COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO. 030914-04

Richard Pobieglo	Employee
Department of Correction	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Fabricant)

This case was heard by Administrative Judge Rose.

APPEARANCES
Rickie T. Weiner, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee on brief
Teresa Brooks Benoit, Esq., for the employee at oral argument
Patricia G. Noone, Esq., for the self-insurer

HORAN, J. The employee appeals from a decision awarding him §§ 34 and 35 incapacity benefits, but denying his § 30 claim for treatment of an alleged psychiatric condition. We recommit the case for further findings of fact regarding the determination of the amount of the employee's earning capacity. We otherwise summarily affirm the decision.

The facts found pertinent to the earning capacity issue are as follow. The employee, age fifty-one at hearing, attended one year of college. In 1987, he was hired by the Massachusetts Department of Mental Retardation as a recreational therapist. In 1999, he became a recreational officer for the Massachusetts Department of Correction. The judge found this job entailed organizing and supervising sporting activities for the inmates, and breaking up an occasional fight. (Dec. 3-4.)

On September 30, 2004,[1] the employee injured his neck and left arm while attempting to break up a fight between two inmates.[2] (Dec. 4.) The employee had surgery on his neck in February, 2008. The judge found that while "the employee suffers from some degree of pain, soreness, and restricted movement in his neck, his complaints at hearing as to his condition post surgery, are exaggerated and not credible." (Dec. 5.) The judge adopted the opinion of the § 11A impartial medical examiner, Dr. Demosthenes Dasco, that the employee's "chronic neck pain with cervical radiculopathy on the left side due to herniated discs at C5-C6 and C6-7" rendered him unfit to return to his pre-injury work.[3] (Dec. 6-7.) Adopting the opinion of Dr. Errol Mortimer, the judge found that as of September 13, 2008, the employee had a partial medical disability and could return as of that date to "full-time work as an instructor or in an office setting with limited lifting up to 25 lbs. and no lifting above shoulder level."[4] (Dec. 7.) The judge then addressed the extent of the employee's incapacity.

Finding the employee "articulate and intelligent," and citing his prior work experience, the judge concluded the employee's transferable skills rendered him capable of performing entry-level management work. (Dec. 8.) The judge then determined the amount of the employee's earning capacity, concluding:

> He also retains the ability to work as a Recreation Director for a city or town. I find that such positions have an entry-level salary of $700.00 per week, and pursuant to Section 35D, the employee's earning capacity is established at that figure commencing September 13, 2008. . . . My vocational analysis is based on my training, experience and knowledge

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[1] The hearing decision references a September 24, 2004 injury date, (Dec. 4), only later to reference the correct date of injury, September 30, 2004. (Dec. 7). The judge noted the date of injury as September 30, 2004 at the hearing. (Tr. 3.)

[2] The parties stipulated the employee's average weekly wage at that time was $1,099.

[3] The judge also adopted the opinion of Dr. Hyman Glick to this effect. (Dec. 7.)

[4] The judge adopted the restrictions placed upon the employee by Dr. Dasco. (Dec. 7.)

> as an Administrative Judge as to the open labor market in Western and Central Massachusetts.

(Dec. 8.) The judge awarded the employee § 34 benefits at the weekly rate of $659.40, from July 1, 2007 to September 12, 2008, and § 35 benefits at the weekly rate of $239.40, from September 13, 2008 to date and continuing, based on the assigned $700 earning capacity. (Dec. 8-9.)

On appeal, the employee argues the judge's decision to assign him a $700 earning capacity was arbitrary, capricious and contrary to law, because the decision, and record, are void of any factual source or reasoned explanation to support that amount. We agree. As the court noted in Dalbec's Case:

> The decision maker should explain the source and application of an earning capacity attributed to the worker in a vacuum of evidence from the parties. A concise explanation will assure compliance with the requirements of the Administrative Procedures Act and with the bedrock principle of visible rationality. A monetary figure cannot emerge from thin air and survive judicial review as a mystery.

69 Mass. App. Ct. 306, 317 (2007); accord Eady's Case, 72 Mass. App. Ct. 724 (2008). The self-insurer posits the decision does contain an adequate factual source, to wit: the judge's self-proclaimed expertise. See Mulcahey's Case, 26 Mass. App. Ct. 1 (1988)(in the absence of evidence regarding amount of an employee's earning capacity, judge may assign earning capacity consistent with wages earned at lower end of wage scale). The judge did base his vocational analysis, and his $700 earning capacity finding, on his "training, experience and knowledge as an Administrative Judge as to the open labor market in Western and Central Massachusetts." (Dec. 8.) However, we agree with the employee that, given the amount of the earning capacity assigned, the judge's acquired vocational expertise, standing alone, fails to satisfy the "visible rationality" requirement. Dalbec, supra.. We note the Appeals Court, in a memorandum and order under rule 1:28, rejected the argument advanced by the insurer here. Thompson's Case, 74 Mass. App. Ct. 1105 (2009)(judge's reliance on personal experience

adjudicating claims did not constitute a factual source or reasoned explanation for $1,100 earning capacity); see also Mahoney's Case, 76 Mass. App. Ct. 1108 (2010)(memorandum and order pursuant to rule 1:28)(judge's summary reference to employee's education, training and work history, without more, insufficient as rational basis to support $360 earning capacity).[5]

What we also glean from Dalbec, and its progeny, is that due process considerations entitle the parties, *in advance* of a decision, to have reasonable notice of the evidentiary sources relied upon by the judge to determine the amount of the employee's earning capacity.[6] Once apprised of the identity of these evidentiary sources, due process requires, at a minimum, that the parties be given an opportunity to state their objection(s) respecting each source, to offer testimony concerning each source, to cross-examine witnesses testifying in reliance upon each source, and to offer, if they so choose, additional evidence bearing on the earning capacity issue.[7]

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[5] We note the judge's decision in this case was filed on December 5, 2008, before these unpublished memoranda and orders were issued.

[6] "A monetary figure cannot emerge from thin air and survive judicial review as a mystery." Dalbec, supra at 317. Given the court's endorsement of the approach followed in Mulcahey, a "minimal" monetary amount is well within an administrative judge's "own judgment and knowledge." Dalbec, at 316-317; see footnote 7, infra. The Dalbec decision did not overrule Mulcahey; in fact, it cited Mulcahey on this point with approval. Dalbec, supra at 317. In a footnote, the Dalbec court noted the $100 earning capacity amount assigned in Mulcahey had a factual source because it was "an estimate of a minimal capacity" for work performed at the low end of the wage scale. Dalbec, supra at 317, n.11. We regard this as an acknowledgment that judges are permitted to take judicial notice of minimum wage laws as a "factual source" for earning capacity determinations without prior notice to the parties.

[7] The Mulcahey court recognized why judges often encounter a void in the evidence addressing the amount of the employee's earning capacity: "Neither the insurer, trying to prove that the employee is able to return to his usual line of work, nor the employee, trying to prove his total incapacity, is likely to proffer evidence that, if persuasive, would tend to compromise its or his position." Mulcahey, supra at 4-5.

Accordingly, we vacate the judge's earning capacity determination, and recommit the case for a decision anew on that issue only.[8] We otherwise summarily affirm the decision.

So ordered.

Mark D. Horan
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

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[8] "On remand, the administrative judge may consult information already present in the case file, or reliable publications of labor statistics, or additional evidence." Dalbec, supra at 318, n.14.