COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 031891-08**

Robert Valerio	Employee
ETS Staffing, Inc.	Employer
Zurich American Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Horan and Fabricant)

The case was heard by Administrative Judge Hernández.

APPEARANCES
John K. McGuire, Jr., Esq., for the employee
Brenda J. McNally, Esq., for the insurer
Jessica S. Babine, Esq., for the insurer on appeal

LEVINE, J. The insurer appeals from a decision in which the administrative judge awarded the employee ongoing § 35 partial incapacity benefits. The judge's conclusion as to the employee's earning capacity appears to be inconsistent with his subsidiary findings. As a result, we recommit the case for further findings.

The insurer accepted liability for the employee's November 4, 2008 low back injury. The employee, a painter, suffered low back pain when he picked up a five gallon bucket of paint. (Dec. 4, 5.) The impartial physician diagnosed a lumbosacral strain and sprain with right radiculitis to the back of the right knee. The doctor opined in his January 2011 report that the employee had a partial impairment in regard to frequent bending, lifting, pushing, with limitation of (lifting) more than ten pounds, and sitting more than a half hour without changing position. After viewing a surveillance tape at his subsequent deposition, the doctor opined that the employee could return to work as a painter with fewer restrictions than he had recommended in his original opinion. (Dec. 6-7.)

The employee brought a claim for § 34 total incapacity benefits from the date of injury until June 7, 2009, when he returned to painting for a different employer.

The employee left that employment on September 4, 2009 and sought § 34 or, in the alternative, § 35 partial incapacity benefits thereafter. The parties stipulated to the employee's average weekly wage of $323.82. (Dec. 3-5; Tr. 19-22.)

The judge did not credit the employee's testimony that he was unable to perform activities such as lifting, walking and operating a motor vehicle. The judge adopted the impartial physician's opinions, and found that the employee could be gainfully employed with only minor or modest accommodations. (Dec. 9-10.) Specifically, the judge found that, after September 4, 2009, "it was not beyond [the employee's] vocational means or his medical limitations, to perform and sustain gainful employment earning over the minimum wage." (Dec. 10.) In his final decision, the judge concluded that the employee had been totally incapacitated from November 5, 2008 to June 7, 2009; that he was partially incapacitated with a weekly earning capacity of $80.96 from September 4, 2009 to March 2, 2011; and that he was partially incapacitated with a weekly earning capacity of $120 beginning March 3, 2011. (Dec. 12.)[1]

We agree with the insurer that the judge's assignment of weekly earning capacities, ranging from $80.96 to $120, appears inconsistent with his subsidiary finding that the employee has the capacity "to perform and sustain gainful employment earning over the minimum wage." (Dec. 10.) The aforesaid earning capacities represent about twenty-five to thirty-seven percent of $320, the full time minimum weekly wage.[2] "It is the duty of an administrative judge to address the issues . . . in a manner enabling this board to determine with reasonable certainty

[1] Before he reached this final result, the judge issued two prior decisions. This is because, in his original decision, the judge misstated the stipulated average weekly wage. In the amended decisions, the judge also changed the employee's earning capacities. The insurer argues that the final decision was arbitrary and capricious as to its change in earning capacities. However, the vocational profile of an employee erroneously assigned a $690.52 average weekly wage, as contained in the original hearing award, may be different from one with an average weekly wage of $323.82.

[2] We take judicial notice – and the parties' briefs acknowledge – that the minimum hourly wage at the time of the hearing was eight dollars.

whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). While the employee argues that the result could be based on the judge's conclusion that he could not sustain full time employment, the decision lacks any findings to support that conclusion. The judge must reconsider or make findings to support the conclusion that the employee is not capable of earning at least full time minimum wage. We recommit the case for further findings.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **February 21, 2012**