COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 033558-11**

Michael Glazer	Employee
North Shore Medical Center Salem Hospital	Employer
Partners Healthcare System, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Harpin and Calliotte)

The case was heard by Administrative Judge Fitzgerald.

APPEARANCES
William H. Troupe, Esq., for the employee
Christina Schenk-Hargrove, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee partial incapacity benefits for an accepted right shoulder injury. We affirm the decision.

The employee attended college part-time for three years, but did not graduate. Nevertheless, he began his career as a counselor in the late 1990s. He worked as a psychiatric counselor for the self-insurer from 2006 until 2011. "As a psychiatric counselor for the Employer, [he] was responsible for conducting group sessions, maintaining security, restraining patients, and paperwork." (Dec. 4.)

On November 25, 2011, the employee injured his right shoulder at work while "helping to restrain a combative patient. . . ." (Dec. 4.) The employee returned to work light duty, but left in January, 2012. (Dec. 7.) Six months later, the self-insurer terminated him, "after it was determined that he submitted a false degree from Northeastern University as he thought it would help him secure the job." (Dec. 8.)

In 2013, a hearing on the employee's subsequent claim for benefits was held. Following the admission of vocational testimony, the parties concluded that litigation by reaching an agreement to pay the employee § 35 benefits based on an earning capacity of $792.88. (Dec. 2, n.1.) The self-insurer then filed a complaint to modify or discontinue

the employee's benefits, and on December 2, 2014, a conference order issued denying that complaint. The self-insurer appealed. (Dec. 2.)

In July, 2015, the employee underwent surgery on his *left* shoulder. Later that month, at the hearing on the self-insurer's appeal of the conference order, the employee claimed a causal relationship between his work-related right shoulder injury and his left shoulder surgery. (Dec. 3-4.) In her hearing decision, the judge rejected that claim, but adopted the opinions of several physicians causally relating the employee's disability, and the need for future right shoulder surgery, to his accepted industrial accident. (Dec. 5-7.) Crediting the employee's complaints of pain, and his testimony that he could perform sedentary work, the judge concluded the employee was partially incapacitated as a result of his work-related right shoulder condition. (Dec. 5-10.)

The judge then addressed the amount of the employee's earning capacity for the relevant period. She rejected the self-insurer's argument "that the Employee's earning capacity should be based on his having a college education." (Dec. 9.) Utilizing the $792.88[1] earning capacity agreed upon previously, (Dec. 2, n.1), the judge ordered the self-insurer to pay the employee § 35 benefits at the rate of $670.78, based on his average weekly wage of $1,910.85. (Dec. 10.)

The self-insurer appeals, and raises two issues. We address them in turn. The self-insurer contends the judge erred by failing to assess the employee's earning capacity on the basis that he held a college degree. We disagree. While "there is no dispute that the Employee submitted a falsified degree from Northeastern University when he applied for the position with the Employer," (Dec. 9), the law imposes no requirement that a judge ascertain an employee's earning capacity based on a degree he does not possess. Even if such a requirement were to be imposed, the judge correctly noted there was no evidence "that [the employee] would not have been offered the

[1] The judge noted this earning capacity "was based upon the average earning potential determined by an expert vocational analysis at the previous hearing." (Dec. 9.) Because the vocational expert's opinions were not in evidence at the hearing below, we cannot tell to what extent the employee's attendance at college, or his false representation of graduation, contributed

position without a college degree," (Dec. 9), as "a bachelor's degree in human service" was only "preferred." (Self-ins. closing argument, 3; Tr. 53-54.) Moreover, there was no evidence on the record regarding what the employee's earning capacity would be with a bachelor's degree. See Dalbec's Case, 69 Mass. App. Ct. 306, 317 (2007)("A monetary figure cannot emerge from thin air and survive judicial review. . . ."); Eady's Case, 72 Mass. App. Ct. 724 (2008); Pobieglo v. Dept. of Correction, 24 Mass. Workers' Comp. Rep. 97 (2010). We find no error.

Finally, the self-insurer argues the judge erred, when assessing the employee's earning capacity, by failing to consider whether he could work overtime, as he had done prior to his injury. We have noted that "if an employee's customary work week included overtime, an administrative judge could appropriately consider that factor in assigning an earning capacity." Scholl v. Fixture Perfect, 14 Mass. Workers' Comp. Rep. 484, 488 n.5 (2000). But we have never required a judge to do so. While the employee conceded he worked overtime pre-injury, (Tr. 41), he also testified regarding the pain and limitations referable to his right shoulder, which the judge expressly credited, in part, to conclude the employee had an ongoing partial incapacity. (Dec. 8, 10.) There was no error.

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the self-insurer shall pay an attorney's fee of $1,618.19 to employee's counsel.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **August 15, 2016**

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to this "average." Neither party challenges the judge's use of the prior agreement as a basis to determine the employee's earning capacity.