Rep. 476 (1998)." Sullivan v. Phillips Analytical, Inc. 18 Mass. Workers' Comp. Rep. 183, 189 (2004). The judge's order for the insurer to pay §35 incapacity benefits at the rate of $227.69, assigned a weekly earning capacity of $126.49, which is neither grounded in the evidence nor supported by adequate findings. While deference must be given to an administrative judge's determination of earning capacity, Mulcahey's Case, 26 Mass. App. Ct. 1, 3

(1988), such determination must not be arbitrary, capricious or contrary to law and must be supported by adequate findings grounded in competent evidence. See Deyette v. University of Massachusetts Medical Center, 13 Mass. Workers' Comp. Rep. 14, 17 (1999).

> However, the precedents do not approve of the exercise of such judgment and knowledge [regarding earning capacity] with no explanation whatsoever. The decision maker should explain the source and application of an earning capacity attributed to the worker in a vacuum of evidence from the parties. A concise explanation will assure compliance with the requirements of the Administrative Procedure Act and with the bedrock principle of visible rationality. A monetary figure cannot emerge from thin air and survive judicial review as a mystery.

Dalbec's Case, 69 Mass. App. Ct. 306, 317 (2007).

While the judge was free to, and did, reject the only vocational testimony presented by the self-insurer's expert witness, the employee's own testimony cited in the hearing decision, as well as his "impressive work history and educational background" require a reassessment of the earning capacity on recommittal. As previously noted, the employee has an active license to practice law in the Commonwealth, has worked as a lawyer in the past and at the time of hearing, was actively pursuing a fueler position with the employer that he testified he felt capable of performing because "I think the hours would be good and I'd have access to a men's room, things of that nature." (Dec. 12, n. 10.)[5] Without a concise explanation as to why the employee is capable of earning only $126.49 per week, we are unable to determine with reasonable certainty whether the judge applied "correct rules of law" to "facts that could be properly found," Praetz v. Factory Mut. Eng'g. and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

[5] We note that the job description for the fueler position was introduced into evidence (Exh. 8) and provides an hourly wage of $18.08. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(permissible to take judicial notice of documents in board file). We also acknowledge that the minimum wage in the Commonwealth establishes the floor below which the hourly earning capacity rate assigned by the judge cannot fall. Spencer v. JG MacLellan Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 150. (2016).

Accordingly, we vacate the decision and recommit the case for further findings on the issue of the employee's earning capacity.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **April 14, 2021**