

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 033122-12

Marybeth Pavilonis
City of Boston
City of Boston

Employee
Employer
Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Harpin)

The case was heard by Administrative Judge McDonald.

APPEARANCES

Michael F. Walsh, Esq., for the employee
Liam P. Curran, Esq., for the self-insurer at hearing
John T. Walsh, Esq., for the self-insurer at hearing and on appeal

CALLIOTTE, J. The employee appeals from a decision awarding her a closed period of § 35 partial incapacity benefits, based on an earning capacity of \$360.00 per week, as well as § 30 medical treatment, for a contusion to her left hand. We summarily affirm the decision, with the exception of the \$360.00 assigned earning capacity, which we modify to \$320.00 per week to reflect the minimum wage at the time of the order.

The employee, a construction supervisor, claimed she injured her left hand, left arm, shoulder, neck, low back and hip, on December 28, 2012, when a box truck side-swiped her car while her left hand was extended out the window. The judge did not credit the employee's testimony regarding how the accident happened, or the extent of her injuries. (Dec. 6, 15.) He adopted the medical opinions of the impartial examiner, Dr. Alan Ertel, a hand specialist, (Dec. 12-14, 15), and the self-insurer's examining orthopedist, Dr. James Nairus, (Dec. 11), and found the employee sustained only a contusion of her left hand, from which she had recovered by September 13, 2013, the date of the impartial examination. (Dec. 13, 15.) The judge rejected the medical opinions of Drs. Nasif, Polivy and Fisher because they were based on a history which he

did not find. See Brommage's Case, 75 Mass. App. Ct. 825, 828 (2009). Considering the employee's "work history in real estate, and her work as a construction supervisor," (Dec. 15), the judge found "she has transferable administrative, organizational, and clerical skills" and is "capable of earning at least minimum wage in the period from January 3, 2013, through September 13, 2013, when Dr. Ertel found no disability." (Dec. 15-16.) The judge ordered § 35 benefits of \$504.00 per week based upon her average weekly wage of \$1,200.00 and an earning capacity of \$360.00 per week. (Dec. 17.)

The employee appeals, making three arguments. We summarily affirm the decision as to the first two arguments. However, the employee's third argument—that the judge erred by awarding § 35 benefits based on an earning capacity above the minimum wage without the assistance of any vocational testimony—requires us to modify the § 35 award and order payment based on the minimum wage in the Commonwealth in 2013.

In Spencer v. JG MacLellan Concrete Co., 30 Mass. Workers' Comp. Rep. ____ (June 9, 2016), we addressed the precise situation presented here. There, without any expert vocational evidence, the judge ordered § 35 benefits paid at the rate of \$10.00 an hour, or \$400.00 per week, although the minimum wage in the Commonwealth on the date of the assigned earning capacity was actually \$9.00 per hour. Id. We held that, "[w]ithout evidence in the record establishing [the employee's earning capacity] at \$1.00 above the hourly minimum wage, the amount of the partial disability award must be modified. Eady's Case, 72 Mass. App. Ct. 724 728 (2008)(there must be a 'reasoned computation of that amount' of the earning capacity which must be accompanied by 'a reference to the factual source(s) for the monetary figure')." Id.

Similarly, here there was no expert vocational evidence. Again, we observe that the minimum wage in the Commonwealth from January 3, 2013 through September 13, 2013, was \$8.00 per hour. G. L. c. 151, § 1, as amended by St. 2006, c. 271, §2, eff. Jan. 1, 2008. Without a "factual source or reasoned explanation," Dalbec's Case, 69 Mass. App. Ct. 30, 316 (2007), the judge's finding that the employee can earn "at least

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minimum wage in the period from January 3, 2013, through September 13, 2013,” (Dec. 15), cannot support an award of benefits \$1.00 above minimum wage, or \$9.00 per hour, as ordered by the judge. Accordingly, we modify the award and order the insurer to pay the employee § 35 benefits at a rate of \$528.00 per week, based on her average weekly wage of \$1,200.00, and an earning capacity of \$8.00 per hour for forty hours, or \$320.00 per week, from January 3, 2013, through September 13, 2013. The insurer may credit itself with § 35 benefits already paid.

Because the employee prevailed in part on her appeal, an attorney’s fee may be appropriate under § 13A(7). Employee’s counsel must submit to this board, for review, a duly executed fee agreement between the employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is reviewed and approved by this board.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: **October 5, 2016**