COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 005259-05**
Manuel Cruz	Employee
Pet Edge Administrative Services	Employer
Massachusetts Retail Merchants SIG	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Costigan and Horan)

APPEARANCES
Charles E. Berg, Esq., for the employee at hearing
Jonathan Harris, Esq., for the employee on brief
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on brief

FABRICANT, J. The employee appeals from an administrative judge's decision denying and dismissing his claim for further weekly compensation benefits. For the following reasons, we recommit the case for the judge to make further subsidiary findings on the employee's earning capacity and extent of disability.

Manuel Cruz, a fifty-seven year-old native of the Dominican Republic, began working as a forklift operator for the employer in 2003. On February 10, 2005, he was thrown from his forklift and injured his right knee. He was out of work from February 20 to March 7, 2005. (Dec. 423-424; Tr. 11-12.) On May 5, 2005, he had knee surgery and was out of work again until July 13, 2005. (Dec. 424-425.) The insurer paid him § 34 temporary total incapacity benefits for the two closed periods. (Dec. 424.)

Following a release from his doctor to return to light duty work, the employee, though complaining of continuing knee pain, "notified his employer and arranged to return to work." (Dec. 424-425.) The judge found:

> He reported to work and was taken by his supervisor to a human resources department representative. The human resources representative had him sit in a cubicle within sight of 40-50 other workers. *He then left saying that he would return with a light duty assignment. But he did not return.* The employee sat, doing nothing, for his entire shift. Some of his co-workers made comments to him

> that he did not like, which drew attention to the fact that he was getting a paycheck but not performing any work.
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> *The next day the employee did not report to work but called his supervisor and the human resources representative and told them that he would report to work when they had work for him to do. He reported that the people he called told him that they would get back to him, but they did not.* He said he called several times. He never returned to work.

(Dec. 424.)(Emphases added.)

The employee began looking for other work, and from October 2005 to April 2006, he earned approximately $100 per week selling pastries from his brother's bakery to Lawrence area stores. On April 23, 2006, two days prior to the hearing, the employee began a job requiring that he stand for eight hours a day and work with pieces of aluminum. The job paid $11 per hour. (Dec. 425.) The employee's pre-injury wage was $454.91 per week. (Dec. 422.)

The employee's claim for § 34, or alternatively § 35, weekly incapacity benefits beginning on July 13, 2005, was denied following a § 10A conference. (Dec. 423, Tr. 4.) The employee appealed, and on February 28, 2006, Dr. Richard Warnock examined him pursuant to § 11A. (Dec. 423.) Dr. Warnock diagnosed the employee with a torn lateral meniscus and degenerative arthritis of the lateral compartment of his right knee. He opined the tear was causally related to the work injury, but the degenerative condition was not. He further opined the employee was partially disabled with " 'a very mild restriction of no lifting greater than 50 pounds.' " (Dec. 425, quoting Ex. 3, Impartial Examiner's report.) Dr. Warnock was not deposed, but the parties submitted additional medical evidence. (Dec. 423.)

The judge concluded the employee had suffered an industrial injury on February 10, 2005 for which he had undergone treatment and surgery, but that he was not entitled to weekly compensation after July 13, 2005. The judge reasoned:

> [The employee] returned to work for one day and performed no work. Had he continued to show up at work each day, he would have been paid his regular wages. His co-workers made unkind comments to him on that one day, and the

> employee's supervisors expended little or no effort to contact him and bring him back to work after that one day return. However, the employee could have continued to receive his wages merely by showing up at work. His decision not to return was entirely his own. Had he returned, he likely would have been given some work to do eventually, and certainly would have continued receiving his wages.

(Dec. 426.) Accordingly, the judge denied and dismissed the employee's claim for weekly compensation benefits.

On appeal, the employee first challenges the judge's finding that, had the employee continued to show up for work, he "certainly" would have been paid his regular wages and "likely would have been given some work to do eventually," as unsupported by the evidence. We agree. The insurer offered no evidence, documentary or otherwise, supporting this finding. The employee was the only witness at hearing, and he did not so testify. The judge's findings on this issue were thus entirely speculative and, as such, they cannot stand.

Next, the employee argues the judge erred by finding that he left a post-injury job voluntarily. We agree, but our holding does not turn on the voluntary or involuntary nature of the employee's actions.[1] Rather, we hold determinative the facts, found by the judge, that the employee continued to seek light duty employment from the employer, and the employer never provided it. The judge found that the human resources director

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[1] Even if the employee had left work voluntarily, it would not necessarily be dispositive of his right to receive compensation. "[V]oluntary termination of one's employment does not, by itself, warrant denial of a claim for partial incapacity compensation." Tredo v. City of Springfield School Dept., 19 Mass. Workers' Comp. Rep. 118, 123 (2005), citing Seymour's Case, 6 Mass. App. Ct. 935, 936 (1978); see also Bajdek's Case, 321 Mass. 325, 329 (1947).

> [W]here the employee is claiming [workers'] compensation for total or partial incapacity after a period during which he was gainfully employed, it is immaterial whether the employee lost his job because of a layoff, strike, *voluntary resignation*, or business recession. Whatever the reason for his predicament, he is entitled to compensation if he is totally or partially incapacitated from earning his former wage, by reason of the effects of his industrial injury.

Bradley's Case, 56 Mass. App. Ct. 359, 360-361 (2002), quoting Locke, Workmen's Compensation § 325, at 385 (2d ed. 1981)(Emphasis added).

told the employee he "would return with a light duty assignment" but that "he did not." (Dec. 424.) The employee informed his employer he would return to work when they offered him a light duty assignment. He called both his supervisor and the human resources representative several times trying to elicit an offer. They never got back to him with a job offer. Id. The judge concluded that "the employee's supervisors expended little or no effort to contact him and bring him back to work after that one day return." (Dec. 426.)

Thus, not only did the employee *not* abandon his light duty job, the employer never actually offered him one. As we held in Tredo, supra, where no one actually offered the employee an accommodated job at the time of her voluntary retirement, "there was no bona fide job offer from the employer indicative of a corresponding earning capacity under G. L. c. 152, § 35D(3)." Id. at 121. That statute requires that the employer make available to the employee a particular, suitable job. By paying the employee for one day without giving him any work or any actual offer of work, and then ignoring the employee's requests for a light duty assignment, the employer has not satisfied the requirements of § 35D(3).

Baribeau v. General Electric Co., 14 Mass. Workers' Comp. Rep. 263 (2000), cited by the insurer, is inapposite. There, the employee voluntarily retired from his light duty position which he had held for four months while receiving his regular wages. The reviewing board upheld the administrative judge's denial of benefits, stating it was irrelevant whether the position was make-work; the employee had chosen not to earn wages. Id. at 265; see Vass's Case, 319 Mass. 297, 300 (1946). In the instant case, the employee actively sought light duty work from the employer, but the employer never actually made him an offer. (Dec. 424.)

In the absence of an offer of a particular suitable, available job, the judge must look to another subsection of § 35D to determine the employee's earning capacity. See Bradley's Case, supra at 362 (the applicable post-injury wage capacity is defined as the "greatest of the amounts computed under the first four subsections of G. L. c. 152,

§ 35D."). Though not mentioning § 35D(1), the insurer would have the judge consider the "actual earnings" of the employee for the one day he was paid, July 13, 2005. However, as noted above, there is no evidence the wages the employee received that day would have continued. Moreover, there was no evidence those wages reflected the employee's ability to earn wages in the open labor market.

In Bradley, the court held that § 35D(4) "post-injury earnings may be an unreliable basis for determining earning capacity." Id. at 364. The court thus affirmed the administrative judge's findings that the employee's wages in his light duty position were "artificially inflated" and did not correlate with his ability to earn in the general labor market. In Sardinha v. Woodman Corp., 19 Mass. Workers' Comp. Rep. 6, 9-10 (2005), we recommitted the case to the administrative judge, pursuant to the court's decision in Bradley, to determine whether the wages paid to the employee for highly modified work (unchanged from his prior wages earned doing more difficult work) accurately reflected his earning capacity in the open labor market. Here, the employee was paid to sit and do nothing for one day. It is difficult to see how that activity (or inactivity) could translate into an earning capacity in the general labor market.

The real issue, never reached by the judge, is to what extent the employee is incapacitated from earning wages by virtue of his knee injury. On recommittal, this is the question the judge must address, taking into account the employee's age, education, training and experience. Scheffler's Case, 419 Mass. 251, 256 (1994). Moreover, since the judge never actually adopted a medical opinion or opinions on disability, he must do so.[2] Once he has done this, he may determine the employee's earning capacity under § 35D(4), "[t]he earnings that the employee is capable of earning."[3] If necessary to determine an earning capacity, the judge may, in his discretion, take further evidence.

[2] Though he discussed only Dr. Warnock's medical opinion, the judge never specifically adopted it over the other medical evidence admitted.

[3] We note that, as the employee argues, his wages of $11 per hour at the job he began just prior to hearing do not appear to equal his pre-injury wages of $454.91, and thus do not necessarily preclude the employee from receiving partial incapacity benefits.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **October 1, 2007**