COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 043761-03**

Lucine Pike	Employee
Massachusetts Department of Mental Retardation	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Horan)

APPEARANCES
Judson L. Pierce, Esq., for the employee
Terence H. Buckley, Esq., for the self-insurer

McCARTHY, J. The self-insurer appeals from an administrative judge's decision awarding the employee ongoing partial incapacity benefits for a work-related lower back injury. The self-insurer argues the judge miscalculated the employee's average weekly wage, and that he misapplied the earning capacity provisions of G. L. c. 152, § 35D. We address the first argument.

The employee worked as a certified nurse's aide and personal care assistant for the employer, the Commonwealth of Massachusetts. On December 27, 2003, a resident in a group home for retarded adults kicked her, resulting in her back injury, a herniated L3-4 disc. The work she performed at the group home was strenuous and exertional. (Dec. 3-4, 6.) The employee also worked as a personal care attendant for a quadriplegic patient, whose provider was also the Commonwealth. The employee did not need to perform strenuous lifting activities at this assignment, so she was able to continue this job. (Dec. 4.)

On the date of injury, the employee was concurrently employed by yet another insured employer, for whom she worked as a phlebotomist. This job was sedentary and light; thus the employee continued it after the injury suffered on December 27, 2003. (Dec. 4, 9.)

The judge found the employee had an average weekly wage of $1,547.24, based on earnings from the three jobs during the fifty-two weeks prior to her work injury. (Dec. 9.) The judge further found the employee could continue working her two light duty jobs, but not the heavy-duty job she was performing when she was injured. (Dec. 4-5.) Based on the prospective earnings from those light duty jobs, the judge assigned the employee a weekly earning capacity of $734.92. The judge found the employee was working as much as she could since her industrial accident, but that her earning capacity could be higher, in the event she was able to take on more work. (Dec. 5.)

The self-insurer argues the decision is arbitrary and capricious as to the average weekly wage calculation. The self-insurer specifically points to the employee's decrease in her hours worked at the facility where she was injured, just a few weeks prior to that incident. The self-insurer argues this decrease indicates a permanent change in the employee's employment status, as a matter of law. We disagree, but conclude that recommittal is appropriate for the following reasons.

The employee's average weekly wage was calculated on the basis of the fifty-two week period prior to the industrial accident. (Dec. 9.) See G. L. c. 152, § 1(1). The judge found the employee's period of part-time employment,[1] coming just prior to her December 27, 2003 accident, did not "signify a permanent change in her long-term status as a full time Employee." (Dec. 10.) The judge found "it a temporary situation only co-incidental to her industrial accident and likely occasioned by the death of her husband before her accident." Id. The judge also relied on the employee's record of over eleven years of full-time work with the employer in making this determination. Id.

The record supports not only that the employee had a consistent work history, but that she indeed did not intend to stay working part-time at the group home for the foreseeable future. The employee's testimony on this point was as follows:

[1] The judge found two to three weeks of part-time work, while wage records apparently indicate that the employee worked part-time for four weeks. The employee testified that she recalled working part-time for three weeks. (Tr. 8.) We do not think the discrepancies are of great importance to the analysis. However, on recommittal, the judge should clarify the actual duration of the part-time employment.

> Q: Did you enjoy your work working in the home in Peabody [where she suffered her industrial accident]?
> A: I loved my work, yes.
>
> Q: Did you enjoy your work prior to that when you were doing full-time?
> A: Yes.
>
> Actually, I wanted to go part-time because I wanted to calm down a little bit. I thought I was working too many hours everywhere, so I thought a change would be good.
>
> I had been at that house for six years, I believe, in Hamilton, and I thought I wanted a change and closer to home and easier to get to, and it was a perfect shift hour because it was a ten-hour day, meaning, eleven at night to nine in the morning on weekends, and it just worked out well.
>
> And when there was going to be an opening for full-time in that particular home, I was planning on going for it.[2]

(Tr. 21-22.)

However, the judge's finding that the employee's part-time employment was likely related to her husband's death has no support in the record. Certainly, findings that are unsupported by the evidence are arbitrary and capricious; the self-insurer's argument to this effect is correct. Considering this finding is one of two findings supporting the judge's conclusion that the part-time employment was temporary and situational – and not reflective of her likely future employment – we cannot say that the error is harmless. Recommittal is appropriate. G. L. c. 152, § 11C.

The circumstances of this recommittal warrant some added direction, however. We assume the fact of the death is not a matter of dispute. The date of the event is readily ascertainable. To the extent the death occurred as the judge implicitly found, prior and proximate in time to the employee's accident, the findings as to the employee's average weekly wage will evince no error. Accordingly, the judge on recommittal may, in his discretion, reopen the record to determine this one crucial fact, and to make further

[2] The self-insurer did not object to or move to strike any part of the answer.

findings of fact.[3] See Gramolini's Case, 328 Mass. 86, 89 (1951)(introduction of new evidence on recommittal matter of discretion).

We do not agree with the self-insurer's argument regarding the change in the employee's work hours. The mere change from full-time to part-time does not operate as a matter of law to mandate the employee's average weekly wage be calculated in accordance with the new weekly rate of pay. "Average weekly wage" is intended to reflect an employee's likely future earnings. "The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity." Gunderson's Case, 432 Mass. 642, 644 (1996)(internal quotes omitted). In some cases, such a change in hours worked does indeed reflect the likely future earnings of the employee. See Morris's Case, 354 Mass. 420, 425-426 (1968)(evidence supported that employee's change from part-time to full-time employment, with accident occurring on the first day of new schedule, was permanent; AWW based on full-time work affirmed); Bembery v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 476 (2003)(judge found, based on record evidence of employer's business practices, that employee's move from part-time to full-time employment was permanent promotion).[4] However, here the judge has made findings that – if accurate – point to the conventional use of § 1(1)'s fifty-two week look-back period for calculating her average weekly wage, and removing her from the Morris-type exception to that general rule. Unlike Morris, the judge found that this employee's relaxing of her schedule was not anticipated to be permanent. (Dec. 10.) Nothing in the evidence compelled a finding that the change to part-time was anything but the temporary situation the employee claimed it to be, which testimony the judge apparently credited.

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[3] On the other hand, the judge could simply decide the issue on the employee's testimony quoted above, without reference to the death.

[4] The dissent's view that the evidence here is in line with Bembery, because the part-time work was of indefinite duration, misses the judge's factual assessment of the employee's intentions, which he considered credible and realistic, given her work history. We do not presume that the mere change in work hours represents a permanent change in her contract of hire as a matter of law. The § 1(1) 52-week look-back method of computing average weekly wage is the rule, not the exception.

Moreover, the self-insurer did not challenge the employee's testimony as speculative, or counter it with its own evidence of unavailability of full-time work at the Peabody home.

Given the absence of one prong of the judge's two-pronged foundation for his finding of a temporary and situational shift in the employee's conditions of employment, we recommit the case for further proceedings consistent with this opinion. We summarily affirm the decision as to the self-insurer's argument that the judge misapplied § 35D, as he specifically found the employee was working up to her capabilities since the accident. (Dec. 5.)

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***September 13, 2007***

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Mark D. Horan
Administrative Law Judge

COSTIGAN, J., concurring in part and dissenting in part. I agree with the majority that the judge's findings as to the employee's post-injury earning capacity are warranted by the evidence and consistent with the provisions of § 35D. I disagree, however, that on the issue of the employee's average weekly wage, recommittal for additional evidence is appropriate.

> It is by now axiomatic that the amount of an employee's average weekly wage is a question of fact for the administrative judge. John More's Case, 3 Mass. App. Ct. 700, 715-716 (1975)(rescript op.). It is equally well-accepted that the burden of proving the essential facts necessary to establish a case warranting the payment of compensation must be carried by the employee, see, e.g., Sponatski's Case, 220 Mass. 526, 527-528 (1915); Katzl v. Leaseway Personnel Corp., 4 Mass. Workers' Comp. Rep. 130, 131 (1990), *and that findings on the calculation of average weekly wage must be based on facts admitted into evidence.* See Mooney v. New Boston Garden, 2 Mass. Workers' Comp. Rep. 146 (1988); Bellis v. County of Middlesex, 2 Mass. Workers' Comp. Rep. 135 (1988).

Wheeler v. Jean Alden Stores, Inc., 6 Mass. Workers' Comp. Rep. 226, 226-227 (1992). (Emphasis added.) See also, Sullivan v. Phillips Analytical, Inc., 18 Mass. Workers' Comp. Rep. 183, 187 (2004).

The administrative judge found the employee's reduction in her work schedule from full-time to part-time some three to four weeks before her industrial accident was "likely occasioned by the death of her husband," and therefore was a "temporary" situation. (Dec. 10.) The majority acknowledges this finding has no support in the record. See supra at p. 3. Nevertheless, the majority not only recommits this case to the judge, but suggests he may re-open the record and seek new evidence that *will* support his finding. As this recommittal is not only unnecessary, but wrong, I dissent.

We have an evidentiary record that contains the employee's explanation of why she decided to transfer to a different group home, and why she voluntarily reduced her hours worked per week. (Tr. 21-22, quoted supra at p.3.) The employee did not even hint that her husband's death had anything to do with her decision, and it was impermissible for the judge to find that it did.[5] Moreover, even if her husband's death was close in time to the employee's decision to reduce her work hours, I do not see how that speaks to whether the reduced work schedule was "temporary," as found by the judge.

In my view, the test is not whether the part-time work schedule was temporary or permanent, but rather whether it was in effect when the employee was injured, and whether its duration was indefinite. See Bembery, supra (bus driver promoted from part-time to full-time status two weeks before industrial accident entitled to benefits based on full-time earnings); Morris's Case, supra (dependent of employee killed on first day of full-time work entitled to death benefits based on full time average weekly wage). The

[5] In fact, when her attorney asked the employee whether she was married or single, the administrative judge, without an objection to the question from self-insurer's counsel, declared sua sponte, "I don't think it's relevant." (Tr. 6.) Notwithstanding the judge's ruling, the employee answered, "I'm a widow." (Tr. 7.) That is as close as her testimony gets to the fact of her husband's death. The employee's biographical data form, admitted into evidence as Ex. 2, (Dec. 1; Tr. 3), identifies her marital status as "Widow."

employee testified that if a full-time position became available at the West Peabody group home to which she transferred prior to her injury, she planned "on going for it." (Tr. 22.) However, she offered no evidence that a full-time position was available, or about to be available, at that group home at the time of her injury, or even that one became available soon after she was injured.[6] Although the administrative judge and the majority pointedly avoid defining how long a period is "temporary," there is nothing in the record from which they could properly conclude the employee would have had the *opportunity* to resume a full-time work schedule at the West Peabody Group Home, notwithstanding her stated *desire* to do so. Thus, the judge's finding, endorsed by the majority, that the employee's part-time status was only "temporary," is wholly speculative. The facts necessary to support a claim cannot be "left to surmise, conjecture, guess or speculation [.]" Sponatski's Case, 220 Mass. 526, 527-528 (1915). "[T]he evidence must contain facts from which reasonable inferences based on probabilities rather than possibilities may be drawn." Timmons v. Massachusetts Bay Transportation Authority, 412 Mass. 646, 651 (1992), quoting Alholm v. Wareham, 371 Mass. 621, 627 (1976).

While a period of two to three weeks (see footnote 1, supra) is not always a sufficient length of time on which to base a determination of average weekly wage, I consider that under the circumstances here, it accurately reflects the employee's "probable future earning capacity," which, as acknowledged by the majority, is the objective of wage calculation. Carnute v. Stockbridge Golf Club, Inc., 17 Mass. Workers' Comp. Rep. 214, 218 (2003), quoting Gunderson's Case, supra, quoting 2 A. Larson, Workmen's Compensation, § 60.11(f) at 10-647-10-648 (1996). Therefore, based on the employee's testimony that on the date of her injury, she was working a twenty-hour per week schedule for the Commonwealth, and because the schedule was of

[6] The majority stands the burden of proof here on its head by suggesting the self-insurer should have offered evidence that such a full-time position was unavailable.

indefinite duration at that point in time, I would vacate as contrary to law the judge's finding that her average weekly wage with this employer was $571.68.[7]

The evidence establishes that the employee began her part-time work schedule on December 7, 2003. (Ex. 4.) She maintained that schedule until her December 27, 2003 injury. Her 2003 earnings statement from the Commonwealth, (id.), reflects that she earned $813.03 in the bi-weekly pay period ending December 13, 2003, which includes one week of full-time work ending December 6, 2003, and one week of part-time work ending December 13, 2003. Based on the fact that during her last four weeks of full-time employment, the employee earned $587.21 per week, ($1,174.43 bi-weekly), it is easily calculated, by subtracting $587.21 from $813.03, that the employee earned $225.82 during her first week of part-time work. When that amount is added to her $580.72 in earnings for the bi-weekly period ending on December 27, 2003, and the resulting total of $806.54 is divided by the three weeks she worked part-time, the employee's average weekly wage with the Commonwealth is $268.85, not the mostly full-time $571.68 wage found by the administrative judge. Thus, the employee's correct concurrent average weekly wage from all three employers is $1,244.41, and the award of § 35 benefits should be based on that average weekly wage and "an earning capacity of $734.92, or actual earnings, whichever produces the lesser § 35 rate." (Dec. 10.) Because recommittal is unnecessary and unwarranted, I respectfully dissent from the majority's opinion.

Filed: ***September 13, 2007***

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Patricia A. Costigan
Administrative Law Judge

[7] In arriving at that amount, the judge impermissibly combined the employee's forty-nine weeks of full-time earnings and her three weeks of part-time earnings in 2003, and then divided her total earnings by fifty-two.