**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF INDUSTRIAL ACCIDENTS** **BOARD NO. 034913-19**

| | |
|---|---|
| Michael J. Potts | Employee |
| City of Boston | Employer |
| City of Boston | Self-Insurer |

**REVIEWING BOARD DECISION**
(Judges Fabiszewski, Fabricant and Long)

The case was heard by Administrative Judge Ricciardone

**APPEARANCES**
Diane Broderick, Esq., for the employee at hearing and on appeal
Kerry Nero, Esq. for the self-insurer at hearing and on appeal

**FABISZEWSKI, J.** The employee and the self-insurer filed cross appeals from the administrative judge's decision awarding the employee ongoing § 35 temporary partial incapacity benefits, plus § 30 medical benefits. We affirm the decision in all respects but address below the self-insurer's arguments regarding the administrative judge's assignment of an earning capacity.

At the time of his injury, the employee worked for the City of Boston as a mechanic and was concurrently employed at JJ Brannelly's as a bartender. (Dec. 4.) On December 18, 2019, while working for the City of Boston, he was installing a steering line in a vehicle and stepped off a stool, which slid out from underneath him, causing him to fall forward into a split. (Dec. 4.; Tr. 23.) He immediately experienced pain in his back through his right leg. (Dec. 4.; Tr. 26-27.) Another employee helped him to the lunchroom, where he remained for the rest of his shift. (Dec. 4.) He attempted to return to work the next day but left after several hours because he was in pain and unable to perform his job. (Dec. 4; Tr. 27-28.) He remained out of work for several months and treated conservatively with medication, epidural steroid injections, and physical therapy. (Dec. 5.) On September 10, 2020, the employee returned to work in a light duty capacity for the employer, delivering parts to different districts in Boston, but did not resume his

concurrent employment as a bartender.[1] (Dec. 5, 6.) In his light duty position, the employee checks his email at the start of each shift and then meets with the parts window employee. (Dec. 5.) A co-worker loads the parts into a van and the employee then drives the parts to different locations within the city, where the mechanics at those locations unload the parts. After making the deliveries, the employee returns to the office, hands in the paperwork, and reviews parts requests. No overtime is available to him because he is on light duty. (Dec. 5.)

In December 2020, the employee filed a claim for § 35 temporary partial incapacity benefits from September 10, 2020, to date and continuing, plus benefits pursuant to §§ 13, 13A and 30. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of the board file.) Pursuant to a § 10A conference, he was awarded § 35 temporary partial incapacity benefits at the rate of $373.18 per week, based on an average weekly wage of $2,343.79 and an earning capacity of $1,721.83 per week. (Dec. 2; Rizzo, supra.) The self-insurer filed a timely appeal. Pursuant to § 11A(2), the employee was examined by Lawrence Geuss, M.D., on July 13, 2021. (Dec. 3.) Prior to hearing, the medical evidence was opened due to complexity and the inadequacy of Dr. Geuss's opinion regarding disability. A hearing *de novo* was held on June 10, 2022. (Dec. 2.)

At hearing, the employee testified that, after his injury, he applied for other jobs with the employer, including Store Control Supervisor and Supervisor Motor Equipment Repairman, both of which he felt he could perform with his physical restrictions. (Dec. 6.) The salary range for the Store Control Supervisor was $1,546.38 to $2,159.71 per week, while the salary range for the Supervisor Motor Equipment Repairman was

[1] The employee worked as a bartender for various establishments between 1987 and the date of his injury. At hearing, he testified that his bartending duties included serving food and drinks to customers, operating a cash register, and restocking the bar, which included carrying up cases of beer from the basement. (Dec. 5.) He also performed cleaning duties at the end of the night, which involved picking up mats weighing between 30 to 40 pounds that were located behind the bar and mopping the floor. (Dec. 5; Tr. 53.) He further testified that after his injury, he reached out to the bars where he previously worked to inquire about returning to work with his limitations but did not receive any offers. (Dec. 6.)

$1,321.83 to $1,846.14 per week, with potential for overtime at both jobs. The employee was not selected for either position. No evidence was admitted regarding what salary the employee would have received had he been selected for either position. Similarly, no evidence was admitted regarding whether overtime would have been offered to him at either position or at what rate he would be paid if overtime were available.

On August 8, 2022, the administrative judge issued her decision awarding the employee § 35 temporary partial incapacity benefits at the rate of $373.18 per week, from September 10, 2020, to date and continuing, based on an average weekly wage of $2,343.79 and an earning capacity of $1,721.83 per week, plus benefits pursuant to §§ 13 and 30 for the employee's back pain and sciatica. (Dec. 12.) In her decision, the administrative judge adopted, in part, the medical opinion of Chadi Tannoury, M.D., who opined that the employee is capable of working light duty with restrictions. (Dec. 8.) The restrictions include no bending or twisting at the waist and no heavy lifting greater than 30 pounds, with the ability to carry up to 50 pounds if the employee is able to "pick up" from waist level. The administrative judge also adopted Dr. Tannoury's opinion that the employee is unable to walk 200 feet without stopping to rest. After considering the adopted medical opinions and the credible testimony of the employee, the administrative judge found that the employee was incapable of returning to both his prior positions as a mechanic for the employer and as a bartender. (Dec. 10.) The administrative judge assigned an earning capacity of $1,721.83, which were the wages the employee was currently earning in his light duty position with the employer at the time of the hearing. She noted that the employee had attempted to secure other jobs with the employer which the employee felt he could perform, and which may have allowed him to work overtime, but he did not receive any offers.

On appeal, the self-insurer raises two arguments related to the earning capacity assigned by the administrative judge. First, the self-insurer asserts that the administrative judge's decision is arbitrary, capricious, and contrary to law based on the employee's testimony that he is capable of working more hours, is qualified to perform other jobs at the Police Department and is willing to resume work as a bartender. (Self Ins. Br. 8, 10.)

The self-insurer also alleges that the other jobs at the Police Department pay more than his current wages. (Id. at 10.) Second, the self-insurer asserts that the administrative judge's award of ongoing § 35 benefits based on actual wages earned should be overturned, given the lack of medical evidence restricting the employee to 40 hours per week of work. (Self Ins. Br. 11.)

Section 35D of chapter 152 governs the computation of wages.[2] Once it is determined that an employee is partially incapacitated, § 35D requires the determination of a weekly wage based on the greater of the employee's actual weekly earnings or the amount the employee is capable of earning. Rattray v. Fresenius Medical Care, 35 Mass. Workers' Comp. Rep. 105, 109 (2021). It has previously been established that "'the goal of disability adjudication is to make a realistic appraisal of the medical effect of a physical injury on the individual claimant and award compensation for the resulting impairment, discounting the effect of all other factors…'" Scheffler's Case, 419 Mass. 251, 256 (1994), quoting L. Locke, Workmen's Compensation, § 321, at 375-376 (2d. 1981). An administrative judge's determination of earning capacity "must be supported

[2] M.G.L. c. 152, § 35D states, in relevant part:

For the purpose of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after injury, shall be the greatest of the following:

(1) The actual earnings of the employee during each week.
(2) The earnings that the employee is capable of earning in the job the employee held at the time of the injury, provided, however, that such job has been made available to the employee and he is capable of performing it. The employee's receipt of a written offer of his former job from the employer, together with a written report from the treating physician that the employee is capable of performing such job shall be prima facie evidence of an earning capacity under this clause.
(3) The earning the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it. The employee's receipt of a written report that a specific suitable job is available to him together with a written report from the treating physician that the employee is capable of performing such job shall be prima facie evidence of an earning capacity under this clause.
(4) The earnings that the employee is capable of earning.

by adequate findings grounded in competent evidence." O'Connor v. M.B.T.A., 35 Mass. Workers' Comp. Rep. 39, 45 (2021). The actual earnings of an employee "are but one factor in assessing earning capacity under § 35D and may establish the floor – not the ceiling – for the assignment of that figure." Perez v. Work, Inc., 20 Mass. Workers' Comp. Rep. 117, 118 (2006). Consideration should be given to "whether the employee is capable of earning more than his actual post-injury wages." Hartnett v. Hogan Regional Ctr., 23 Mass. Workers' Comp. Rep. 49-50 (2009).

Here, relying on the adopted medical evidence and credited testimony from the employee regarding his pain, the administrative judge determined that the employee was incapable of returning to both his prior positions as a mechanic and a bartender. (Dec. 10.) In reaching this conclusion, she specifically noted the adopted medical restrictions that limited the employee from bending or twisting at the waist, lifting greater than 30 pounds, carrying greater than 50 pounds if picked up at waist level, and walking more than 200 feet without stopping to rest. (Dec. 9.) After considering the employee's education, work experience, physical restrictions, and complaints of pain, she found the employee was capable of working in a light duty position, with his earnings commensurate with the wages he currently earns of $1,721.83 per week. (Dec. 10.)

The self-insurer asserts that the employee's testimony establishes that he is able to work at jobs earning more than his current wages, capable of working more hours and willing to resume work as a bartender, thus warranting the assignment of a higher earning capacity. (Self Ins. Br. 10-11.) We disagree. First, it is purely speculative that the employee was capable of earning more wages at the other jobs he had applied for with the employer. Although the upper end of the salary range for both positions exceed the earning capacity assigned by the administrative judge, the lower end of the salary range for each position is several hundred dollars a week less than the assigned earning capacity.[3] While it is possible that the employee could have earned more in either

[3] As previously noted, the salary range for the Store Control Supervisor was $1,546.38 to $2,159.71 and the salary range for the Supervisor Motor Equipment Repairman was $1,321.83 to $1,846.14, whereas the earning capacity assigned by the administrative judge was $1,721.83.

position, it is also possible that he could have earned less. As the administrative judge notes in her decision, there was no evidence submitted regarding what salary would have been given to the employee had he been selected for either position. (Dec. 6.) Contrary to the self-insurer's argument, the employee's belief that he could perform either job with his physical limitations does not establish that he would have been paid more than the assigned earning capacity if he had succeeded in securing either position.

Second, the employee's expressed belief that he would be able to perform either position or work overtime does not require the assignment of an increased earning capacity. No evidence was presented regarding what overtime would have been available to the employee in either position or what his salary rate would be. Similarly, the employee's attempt to secure work as a bartender does not render the administrative judge's decision on earning capacity arbitrary, capricious, or contrary to law, given that some of the duties he previously performed in this role are outside of his current physical restrictions. As noted in the decision, after contacting bars to see if he could return with his limitations, the employee received no offers. (Dec. 6.) The administrative judge was not "bound by the employee's optimistic view of his own work capacity." Guzman v. ACT Abatement Corp., 23 Mass. Workers. Comp. Rep. 291, 301 (2009). Instead, her assignment of an earning capacity was properly grounded upon the evidence at hearing, including the employee's education, work experience, physical limitations, and complaints of pain. Additionally, we are not persuaded by the self-insurer's argument that the administrative judge's decision should be reversed or remanded where the employee's earning capacity was based on actual wages and there was no medical evidence restricting the employee to a 40-hour work week. (Self. Ins. Br. 11.) The evidence indicates that overtime is not available in the employee's current light duty position, the employee did not receive job offers for the two jobs that he applied for which may have provided overtime and, even if he had been offered either position, there is no evidence to substantiate whether overtime would be available to him or what salary he would be paid. The administrative judge's decision to base the assigned earning

capacity on the employee's actual earnings is adequately supported and grounded in the evidence.

Accordingly, for the reasons set forth above, we affirm the decision of the administrative judge. The self-insurer is ordered to pay employee's counsel an attorney's fee pursuant to § 13A(6), in the amount of $1,866.87, plus necessary expenses.

So ordered.

Karen S. Fabiszewski
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***May 17, 2024***