COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039444-06**

Jose Lopez	Employee
Wilson Farms, Inc.	Employer
Massachusetts Retail Merchants SIG	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Taub.

APPEARANCES
Paul S. Danahy, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on brief

HORAN, J. The employee appeals from a decision awarding him a closed period of § 34 total incapacity benefits and ongoing § 35 partial incapacity benefits. He challenges the evidentiary basis for the judge's assignment of a $320 weekly earning capacity for sixteen hours of work. We vacate the decision and recommit the case for further findings of fact.

The pertinent facts as found by the judge are as follow. The employee, fifty years old at the hearing and a native of El Salvador, immigrated to the United States in 1995. Although he speaks Spanish, he has no formal schooling and cannot read or write. His command of the English language is poor. "He does not know arithmetic, can only handle simple problems or calculations, but can follow simple cash transactions with simple change." (Dec. 2.) For eighteen years, he drove a bus in El Salvador. He has never been licensed to drive in Massachusetts, where he has worked as a farmhand and factory worker. (Dec. 2-3.)

For over five years prior to his industrial accident, the employee worked as a cook for the employer, earning an average weekly wage of $849.75. (Dec. 2-3.) "The employee used his hands all day in all of his work activities. He was

constantly lifting, with much of it involving heavy bulk food items such as sacks of potatoes, meat cartons, and other large food containers. He regularly lifted items that weighed from 75 to 100 pounds." (Dec. 3.) He also handled knives, cooking utensils, pots and pans, and other items which required "significant amounts of gripping and grasping." Id.

On December 27, 2006, Mr. Lopez was sharpening a knife in the course of his employment. The knife slipped and seriously cut the outside portion of his left wrist, resulting in a complete laceration of the ulnar nerve at the wrist crease. (Dec. 3.) The insurer accepted the case and commenced payment of § 34 benefits. (Dec. 1-2.)

Two attempts to surgically repair the employee's ulnar nerve failed to relieve his symptoms. (Dec. 3-4.) His second surgery was performed by Dr. Craig Stirrat in January, 2008. On March 18, 2008, Dr. Stirrat opined the employee had some ability to use his left hand at work. (Dec. 4-5.) In a letter dated April 4, 2008, the employer first offered the employee his job back on a full-time, regular basis. (Ex. 4.) That job offer specified, *inter alia*, that the employee would be required to lift forty pounds. Id. "On April 15, 2008, Dr. Stirrat opined that he felt Mr. Lopez would be best served by returning to a 'structured job' that took the hand impairment into account as opposed to being out of work. . . ." (Dec. 5.) On April 22, 2008, the insurer filed a complaint to discontinue or modify the employee's weekly incapacity benefits.

On July 22, 2008, the employer sent a second job offer to the employee by mail. (Ex. 5.) That offer was substantially similar to the first, but lowered the job's lifting requirement to thirty pounds. Id. The cover letter accompanying the second job offer stated: "You will resume your regular hourly salary and work a full time schedule." Id. In response to the second job offer, in August, 2008, the employee returned to work for "two consecutive days, about 5-6 hours the first day and about 6 hours the second." (Dec. 6.) Assigned to pack plastic containers

with food, the employee experienced pain in his injured hand and could not finish either shift. Id.

Following a § 10A conference on the insurer's modification/discontinuance complaint, the judge awarded the employee § 35 benefits at the weekly rate of $382.39, based on an earning capacity of $160.00, from October 21, 2008, to date and continuing. (Dec. 2.) Both parties appealed. Id.

At the hearing, Cynthia Wilson testified for the employer regarding the job offers. She confirmed the employer's willingness to accommodate the employee, but also testified the offers were for full-time regular work. (Tr. 57-58, 60-64, 67-68.) Carol A. Falcone, a licensed rehabilitation counselor, testified on the employee's behalf. (Dec. 6; Tr. 69-88.) She opined that in order to successfully return to the workforce, the employee required structured, sheltered employment, and an understanding employer. (Dec. 7; Tr. 86-87.) The employee conceded he could lift up to thirty pounds with some difficulty, but could not hold heavy items with his left hand. (Dec. 4; Tr. 27-28.)

The judge credited the testimony of Ms. Wilson regarding the employer's willingness to accommodate the employee, and found the job offers extended to be "the sort of structured work environment that Dr. Stirrat suggested and Ms. Falcone thought to be the only chance for Mr. Lopez to be able to sustain employment." (Dec. 8.) While the judge found the employee had aborted his post injury return to work prematurely, he also credited the employee's "complaints about his symptoms and his readily apparent frustration with the fact that his hand has not recovered to a greater extent." Id. Consequently, the judge found the employee "could not withstand the rigors of full-time employment," and concluded that he could work sixteen hours per week. Id. The judge assigned the employee a weekly earning capacity of $320 as of August 5, 2008. (Dec. 8-9.)

The issues raised by the employee on appeal challenge the factual foundation of the earning capacity assigned. On this evidentiary record, we agree

the judge's assignment of a $320 weekly earning capacity, based on a sixteen hour work week, was arbitrary.

Notwithstanding the judge's recognition of the employer's willingness to accommodate the employee for full-time regular work, it never offered the employee part-time adjusted work for sixteen hours a week at $20 per hour. (Tr. 52-68; Exs. 4 and 5.) Once the judge credited the employee's testimony that he was unable to work on a full-time basis, he could not presume, as he apparently did,[1] the employer's willingness to convert its full-time job offer into a part-time job offer paying $20 per hour. See Raczkowski v. Center For Extended Care, 18 Mass. Workers' Comp. Rep. 289, 292 (2004), citing Mello v. Bristol County Sheriff's Office, 16 Mass. Workers' Comp. Rep. 376, 377 (2002)(under § 35D[3] job must actually be "available" as well as "suitable").

Absent a bona fide job offer paying $20 per hour for sixteen hours of adjusted work, we cannot discern a rational basis, on this record, to justify the assigned $320 earning capacity. This is especially true in light of the employee's significant physical impairment, limited transferable skills, poor language skills, and his credible complaints of pain. As the court held in Eady's Case, 72 Mass. App. Ct. 724, 726 (2008): "The decision maker must . . . support the earning capacity he assigns by explaining its 'source and application,' including a 'factual source' for the monetary figure." citing Dalbec's Case, 69 Mass. App. Ct. 306, 316-317 (2007).

Accordingly, we reverse so much of the decision as assigns a $320 weekly earning capacity and vacate the resulting § 35 award.[2] We recommit the case to

[1] It is our duty to recommit a case for further findings when we cannot determine "with reasonable certainty whether [the] correct rules of law have been applied to facts that could properly be found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

[2] In so doing, we reinstate the aforementioned conference order.

the judge for further findings of fact, based on the record evidence. See G. L. c. 152, § 35D(4).

So ordered.

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Mark D. Horan
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **July 7, 2011**