COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 029730-99**

Patrick Saletnik	Employee
I-Log	Employer
American Auto Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Wilson and Carroll)

APPEARANCES
James D. Chadwell, Esq., for the employee
Kathleen M. Greeley, Esq., for the insurer

LEVINE, J. The employee appeals from a decision in which an administrative judge denied his claim for partial incapacity benefits. The employee challenges the judge's conclusion that his receipt of a $97,691.00 bonus check during the period in which he was claiming § 35 benefits reflected a general ability to earn, i.e., "[t]he earnings that the employee is capable of earning," under G. L. c. 152, § 35D(4). (Dec. 3-4.) We affirm.[1]

The employee is a computer software salesman, who suffered a work-related injury on August 1, 1999. On January 17, 2000, the employee returned to work at twenty hours per week, increasing to thirty hours per week on August 16, 2000. The insurer paid § 34 benefits while the employee was out of work, and § 35 benefits to the employee from January 17, 2000 through May 15, 2000. The employee received a bonus check from the employer in the amount of $97,691.00 on July 31, 2000. (Dec. 2.) The employee is paid biweekly; he contends that the $97,691.00 check should have barred receipt of § 35 benefits for only one bi-weekly pay period. The employee contends that he should have otherwise continued to receive § 35 benefits for the remainder of the

[1] We summarily affirm the decision as to the employee's claim for a § 8(5) penalty.

weeks after his injury when he worked fewer than his regular forty hours. The judge disagreed:

> Because of the structure of the sales and commission work done by Mr. Saletnik, the standard formula of weekly wages cannot be applied here. There are many weeks both before and after his date of injury that Mr. Saletnik was paid less than his Average Weekly Wage, and weeks where he was paid far more.
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> [O]n his return to work, payment of partial benefits must be guided by Section 35, which reads in pertinent part:
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> "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 . . ." (emphasis added) Section 35D states the weekly wage the employee is *capable of earning*, if any, after the injury shall be defined as the greatest of one of four different measures, including one that reads simply "(4) The earnings that the employee is capable of earning."
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> The check issued to the employee on July 31, 2000 in the amount of $97,691.00 is not reflective just of the employee['s] actual earnings . . . in those two weeks, but of his general ability to earn in the weeks and months leading up to it. The workers' compensation system is meant to be one of wage replacement. I find that by May 15, 2000, Patrick Saletnik was indeed *capable of earning* his previous average weekly wage, even if in those particular weeks he did not, and therefore no further weekly benefits are due.

(Dec. 3-4.)

There was no error. The employee's $97,691.00 bonus check was in the nature of "earnings," which are to be considered in determining the employee's entitlement to § 35 benefits. See 5 A. Larson, Workmen's Compensation § 60.12(a) (1997)(in computing actual earnings, bonuses should be included). Cf. Bradley's Case, 46 Mass. App. Ct. 651, 654 (1999)(commissions included in determination of average weekly wage). The only question is whether the bonus should be taken as representing earnings for only two weeks, or as representing earnings for the entire period of claimed § 35 benefits. The recent Appeals Court opinion in Cassola's Case, 54 Mass. App. Ct. 904 (2002), answers

this question. In that case, an automobile salesman earned more than his pre-injury average weekly wage in some weeks and less in other weeks. The court analyzed the employee's § 35 benefit entitlement not in terms of a week-by-week assessment of actual earnings (argued – as here – by the employee in that case), but as a whole:

> The employee has "good" earning weeks and "bad" earning weeks. His "bad" earning weeks are below his pre-injury average weekly wage, while his "good" weeks exceed it. In 1996, the employee earned $38,647.62, averaging $743.22 per week. In 1997, he earned $36,345.20, averaging $698.95 per week. The average for each year exceeds the employee's pre-injury average weekly wage of $549.97.
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> The judge . . . rejected the employee's argument that he should be paid G. L. c. 152, § 35, benefits for the weeks that his earnings fell below his pre-injury average weekly wage because the judge did not find that the employee's low earning weeks were attributable to his injury. Rather, the administrative judge determined that "the nature of the business of selling automobiles is such that a salesman's income will naturally fluctuate," and therefore, the employee will have "good" and "bad" earning weeks.
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> [T]he administrative judge['s] . . . discussion clearly shows that he conducted the analysis required by §§ 35 and 35D, and that his decision to deny and dismiss the employee's claim was based on "[t]he earnings that the employee is capable of earning," G. L. c. 152, § 35D(4), which were in excess of his pre-injury average weekly wage. There was no error.

Id. at 904-905. Cassola is indistinguishable, in all pertinent aspects, from the instant case.

The decision is affirmed. So ordered.

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Frederick E. Levine
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: November 21, 2002