COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 028421-23**

Nicholas Harris	Employee
City of Methuen	Employer
City of Methuen	Self-Insurer

REVIEWING BOARD AMENDED DECISION
(Judges Long, Fabiszewski and O'Leary)

The case was heard by Administrative Judge Bean.

APPEARANCES
Yolla Sabounji, Esq., for the employee
David A. DeLuca, Esq., for the self-insurer

LONG, J. The self-insurer appeals from the administrative judge's decision awarding § 35 temporary partial incapacity benefits, from the date of injury, March 31, 2023, to date and continuing, with an assigned earning capacity of $600.00 per week, or actual wages, § 13 and 30 medical benefits for the employee's back injury and the denial of the self-insurer's claim of fraud and penalties pursuant to § 14(2)[1]. Finding merit in the self-insurer's arguments regarding the judge's findings on earning capacity and

[1] M.G.L. c. 152, §14(2) provides in pertinent part:

> (2) If it is determined that in any proceeding within the division of dispute resolution, a party, including an attorney or expert medical witness acting on behalf of an employee or insurer, concealed or knowingly failed to disclose that which is required by law to be revealed, knowingly used perjured testimony or false evidence, knowingly made a false statement of fact or law, participated in the creation or presentation of evidence which he knows to be false, or otherwise engaged in conduct that such party knew to be illegal or fraudulent, the party's conduct shall be reported to the general counsel of the insurance fraud bureau. Notwithstanding any action the insurance fraud bureau may take, the party shall be assessed, in addition to the whole costs of the proceedings and attorneys' fees, a penalty payable to the aggrieved insurer or employee, in an amount not less than the average weekly wage in the commonwealth multiplied by six…

§ 14(2), we recommit to the administrative judge for further findings consistent with this opinion.

The employee, Nicholas Harris, was 42 years old at the time of hearing and has worked at various heavy jobs for the City of Methuen since 2001, most recently as a food service deliveryman. In that most recent role, the employee would load a cargo van with boxes of food and deliver the products to schools and pre-schools in Methuen, as well as to the local YMCA. (Dec. 122.) For the past number of years, the employee has also worked part-time as a self-employed seasonal landscaper and irrigation systems installer. A couple of years ago, the employee started Harris Irrigation Company which installs irrigation systems. He also worked as a snowplow operator during winter snowstorms. Prior to March 2023, he prepared estimates, bid on jobs and installed irrigation systems. Although he did much of the physical work himself, he also hired individuals to perform the irrigation installation. (Dec. 122; Tr. I 57.)

On Friday, March 31, 2023, while working for the City of Methuen, the employee suffered an industrial accident while lifting, causing him to leave work early. The employee did not immediately report the injury, but six days later he reported the accident to his supervisor via text message, and, on April 26, 2023, he brought a doctor's note to human resources. (Dec. 122-123.) The employee underwent diagnostic testing that revealed a bulging disc, which his doctor suggested would not be improved with surgery. He received a cortisone shot and physical therapy, and surgery has now been recommended. (Dec. 123.)

Procedurally, the employee's initial claim for benefits was denied at conference and, following his appeal, the employee was examined on May 22, 2024, by the impartial physician assigned pursuant to § 11A, Ralph R. Wolf, M.D. The judge allowed additional medical evidence at the hearing, which was held on December 4 and December 6, 2024. (Dec. 122.) Each party submitted additional medical evidence at the hearing, along with

non-medical exhibits which included an Employee's Earning Report -Form 126[2] (Self-ins. Non-medical Ex. 4.); Records of Salem Cooperative Bank (Self-ins. Non-medical Ex. 15.); and Records of Nancy Siopes and Gerard Associates (Self-ins. Non-medical Exs. 16 and 18.) The employee claimed § 34, temporary total incapacity benefits, from April 1, 2023, to April 30, 2024, § 35, temporary partial incapacity benefits, from May 1, 2024, to the present and continuing and medical benefits pursuant to §§ 13 and 30. The self-insurer sought a denial of all claims and penalties pursuant to § 14(2). (Dec. 120.)

Throughout the course of the hearing and as part of its defense of the claim, the self-insurer repeatedly addressed the employee's self-employment and the Form 126. In the hearing decision, the judge made the following subsidiary findings of fact regarding the employee's self-employment:

> Harris Irrigation Company, continued to bid on jobs and install irrigation systems throughout the spring, summer and fall of 2023. The company website remains active. Irrigation installation is seasonal work that generally runs from the end of April through the end of October. It is not as heavy a job as one might imagine. The company uses a machine that digs the trenches for the irrigation lines eliminating much of the digging. The employee continued to do light and sedentary tasks for the company and hired additional workers [to] do the physical work. The company provides no services to customers from November to March or April. However, the employee continued to receive payment for jobs done in the summer and fall into November 2023. He stated that he made no money from his irrigation company in 2023. All of his income from the company went to pay for supplies and wages paid to his workers. Prior to his industrial accident he

[2] Form 126 is the Employee's Earning Report and is the "form approved by the department" referenced in M.G.L. c. 152, § 11D(1), which provides:

> (1) Any employee entitled to receive weekly compensation under this chapter shall have an affirmative duty to report to the insurer all earnings, including wages or salary earned from self-employment. Insurers shall notify employees of said duty on a form approved by the department. Such form shall indicate that failure to report any earnings may subject the employee to civil or criminal penalties, and shall further indicate that failure to file an earning's report on a form approved by the department within thirty days of an insurer's request for such filing may result in the insurer's suspension of the employee's weekly benefits; provided, however, that no employee shall be required to file an earnings report more often than once every six months.

> made about $1000 a week. In the winter of 2023-2024 he plowed snow for which he was paid. He did not report that income which he conceded was a mistake. In prior years he called in sick on snowy days when he could make money plowing.
>
> The self-insurer hired a private investigative agency to surveille the employee. He was seen on video taken by private investigators raking, using a leaf blower, trimming hedges with a power trimmer and handling a shovel. No heavy exertion was witnessed. …Chris Melito, one of the workers used by the irrigation company saw the employee on the company's job sites often in 2023 and 2024. But he was not at every job. He appeared to be in pain while on the job and did little more than set up the jobs. Irrigation workers customarily wore work boots, but the employee was seen on the video wearing slip-on shoes, sneakers or sandals.

(Dec. 123.) The judge thereafter made the following general findings regarding the employee's self-employment and testimony:

> While I credit the employee's testimony generally, there were some inconsistencies. He claimed §34 temporary total disability compensation while working as a snow plow operator and while running his irrigation business. He admitted his mistake in not reporting his snow plowing money earned during the winter of 2023-2024. I find that he did work for his irrigation installation company and that he did plow during the many months after his industrial accident. However, I find that given that he had to hire extra workers to perform many of the tasks of irrigation installation and that he had to buy supplies to perform the jobs, he made not more than a trifling amount of money through his irrigation business. The main benefit that he likely received for his work for his irrigation installation company since his industrial accident is the continuation of his company as an ongoing concern. I find that there was no intent to commit fraud within the meaning of § 14(2) and dismiss that claim. While the employee only made a trifling amount of money, if that, after the date of his industrial accident, he demonstrated an ability to perform light duty work. Therefore, I find that he has had at least a full time, minimum wage earning capacity since his industrial accident. His § 35 partial disability rate is $600.00 a week or actual wages, whichever is higher.

(Dec. 125.)

The self-insurer objects to the assigned earning capacity and argues "[t]he judge erred by failing to credit the substantial evidence demonstrating the employee's continued employment with his own company, Harris Irrigation, after the alleged incident." (Self-insurer br. 18.) Further, "[t]he employee's continued income generation

through his irrigation business, subcontracting arrangements and contract work … plainly demonstrated preserved earning capacity of more than a trifling amount." (Self-ins. br. 23.) While the judge may or may not have erred as alleged by the self-insurer, the decision lacks any cogent analysis of the "substantial evidence" of Harris Irrigation's income, namely the bank records from Salem Cooperative Bank and other income documents that were introduced into evidence by the self-insurer. (Exhibits 15, 16 and 18.) Despite the documented evidence of income to Harris Irrigation during the claimed periods of incapacity, there are no findings on the amount of money paid to the employee's company during the relevant time period. The judge's finding that "he made not more than a trifling amount of money" is wholly without support in light of the unresolved analysis of the employee's self-employment earnings.[3] "Proper decisions of the single member and the board must contain conclusions which are adequately supported by subsidiary findings which are not lacking in evidential support or tainted by error of law. Ballard's Case, 13 Mass. App. Ct. 1068, 1069 (1982). Similarly, the judge's finding that "[t]he main benefit that he likely received for his work for his irrigation installation company since his industrial accident is the continuation of his company as an ongoing concern" also lacks any evidential support because the actual income evidence was not analyzed. An administrative judge's decision must reach conclusions that are adequately supported by subsidiary findings of fact and rulings of law,

[3] The only direct testimony from the employee on this issue is found at Tr. I, pg. 47:

> By Attorney Sabounji:
> Q. Did you have to hire additional employees to help?
> A, I did.
> Q. Has that significantly decreased the net money that you are making from Harris Irrigation?
> A. Yes. Yes.

As indicated, the judge did not ascertain either the gross or net proceeds for Harris Irrigation, nor did he indicate whether he credits this testimony or not, which is a problem that frequents the decision.

"[f]indings without evidentiary support cannot stand." Kilcullen v. San Vel Concrete Corp., 4 Mass. Workers' Comp. Rep. 182, 183-184 (1990).

We also note:

> Self employment earnings are material to an inquiry concerning earning capacity, whether or not begun before the industrial injury. Determination of an earning capacity requires a judge to consider 'the whole monetary result of a reasonable use of all his powers, mental and physical, whether working for others or for himself, and whether his earnings are called 'wages' in common speech or not' Federico's Case, 283 Mass 430, 432 (1993). See Hawkins v. General Motors, 1 Mass. Workers' Comp. Rep. 251, 253 (1987). See also Dabelle v. News Distributors, 9 Mass. Workers' Comp. Rep. 114 (1995)(approving a judge's consideration of self-employment earnings in determining earning capacity where the employee had been self-employed while partially incapacitated by an industrial accident which prevented him from working at his job with the insured employer).
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> * * *
>
> It [is] the judge's responsibility to use his knowledge and judgment based on an inclusive variety of vocational factors in determining [the employee's] earning capacity**.** See Frennier's Case, 318 Mass. 635, 639 (1945); LaChance v. Globe Newspapers, 1 Mass. Workers' Comp. Rep. 282, 285 (1988).

Rodgers v. Mass. Dept. of Public Works, 9 Mass. Workers' Comp. Rep. 539, 541 (1995).

Further,

> gross receipts from self-employment alone are not a sufficient basis for determining earning capacity….
>
> What the employee is capable of earning in self-employment is ordinarily represented by the *net earnings* of his business unless there are other circumstances from which the judge may infer a different conclusion, such as that the employee's skills necessary to run his own business would somehow command more if applied in the open labor market. Mulcahy's Case, 26 Mass. App. Ct. 1 (1988).

Rodgers, at 542(emphasis original.) We observe that usually this relevant information may be found in the employees' business books, banking statements or income tax

documents. Since the judge's conclusions here are not "adequately supported" we recommit so that findings with such support can be made.

The self-insurer also appeals the judge's finding that "there was no intent to commit fraud within the meaning of § 14(2)" and argues:

> the evidence strongly supports a finding of intent to defraud. The employee reported zero income on his Form 126 from November 2023 through October 2024, despite admitting to earning income through his irrigation business. See Tr. Dec, 2024, p. 57, 11. 8-13. He further admitted receiving payment for snowplowing in January 2024, which he also failed to report on Form 126. See Tr. Dec. 4, 2024, p. 55-58.

(Self-Ins. br. 25.) The self-insurer's argument may have merit, however, the judge completely ignores the Form 126 and summarily concludes "I find that there was no intent to commit fraud within the meaning of § 14(2) and dismiss that claim." (Dec. 125.) Here again, there is no cogent analysis of how or why the judge arrived at this finding and, as such, it cannot stand. Without further findings and analysis we are unable to perform our appellate function. Praetz v. Factory Mutual Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45 (1993). In Murphy v. Trans World Airlines, 11 Mass. Workers' Comp. Rep. 94 (1997), we outlined the required inquiry in § 14(2) situations, where:

> Pursuant to the amended version of § 14(2), the judge [is] required to determine whether the employee . . . 1) concealed or knowingly failed to disclose that which is required by law to be revealed; 2) knowingly used perjured testimony or false evidence; 3) knowingly made a false statement of fact or law; 4) participated in the creation or presentation of evidence which he knew to be false; or 5) otherwise engaged in conduct that such party knew to be illegal or fraudulent.

Murphy, at 99.

While the judge found the employee "admitted his mistake in not reporting his snow plowing money earned during the winter of 2023-2024," he does not directly, or indirectly, address the Harris Irrigation income and the impact/non-impact of this evidence with respect to the Form 126, which was admitted into evidence at the hearing. The judge acknowledged Harris Irrigation as an ongoing enterprise during the claimed

period of incapacity, yet he did not address the Form 126 at all. On recommittal, the judge must reconcile the Harris Irrigation income with the Form 126.

Moreover, we note:

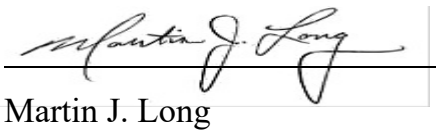
> [t]he present case is governed by principles already addressed in various reviewing board decisions. First, we have concluded that the failure to report earnings on the appropriate form approved by the department not only is a violation of § 11D(1), but also constitutes 'participat[ion] in the creation … of evidence which [the employee] knows to be false…' § 14(2).

Carucci v. S&F Concrete, 13 Mass. Workers' Comp. Rep. 405, 410 (1999). We further note that:

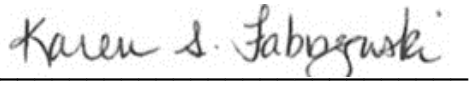
> [a]rguendo, retraction or correction of a false statement could conceivably, under appropriate circumstances, prevent the imposition of a § 14(2) penalty. However, just as with the crime of perjury, under §14(2), a retraction or correction does not necessarily exculpate a party or neutralize the false evidence previously created. The recantation or correction is only effective if it occurs *before* it has become manifest to the party that her falsity has been or will be exposed. See C.J.S., Perjury § 11 (1987).

Pirelli v. Caldor, Inc., 11 Mass. Workers' Comp. Rep. 380, 382 (1997)(emphasis original). Accordingly, we vacate the judge's finding of the employee's earning capacity and recommit the case to the administrative judge to further assess the § 14(2) claim and determine the employee's earning capacity in accordance with this decision. On recommittal, the judge must make sufficiently specific subsidiary findings to support his ultimate determination on the period of incapacity, if any, so that we may determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found. Praetz, supra. The judge may take additional relevant evidence to determine the net earnings from his business. See, Rodgers at 542; Varano's Case, 334 Mass. 153 (1956). In the meantime, the underlying conference order is reinstated with regard to the payment of weekly indemnity benefits only. See, LaFleur v. Dept. of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

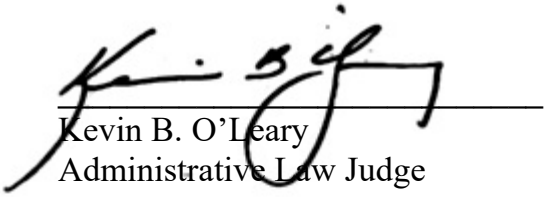
So ordered.



Martin J. Long
Administrative Law Judge



Karen S. Fabiszewski
Administrative Law Judge



Kevin B. O'Leary
Administrative Law Judge

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