COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 007160-20**

Robert Kilgore	Employee
City of Boston	Employer
City of Boston	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Fabiszewski)

The case was heard by Administrative Judge Dooling.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Kerry G. Nero, Esq., for the self-insurer

FABRICANT, J. The employee appeals from the administrative judge's award of Section 35 benefits at the weekly rate of $562.54, based upon an average weekly wage of $1,657.56 and an earning capacity of $720.0 per week, from August 3, 2020, to date and continuing. (Dec. 12.) The employee raises two related issues on appeal: 1) the finding of an earning capacity of $18.00 per hour for 40 hours per week; and 2) the assignment of the earning capacity from August 3, 2020, to date and continuing. Because the adopted evidence supports the judge's findings on both issues, we affirm the decision.

The employee graduated from UMass Boston *summa cum laude* with a bachelor's degree in psychology in 2006, and later earned a Master of Science in special education from Bay Path University in 2015. From 2010 to 2018, he worked at the Guild for Human Services (the Guild), a residential intensive behavioral program for students with a wide range of intellectual and psychological disabilities. He held several positions during that time, including assistant residential manager, residential manager, and special education lead teacher, and he was trained in Crisis Prevention Intervention which

included non-violent crisis intervention, physical restraints and physical blocking. (Dec. 5-6.)

While at the Guild, the employee was frequently in situations that required physically restraining aggressive male students. He estimates that he has restrained students thousands of times and has been assaulted hundreds of times. (Dec. 6.) In 2017, a student assault resulted in his first workers' compensation claim where he was out of work with related injuries for six to nine months. (Dec. 6, Exhibit 12.)

From September 2018 until March 2020, the Employee worked as a special education teacher for the Boston Public Schools. During the 2018-2019 school year, the employee worked at the Community Academy of Science and Health (CASH) in Dorchester, MA. The following school year, he worked at the Timilty School. (Tr. 1, 58, 61.)

On March 10, 2020, the employee was injured by one of his students during a violent confrontation in his classroom. The employee had instructed a female eighth-grade student to remove her headphones, which were prohibited in class. (Dec. 6.) When she refused to do so, the employee called the school Dean to come to the classroom. (Tr. 1, 70.) The student then physically swiped all of the employee's belongings off of his desk and called him a "dumbass bitch," at which point the employee instructed her to leave the room. The student refused to leave, and instead began to strike the employee on his head, neck and shoulders with her fists, at which point the employee attempted to leave the classroom. (Dec. 6.)

As a result of the attack, the employee suffered injuries to his head and neck, experienced flashbacks of prior student assaults, suicidal ideation, depression, and panic attacks. (Dec. 6-7; Tr. 1, 75, 80.) The employee's present claim was the subject of a § 10A conference before another administrative judge on August 25, 2020, yielding an Order of Payment for § 34 benefits of $994.54 per week (based upon an average weekly wage of $1,657.56) from March 11, 2020, to August 22, 2020, followed by § 35 benefits at a rate of $745.90 per week (based upon an earning capacity of $414.39 per week) from

August 23, 2020, to date and continuing, plus medical benefits pursuant to §§ 13 and 30. (Dec. 2-3.)

Both parties appealed that order[1] resulting in a two-day hearing *de novo* on December 27, 2021, and April 15, 2022.[2] The record closed on July 8, 2022. (Dec. 3.)

The employee was examined by the § 11A physician, Michael Braverman, M.D., on April 1, 2021. The judge specifically adopted the following parts of Dr. Braverman's opinion:

- The diagnoses are ongoing signs and symptoms of significant PTSD, major depression, and anxiety disorder with panic.
- The Employee's treatment has been reasonable and appropriate.
- The Employee's psychiatric disability prevents him from returning to his former employment as a schoolteacher.
- The March 10, 2020, work injury is the major and predominant cause of his current depression and the major and predominant cause of the exacerbation of his pre-existing psychiatric conditions.

(Dec. 7; Exhibit 1, p. 5.)

On the self-insurer's motion, the judge opened the record for additional medical evidence due to the complexity of the case. (Dec. 7.) David S. Kroll, M.D. examined the employee for the self-insurer on July 30, 2020, and December 8, 2021, and the judge adopted the following portions of his opinion from his written report of August 3, 2020:

- The Employee should not return to a work setting where he is expected to manage a classroom of disruptive students or manage disruptive or volatile people in general.

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[1] The employee's appeal sought continuous and ongoing § 34 benefits with only a brief period of § 35 benefits from July 20, 2021 to November 27, 2021, with an earning capacity of just $96.12. (Dec. 3.)

[2] Herein, the transcript for the December 27, 2021, proceeding is referenced as "Tr. 1," and the transcript for April 15, 2022, is referenced as "Tr. 2."

- There is no psychiatric condition that would prevent the employee from working in a remote setting where he is not expected to interact with potentially disruptive or volatile people.

(Dec. 8; Exhibit 6.) The judge also adopted Dr. Kroll's opinion, based on his original and follow up examinations, that the employee has exaggerated his symptoms. (Dec. 8; Exhibits 6, 7 and 8.)

The employee treated from March 23, 2020, through July 8, 2020, at Arbour Counseling Services in Jamaica Plain with Kendra Knauf, LMHC. (Dec. 7-8; Exhibit 17.) Ms. Knauf diagnosed the employee with recurrent and moderate major depressive disorder, generalized anxiety disorder, and PTSD, with a very low risk of suicide. (Dec. 7-8; Exhibit 17.)

From July 15, 2020, through February 15, 2021, the employee continued to treat at Arbour Counseling Services with Natalie Gajda, MA. He testified that he still continues to see her once or twice a week, in addition to attending outpatient and virtual group therapy. (Dec. 8-9; Tr. 1, 89; Exhibit 18.)

The employee's credited testimony about his daily activities includes caring for his children and walking them to school, driving his wife to work and elsewhere (she does not like to drive), cleaning his house, "puttering around" and "fixing things," growing flowers and vegetables at the community garden, grocery shopping, and going to Dunkin Donuts almost every day.[3]

During the summer and fall of 2021, the employee also performed yardwork, light carpentry, and gardening for his parents and two other family friends. He was paid for this work, and earned $1,785 from July 20, 2021 to November 27, 2021, working as many as 5 hours in one day, and being paid in cash anywhere between $75.00 and $250.00. (Dec. 9; Tr. 1, 115-116.)

[3] Much of this activity is corroborated by surveillance. (Dec. 9; Exhibits 5 A-E; Tr. 1, 87, et. seq.)

The employee submitted the April 5, 2022, report prepared by Vocational Consultant Rhonda Jellenik, in which she opined that the employee is totally vocationally disabled. The judge declined to adopt this opinion. (Dec. 10; Exhibit 10.) Instead, the judge chose to adopt the opinions contained in the December 21, 2021 report of Vocational Consultant Ann Marie Latella submitted by the self-insurer. (Dec. 10; Exhibit 11.)

Ms. Latella opined that the employee could work in an environment free from potentially aggressive behaviors and disruptive students or co-workers, and in a quiet personal space with the ability to work independently, flexibly, and with a slight vocational adjustment. (Dec. 10; Exhibit 11.) Ms. Latella's report is replete with examples of current available positions that would meet these requirements, as well as match the employee's past employment job skills. The report concludes, in relevant part:

> The labor market research demonstrates that these jobs are currently available in the Jamaica Plain, MA geographical area. Direct contact with employers confirmed the availability of these jobs in the local labor market as well as indicating that an individual with a profile consistent with Mr. Kilgore's is a qualified applicant. In remote customer service positions, Mr. Kilgore is capable of earning $18.00-$22.00 per hour.

(Exhibit 11.)

Citing the August 3, 2020, opinion of Dr. Kroll, that the employee could work in a remote setting where he would not be expected to interact with potentially disruptive or volatile people, as well as the December 21, 2021, report of Ann Marie Latella, the judge concluded "…the employee does retain the ability to work in the open labor market and could do so since *August 3, 2020*, at an $18.00 per hour full time earning capacity, *based on the opinion of Ann Marie Latella.*" (Dec. 11, emphasis added.)

The employee appeals the judge's decision awarding Section 35 benefits and argues that the assigned earning capacity was not supported by sufficient and adequate subsidiary findings grounded in the evidence. (Employee br. p. 2.) The employee also challenges the award of a "retroactive earning capacity" dating back to August 3, 2020. (Employee br. p. 1.)

The employee raises our recent case of McLaughlin v. Boston University, ___ Mass. Workers' Comp. Rep. ___ (2022), as precedent for his assertions that the judge did not address the issues in this case in a manner that would enable the board to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found (see Praetz v. Factory Mutual Engineering and Research , 7 Mass. Workers' Comp. Rep. 45, 47 [1993]), and that the employee's complaints of pain need to be considered for their impact on an earning capacity determination, (see Greci v. Visiting Nurses Association, 12 Mass. Workers' Comp. Rep. 462, 465 [1998]). (Employee br. p. 8.)

We distinguish the instant case from McLaughlin in that the adopted medical and vocational evidence appears consistent with the employee's own credited testimony. Indeed, the adopted vocational opinions and report of Ann Marie Latella go to great lengths to evaluate the availability of real-world opportunities in the job market that accommodate the employee's restrictions as presented in the evidence. She specifically opined the employee could work in a position that offered remote work, a safe and secure workspace in an environment that offered a quiet personal space with the ability to work independently, flexibly, and with slight vocational adjustment. Insofar as the employee takes issue with the retroactive earning capacity award, Ms. Latella's opinion regarding an earning capacity of $18.00 - $25.00 per hour during the period awarded by the judge, is supported by her citing of regional wage information from the May, 2020 Occupational Employment Statistics Survey of the U.S. Bureau of Labor Statistics. (Dec. 10; Ex. 11, p. 4.) It is also clear that the August 3, 2020, start date was appropriately assigned based upon the credited medical report of Dr. Kroll from that same date. (Dec. 11; Exhibit 6.)

It merits repeating that we inquire as to whether the judge's decision is factually warranted and not arbitrary or capricious in the sense of having adequate evidentiary and factual support and disclosing reasoned decision making within the particular requirements governing a dispute. See Dalbec's Case, 69 Mass. App. Ct. 306 (2007), Eady's Case, 72 Mass. App. Ct. 724 (2008) (decision must contain a factual source for

the monetary figure with an explanation for earning capacity assigned), see Pobieglo v. Department Of Correction, 24 Mass. Workers' Comp. Rep. 97 (2010)(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); Mancini v. Suffolk County Sheriff's Dept., 30 Mass. Workers' Comp. Rep. 39 (2016)(amount of partial disability award vacated and matter remanded "for a reasoned computation of that amount," accompanied by "a reference to the factual source(s) for the monetary figure"), quoting Eady's Case, supra.

We conclude that the judge has addressed the issues in an appropriate and discerning manner, and that his decision is adequately supported by the evidence presented, leaving no doubt for our review as to whether correct rules of law have been applied to the facts. Praetz, supra. We therefore affirm the judge's decision.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **November 1, 2023**

Karen Fabiszewski
Administrative Law Judge