

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO.:** 036450-94

Robert Healy  
Richard Burbridge  
AIM Mutual Insurance Company

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**

(Judges Horan, Costigan and McCarthy)

**APPEARANCES**

Robert L. Noa, Esq., for the employee at hearing  
James N. Ellis, Esq., for the employee on appeal  
Michael K. Landman, Esq., for the insurer

**HORAN, J.** Both parties appeal from a decision awarding the employee compensation benefits for a physical injury, but denying his claim for compensation for the alleged psychiatric sequela of that injury. We agree with the insurer that the evidence does not support an ongoing award of temporary total incapacity. Therefore, we vacate the § 34 award and recommit the case.

On April 2, 2004, the employee, a carpenter, was using a spray bottle of Clorox bleach to remove mold and fungus from a basement during a demolition job. He developed a cough, shortness of breath and lightheadedness. The employee returned to work on April 8, 2004, and was "working up on a ladder removing planks when he experienced trouble breathing and fell. . . ." (Dec. 5.)

The employee filed a claim for a physical injury based on his chemical exposure. Following a § 10A conference, the administrative judge ordered the insurer to pay § 35 benefits from May 20, 2004, through January 5, 2005. (Dec. 2.) Both parties appealed. (Dec. 3.) Prior to hearing, the employee was allowed to join a claim for a psychiatric injury, which allegedly resulted from his work-related physical injury. (Employee br. 2; Ins. br. 2.)

Dr. Thomas Morris examined the employee pursuant to § 11A with respect to his physical injury. The judge allowed the parties to submit additional medical evidence to address the "gap" period between the date of injury and the impartial medical examination, as well as additional medical evidence to address the employee's claimed psychiatric injury. (Dec. 4.)

At the hearing, the employee complained he suffered from shortness of breath on exertion and severe coughing. He testified his breathing difficulties are the primary reason for his inability to return to either of the jobs held at the time of his industrial accident.<sup>1</sup> (Dec. 5, 7.) He also testified to suffering from depression and anxiety as a result of his physical injury. (Dec. 7.)

The judge adopted Dr. Morris's opinion that the employee suffered a chemical injury to his airways on April 2, 2004, resulting in a syndrome of cough and exertional dyspnea. (Dec. 8; Ex. 1, p. 2.) He also adopted Dr. Morris's opinion that the employee is unable to continue with vigorous forms of employment, such as construction work or lobster fishing. Id. Based on the employee's work history, lack of training, age (forty-five) and education (high school graduate), the judge found him totally incapacitated and awarded § 34 benefits from May 20, 2004, to date and continuing, based on an average weekly wage of \$414.00. (Dec. 13-14, 18.)

With respect to the employee's alleged psychiatric condition, the judge adopted the opinion of the insurer's medical expert, Dr. Robert Weiner, who, citing numerous non-work related stressors in the employee's life, opined he was experiencing anxiety and depression but was "not psychiatrically disabled from employment because of the industrial incidents of April 2, 2004, and April 8, 2004." (Ex. 5, p. 2; Dec. 10.)

We summarily affirm the decision on the issues raised by the employee on appeal, but agree with the insurer that the case must be recommitted for the judge to re-examine the extent of the employee's incapacity. The judge found the employee totally incapacitated from May 20, 2004, forward. However, at the hearing the employee testified he had been earning \$75.00 per week driving children to and from school. (Tr. 62.) He estimated working eight hours a week, and assumed he could do this type of work, if available, on a full time basis. (Tr. 62-63.) Section 35D requires the assignment of an earning capacity based on the greatest amount the employee is capable of earning.<sup>2</sup> Where an employee has actual post-injury earnings in any given week, those

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<sup>1</sup> The employee was also self-employed as a commercial lobsterman. (Dec. 7; Tr. 8-9.)

<sup>2</sup> General Laws c. 152, § 35D, provides, in pertinent part:

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

earnings establish the minimum earning capacity a judge must assign for that week. G. L. c. 152, § 35D(1); Eason v. Symmetricom Corp., 21 Mass. Workers' Comp. Rep. 123, 125 (2007); Perez v. Work, Inc., 20 Mass. Workers' Comp. Rep. 117, 118 (2006). The employee may, in fact, have an earning capacity higher than \$75.00 per week. G. L. c. 152, § 35D(4). Accordingly, we recommit the case for the judge to make further findings on the extent of the employee's incapacity.

So ordered.

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Mark D. Horan  
Administrative Law Judge

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Patricia A. Costigan  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

**Filed:** June 3, 2008

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(1) The actual earnings of the employee during each week.

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(4) The earnings that the employee is capable of earning.