COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 010961-08**

Julieta Barbosa	Employee
Harvard University	Employer
Harvard University	Self-insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Koziol)

The case was heard by Administrative Judge Levine.

APPEARANCES
Catherine M. Doherty, Esq., for the employee
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

HORAN, J. The self-insurer appeals from a decision awarding the employee weekly incapacity benefits under §§ 34 and 35. It argues the judge erred by awarding § 34 benefits for a period when the employee was indisputably performing part-time work in her own business. It also posits the exclusive medical evidence of the § 11A physician failed to support the judge's finding that the work injury remained a major cause of the employee's disability and need for treatment. See G. L. c. 152, § 1(7A).[1] We agree the judge erred by awarding § 34 benefits for the period of time the employee was self-employed, but reject the self-insurer's § 1(7A) argument. We recommit the case for a determination of the employee's earning capacity for the closed period discussed below.[2]

[1] General Laws c. 152, § 1(7A), provides, in pertinent 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 remains a major but not necessarily predominant cause of disability or need for treatment.

[2] We otherwise summarily affirm the decision.

In 2006, the employee began work at the self-insurer's Faculty Club. "The Faculty Club consisted of a restaurant and twelve guest rooms. The employee worked in housekeeping. She worked both nights and days. The employee's job duties were the usual ones for a housekeeper. She mopped, dusted and cleaned the lobby, bathrooms, [and] dining area. She carried buckets of water." (Dec. 5.) Since 2002, the employee also worked at Julieta's Boutique, which she and her husband owned. "This store sells jewelry, children's clothing, cds, gifts, [and] religious items." Id. It primarily served the Portuguese community and "has been continuously in business since it began in 2002." Id. The judge noted the employee had years of experience working as a cashier. (Dec. 4, 8.)

On March 16, 2008, while moving a bed at the club, the employee felt pain in her back, and thereafter experienced pain in her neck, right shoulder and upper spine. The self-insurer paid the employee § 34 benefits without prejudice from that date until her return to work at the club on November 5, 2008.[3] However, due to her pain, the employee stopped working as a housekeeper altogether as of January 22, 2009.[4] (Dec. 5-6.)

The employee underwent a § 11A impartial medical examination performed by Dr. Mark Berenson, an orthopedic surgeon. Dr. Berenson opined the employee suffered from mild bursitis of the right shoulder and pre-existing cervical spondylosis with exacerbation secondary to the work injury. (Dec. 7.) He also opined that because the employee was not symptom-free upon her return to work in November 2008, her work injury was a major cause of her neck and right upper extremity symptoms. (Dec. 7; Dep. 55-57, 77.) Dr. Berenson concluded the employee was totally disabled from returning to work as a housekeeper, but was

[3] At the hearing the self-insurer stipulated that "[o]n March 16, 2008, the employee suffered an industrial injury which arose out of and in the course of her employment with the self insurer." (Dec. 2.)

[4] Based on our review of the record and the decision, it appears the employee made no claim for a higher average weekly wage based on her concurrent employment at Julieta's Boutique on her injury date. See General Laws c. 152, § 1(1).

capable of engaging in sedentary work activity. The judge adopted Dr. Berenson's opinions. (Dec. 7-8.)

The judge found the employee was totally incapacitated from March 16, 2008, until her return to work at the club on November 5, 2008. Noting her years of experience working in a "cashier-type" job "at her own business," the judge concluded the employee, upon leaving work in January 2009, had a minimum wage earning capacity of $320 per week. (Dec. 8-9.)

The self-insurer asserts on appeal that there is no evidence to support the judge's finding of § 1(7A) "major" causation for this combination injury. We disagree. The adopted deposition testimony of Dr. Berenson supports the judge's finding of § 1(7A) "major" causation with regard to the employee's work injury. As there was no disputing the existence of the employee's non-work-related pre-existing condition (cervical spondylosis), which her work injury aggravated, the issue was whether the requisite "a major" causation standard was met by Dr. Berenson's opinion. It was. The doctor testified as follows:

> Q: Did that underlying condition combine with a work injury to produce symptoms?
> A: Yes.
>
> Q: And you testified that it did combine with [the employee's] work injury, which was an acute incident, correct?
> A: Yes.
>
> Q: When it combined with her work injury, did her work injury become a major cause for her medical treatment?
> A: Yes.
>
> . . .
>
> Q: And was her work injury a major cause of the total disability that you testified about today.
> A: Yes.
>
> Q: With regard to [your earlier stated] restrictions, was it the combination of [the employee's] work injury and her preexisting condition that was a major cause for your assessment of those restrictions on [the employee]?

A: Yes.

Q: And was her preexisting condition aggravated by her work injury?
A: Yes.

Q: Was it aggravated so considerably by her work activity as a housekeeper that it prevented her from performing the duties and responsibilities at [the club]?
A: Yes.

(Dep. 55-57.)

. . .

Q: [I]f you assume that the patient had indeed become asymptomatic as of November 4 or late October, returned to full duty, and then reported later symptoms . . . [in] January . . . , the March '08 [work] incident would likely not be a major cause of the new symptoms . . . assuming those facts, your opinion would be it would not be a major cause, correct?
A: Correct

Q: But assuming the facts that she had never really recovered from the symptoms except for a few days of symptom-free days when she started to work, and that the condition started to get worse and she had more problems even though she wasn't seeing a doctor or wasn't missing any time or asked for any restrictions, but assuming that that was the case, then it would be related, correct?
A: Yes.

(Dep. 77-78.) The combination of these two deposition excerpts supports the judge's finding that the employee's work injury was a major cause of her disability and need for treatment, because he concluded that she experienced continuous symptoms during the relevant time period.[5]

However, we agree with the self-insurer that the judge erred by awarding the employee § 34 benefits from March 16, 2008 until November 5, 2008,

[5] The judge found "that the employee never was totally symptom free when she returned to work in 2008. In that circumstance, it is the opinion of Dr. Berenson, which I adopt, that the industrial injury is a major cause of the worsening of her condition when she returned to work in January 2009. (Dep. 77.)" (Dec. 7.)

notwithstanding her admission that she continued to work part-time at her family business, Julieta's Boutique, during this period. (Tr. 22, 56, 63, 82, 98.) The employee testified she never received a paycheck for her work at Julieta's Boutique; instead, the money taken in from the sale of jewelry, cds, religious articles, and the like, was put back into the business. (Tr. 82, 98.) The judge found that:

> Although the employee worked during that period of time, she only worked a couple or three hours per day and was able to interrupt the workday to relax in the store or at home and put ice or hot pads on her shoulder. These activities are inconsistent with an ability to work on a regular basis in the open labor market. See D'Agostino [v. City of Worcester Parks and Recreation Dept.] 17 Mass. Workers' Comp. Rep. 288, 289-290 (2003). Section 35D does not require a different result.

(Dec. 8.)

We agree with the self-insurer that the judge's reliance on D'Agostino, supra, is misplaced. Unlike the employee in that case, Ms. Barbosa cannot be said to have been receiving a gratuity for the time she spent minding the store at Julieta's Boutique. To the contrary, in D'Agostino, this board recommitted the case for the judge to make findings on the "extensive testimony about the employee's participation in" the family business. Id. at 290. Here, we cannot ignore the employee's admission that she worked at Julieta's Boutique throughout 2008, albeit part-time, any more than we can ignore the plain meaning of G. L. c. 152, § 35D. See discussion, infra. That the employee chose to channel back into the business proceeds ascribable to her part-time work cannot negate the fact that she was capable of working as a part-time cashier or sales clerk, or equate with a finding that she was incapable of earning wages in sedentary employment for the period in question.

The judge found that, from March through November 2008, the employee "could work two or three hours per day." (Dec. 5-6.) Even at a minimum wage rate, this testimony would support an earning capacity of at least $80 per week.

In Healy v. Richard Burbridge, 24 Mass. Workers' Comp. Rep. 159 (2010),[6] we reasoned:

> The employee's contentions that his activities manifest only a "sporadic" ability to work, and that $75 per week is too "trifling" an amount to support an earning capacity finding, are defeated by the plain language of § 35D, which provides, in relevant part:
>
> > For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, shall be the greatest of the following:--
> >
> > (1) The *actual earnings* of the employee during each week.

(Emphasis added.) Id. at 160. Noting that § 35D had changed prior practice in establishing an employee's earning capacity, we affirmed the $75 earning capacity assignment because § 35D foreclosed the judge from disregarding the amounts the employee actually earned each week in the disputed period of incapacity. Id. Similar logic applies here, as the employee worked at her family business continuously, albeit with a significant reduction in her pre-injury thirty hour work week, throughout the time of her incapacity to perform heavier work at the club. (Dec. 5-6.) As § 35D(4) provides, in the absence of actual earnings, the judge must consider "the earnings that the employee is capable of earning." We do not believe the legislature, in last amending § 35D, would countenance an award of total incapacity benefits to a self-employed worker simply because she foregoes wages and chooses instead to reinvest her income into the family business.

Because the award of § 34 benefits is incompatible with an earning capacity as demonstrated by the employee's part-time work, we vacate that award, and recommit the case for further findings on the extent of the employee's incapacity from the date of injury until her return to work on November 5, 2008. Because the judge who presided at the hearing no longer serves in that capacity, we transfer the

[6] The decision on review was filed a month prior to Healy, supra. Our decision in Healy was recently affirmed by the Appeals Court in Healy's Case, 79 Mass. App. Ct. ___ (July

case to the senior judge for reassignment and a hearing de novo on this issue. As the employee has prevailed with respect to the § 1(7A) issue, the self-insurer shall pay a fee to employee's counsel pursuant to § 13A(6) in the amount of $1,488.30.

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: **August 10, 2011**

19, 2011)(Memorandum and Order Pursuant to Rule 1:28.)