COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 012231-15**

Neil Eversley	Employee
Marathon Moving Company	Employer
Vanliner Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Long)

This case was heard by Administrative Judge Segal.

APPEARANCES
Seth J. Elin, Esq., for the employee
William Murphy, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

CALLIOTTE, J. Both parties appeal from a decision awarding the employee the remainder of his § 34 benefits to exhaustion, § 34A benefits for approximately ten months, and ongoing § 35 benefits thereafter. The employee maintains the judge erred in finding him partially, rather than totally, incapacitated. The insurer argues that the judge erred in finding the employee was entitled to § 35 benefits at the maximum compensation rate, and by failing to address a written job offer made to the employee. We summarily affirm the decision with respect to the employee's argument. However, finding merit in the insurer's arguments, we recommit the case for further findings.

The employee, who was twenty-six years old at hearing, obtained a GED after leaving high school following the eleventh grade. Before his industrial accident, he had worked at a series of mostly physical jobs involving lifting from 40 to 80 pounds. At one of the jobs, he also worked for several months as a cashier. (Dec. 5.) At the time of his injury, he was employed as a mover/helper, which required him to lift and carry items weighing up to 100 pounds on his own, and to move heavier items in concert with other workers. (Dec. 5.)

On April 30, 2015, the employee injured his right major hand in a motor vehicle accident arising out of and in the course of his employment as a mover.[1] (Dec. 4, 5, and n. 3.) The employee subsequently underwent three surgeries to his hand, the last on October 9, 2018, to remove painful hardware. (Dec. 7-8.) He has not returned to work.

The insurer voluntarily paid § 34 benefits, eventually accepting liability for the injury. On June 9, 2017, based on a report from his then-treating physician, and the employer's offer of a job, the insurer terminated indemnity benefits. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3(2002)(permissible to take judicial notice of board file). The employee filed a claim for reinstatement, and, by conference order of November 7, 2017, the judge required the insurer to reinstate § 34 benefits from June 23, 2017, to May 1, 2018, to pay § 34A benefits from May 2, 2018, to May 1, 2019, and to pay § 35 benefits from May 2, 2019, forward. (Dec. 2.) Conservative medical care as recommended by Dr. Olarewaju Oladipo, was ordered, as was occupational therapy. Both parties appealed. (Dec. 2.) The insurer filed a motion for reconsideration of the conference order, and the employee, who had not claimed § 34A benefits at conference, filed a claim for those benefits prior to hearing. Rizzo, supra. The judge denied the insurer's motion and allowed the employee's joinder of the § 34A claim. Id. (Dec.3.)

Declaring the medical issues complex, and the § 11A report of Dr. Hillel Skoff inadequate because the employee had surgery after the impartial examination, the judge allowed the parties to submit additional medical evidence. (Dec. 3.) She then adopted parts of the opinions of two of the employee's treating physicians, Dr. Oladipo and Dr. Arnold Savenor. Dr. Oladipo opined in notes of August 3, 2017, and October 5, 2017, that the employee was unable to return to work due to his April 30, 2015, injury. Dr. Savenor, who began treating the employee in December 2017, recommended surgery, which he performed on October 9, 2018, to remove the painful hardware that had been

[1] The employee also injured his neck, low back, and knees, but those injuries are not at issue here. (Dec. 5, and n. 5.)

installed in the employee's two previous hand surgeries.[2] Following the surgery, the employee participated in occupational therapy and was given Lidex and Voltaren gel for pain relief. On March 25, 2019, Dr. Savenor opined that the employee was "unable to return to his pre-injury job as a mover," but "is able to lift items up to 35 pounds." (Dec. 8.) On August 9, 2019, he causally related the surgeries and the employee's current disability to the industrial accident. (Dec. 9.)

The judge found the employee cannot bring his right pinky finger and thumb together, which affects his grip strength and ability to carry items with his right hand. She credited his testimony that his pain level fluctuates daily. Making a fist and holding a telephone in his right hand for a long time both cause pain, as does driving for more than 30 minutes. The judge further credited the employee's testimony that he cannot do yard work or wash dishes because of his injury. (Dec. 9.) However, she did not credit his testimony that he could not presently work "because every time my hand swells up, like almost every other day, as soon as I go to use it, it's giving me a problem." (Dec. 10; Tr. 38.)

The judge found the employee's present disability and need for treatment causally related to his injury. Finding him capable of returning to work within the restrictions imposed by Dr. Savenor on March 25, 2019, she found him partially disabled as of the following day. Noting that neither party had submitted vocational evidence, she based this finding on the facts that the employee had earned a GED, is able to minimally use a computer (although he has never used one for a job nor has he ever worked in an office), has worked as a cashier, and drives his daughter and nephew to school on most days. (Dec. 10, 11.)

[2] Dr. Sang-Gil Lee performed the first surgery in which pins were installed, on November 30, 2015. Due to the employee's continued pain, Dr. Lee performed the second surgery, a fusion of his right thumb metacarpophalangeal joint, in September 2016. (Dec. 6, n. 4.) The surgery Dr. Savenor performed on October 9, 2018, involved, 1) removal of hardware-deep-right thumb – kwires and circlage wire; 2) MD use of Fluoroscopy; and 3) extensor pollicis longus tendon tenolysis. (Dec. 8.)

Accordingly, the judge awarded § 34 benefits at a rate of $246.00, based on an average weekly wage of $410.00 from June 9, 2017, to exhaustion; § 34A benefits at a rate of $273.33 based upon an average weekly wage of $410.00 from the date of exhaustion of § 34 benefits to March 25, 2019; and § 35 benefits at a maximum rate of $184.50, based upon an average weekly wage of $410.00 from March 26, 2019, to date and continuing, along with § 13 and 30 medical benefits for the employee's right hand injury.[3] (Dec. 12.)

The insurer first argues that the judge's findings on earning capacity are insufficient for us to determine whether she correctly applied the law and are thus arbitrary and capricious. By awarding the employee the maximum partial incapacity benefits of $184.50, the insurer maintains, the judge effectively found the employee had an earning capacity of $102.50, which is unrelated to the evidence in the record or to the minimum wage in the Commonwealth. It further argues that the employee had at least a full-time minimum wage earning capacity of $440.00 per week, which, given his low average weekly wage, would not entitle him to any indemnity benefits after March 25, 2019. The employee does not address this argument in his brief. We agree with the insurer that the judge has failed to make adequate subsidiary findings on the issue of earning capacity.

A judge must support an earning capacity determination "by explaining its 'source and application,' including a 'factual source' for the monetary figure." Eady's Case, 72 Mass. App. Ct. 724, 726 (2008). "The reason for the assignment of earning capacity must be clear from the factual findings and the decision maker's explanation." Id., citing Scheffler's Case, 419 Mass. 251, 258 (1994). "A finding of earning capacity that is not

[3] The decision does not explain why the judge used $410.00 as the employee's average weekly wage, even though the parties had stipulated to an average weekly wage of $407.77. (Dec. 3; Tr. 5.) However, neither party has raised this issue on appeal, so we do not address it. See 452 Code Mass. Regs. § 1.15(4)(a)3("The Reviewing Board need not decide questions or issues not argued in the brief").

grounded in specific subsidiary findings sufficient to enable us to discern any basis is purely arbitrary." Id. at 727-728; Dalbec's Case, 69 Mass. App. Ct., 306, 316 (2007).

Here, without assigning an earning capacity, the judge simply awarded § 35 benefits at the maximum compensation rate of $184.50, beginning on March 26, 2019. That rate is determined by taking 75% of the employee's § 34 compensation rate of $273.33.[4] However, the judge failed to perform any analysis as to why $102.50, which is the earning capacity necessary to produce the maximum partial compensation rate of $184.50, is the greatest amount the employee can earn under the provisions of § 35D. While the judge permissibly could have assigned a minimum wage hourly earning capacity without citing a "factual source" for her determination, Pobieglo v. Department of Correction, 24 Mass. Workers' Comp. Rep. 97, 100 n. 6 (2010), we do not know if that is what she did.[5] In addition, the judge's implicit finding that the employee was only able to work part-time, as a $102.50 earning capacity would require, is not supported by the findings or evidence. Although the evidence supports the judge's finding the employee was partially disabled and able to work with restrictions regarding his right hand, the judge has neither cited any evidence nor offered any explanation as to why the employee could not work full-time. Brandao v. Judge Rotenberg Education Center, 31 Mass. Workers' Comp. Rep. 87, 90 (2017)(recommittal required where judge failed to analyze or explain why employee was not capable of full-time work), citing Pasquale v. Benchmark Assisted Living, 29 Mass. Workers' Comp. Rep. 25, 29 (2015). Compare Breslin v. American Airlines Corp., 24 Mass. Workers' Comp. Rep. 123, 125

[4] General Laws c. 152, § 35, provides, in relevant part:

> While the incapacity for work resulting from the injury is partial, during each week of incapacity the insurer shall pay the injured employee a weekly compensation equal to sixty percent of the difference between his or her average weekly wage before the injury and the weekly wage he or she is capable of earning after the injury, but not more than seventy-five percent of what such employee would receive if he or she were eligible for total incapacity benefits under section thirty-four.

[5] As the insurer points out, even at the minimum wage rate, that works out to less than nine hours of work per week. (Self-insurer br. 14.)

(2016)(where judge finds employee remains totally incapacitated after exhaustion of § 34 benefits, she need not make additional findings to support an award of maximum available benefits pursuant to § 35). Accordingly, the judge's findings on earning capacity are arbitrary and capricious. On recommittal, she must make further findings on earning capacity so that we may determine with reasonable certainty whether she has correctly applied the law to "facts that could be properly found." Praetz v. Factory Mut. Eng'g. and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

The insurer next argues that, by failing to make findings regarding the insurer's job offer to the employee, the judge has failed to address all issues in controversy, as required by G.L. c. 152, § 11B. The employee counters that the judge was not required to make findings on all evidence submitted, as long as she acknowledges such evidence in her decision. Here, the judge listed as Exhibit 8 the "Marathon Moving Company Job Offer, 4/09/19," and both the employee and the operations manager for the employer, Aari Evert, testified regarding the job offer. (Tr. 36-38, 65-67.) However, the judge did not mention the job offer at all in her vocational analysis, implying that she disregarded it in determining the employee's earning capacity.

We have held that General Laws c. 152, § 35D,[6] " 'requires the judge, when confronted with a job offer, to determine whether the job offer is bona fide, within the employee's physical and mental capacity to perform, and bears a reasonable relationship to the employee's work experience, education, or training either before or after the employee's injury. G.L. c. 152, § 35D(3) and (5).' " Akoumianakis v. Stadium Auto Body, Inc., 17 Mass. Workers' Comp. Rep. 385, 391 (2003), quoting Thompson v. Sturdy Memorial Hosp., 10 Mass. Workers' Comp. Rep. 133, 136-137 (1996). See also O'Sullivan v. Certainteed Corp., 18 Mass. Workers' Comp. Rep. 16, 23 (2004)(same). In

[6] Section 35D provides four alternative means of determining earning capacity, and instructs that the greatest of the four be used: (1) the employee's actual weekly earnings; (2) the earnings the employee can earn in the job held at the time of the injury, provided the job is available and within the employee's capability; (3) the earnings the employee can earn in a particular suitable job provided it is made available and is within the employee's capacity; or (4) the earnings the employee is capable of earning.

addition, if the judge determines the job offer is for a specific job, the judge must make further findings as to whether the job remained available to the employee, and whether the employee could perform it. Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 368 (2005). On recommittal, the judge should address the job offer with regard to the relevant factors as set forth in these cases.

Accordingly, we recommit the case to the judge for further findings consistent with this decision. This requires that we vacate the award of § 35 benefits beginning March 26, 2019. However, we reinstate the § 35 conference order pending receipt of the judge's decision on recommittal. Carmody v. North Shore Medical Center, 33 Mass. Workers' Comp. Rep. 75, 81 (2019); see Lafleur v. Department of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Martin J. Long
Administrative Law Judge

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