COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 022058-09**

Ronald Cavanaugh	Employee
Department of Corrections	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge O'Neill.

APPEARANCES
Paul L. Durkee, Esq., for the employee
Robin Borgestedt, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals from a decision awarding ongoing § 35 weekly partial incapacity benefits, alleging the judge's earning capacity determinations were inconsistent with §§ 35(D)(1) and (4). We affirm the decision of the administrative judge.

On October 11, 2001, the employee, a plumber, injured his right shoulder while unclogging a drain for the employer at the Worcester County Sheriff's Department. The employee received workers' compensation payments for the four months he was out of work and underwent right shoulder surgery. He returned to work with some residual pain, but was able to perform his job without restrictions. (Dec. 5.)

Thereafter, the employee began working for the employer taking care of the plumbing, heating, and gas at the MCI Framingham facility. His job was heavy, requiring that he lift objects weighing 100 pounds or more. On August 24, 2009, while at work, he fell down several stairs, again injuring his right shoulder. (Tr. 6-7). He underwent surgery in October 2009 and was out of work for fourteen months. (Dec. 5.)[1]

[1] The employee was paid workers' compensation benefits via a conference order and § 19 agreement. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of documents in the board file).

Upon returning to work in December of 2010, the employee continued to have elevated pain levels. (Dec. 6.) In 2011, he transferred to a newer facility, the Baranowski Correctional Center in Shirley. Despite assistance, the employee was unable to do his job due to increased pain in his right shoulder. As a result, he retired from the Department of Corrections on November 15, 2014. (Dec. 6; Tr. 37-38, 41.)

Sometime in 2014, prior to his retirement, the employee began working as an alternate plumbing inspector for the Town of Clinton, (Town), performing inspections when the full-time inspector was unavailable. The job involved working twenty to forty hours per year. (Dec. 7.) In January of 2015, approximately two months after his retirement, the employee began working for the Town as a full-time plumbing and gas inspector. His job duties involved reviewing permit applications to confirm licenses were valid and performing rough and final inspections to ensure the work met appropriate standards. Although the employee was on call 52 weeks per year, he actually only received occasional requests for inspections, and the amount of hours he worked varied, ranging from five to ten hours per month, depending on how many permits were outstanding and the number of permits requested. (Dec. 7; Tr. 23.) In some months, no permits were pulled, while in other months, if work was available, he could work ten hours. (Dec. 7; Tr. 56- 61.)

As of January 2016, the employee gave up the gas inspection portion of the job because he could not perform certain requirements of the job, such as climbing ladders. (Dec. 7; Tr. 24.) His income dropped from $27,000.00 annually in 2015 to $11,000.00 in 2016.[2] (Dec. 7; Tr. 24-25, 83.) The employee testified that he has not actually performed more than three inspections in a day. He further testified that "it was his practice to submit a batch of the inspection paperwork all at one time so that his payments did not necessarily represent what he had earned in a one-week period." (Dec. 8.)

In August 2015, the employee filed a claim for § 35 temporary partial incapacity

[2] The employee originally testified that he earned "over $20,000.00" a year prior to January 2016. (Tr. 24-25.) The parties later stipulated that he earned $27,000.00 in 2015. (Tr. 83.)

benefits from November 15, 2014, the date of his retirement, and continuing, based upon the August 24, 2009, date of injury. A conference order issued on January 8, 2016, awarding the employee § 35 benefits at a rate of $567.35 per week, based upon the employee's average weekly wage of $1,534.83, and an earning capacity of $589.24, from January 5, 2016, to date and continuing, and §§13 and 30 benefits.[3] Cross appeals were filed. Rizzo, supra.

At the hearing on May 16, 2017, the employee was the only lay witness. Pursuant to § 11A(2), Dr. James Nairus performed an impartial medical examination and was deposed by the employee. The judge adopted Dr. Nairus' opinion that the 2009 injury was a major cause of the surgically repaired right shoulder condition. However, she found that § 1(7A) was not applicable, so the employee need only prove "as is" causation. (Dec. 13.) She also adopted the § 11A doctor's opinion that, at the time of his examination, the employee was partially disabled and was restricted to lifting 10 pounds frequently, 20 pounds occasionally, and no overhead lifting over 5 pounds.[4]

Over the self-insurer's objections, the judge allowed the employee's motion to open the medical records due to the complexity of the case. The employee submitted reports from Dr. Christopher Vinton and the judge adopted his opinion that the 2009 work injury acted as a major contributing cause to the employee's permanent partial disability as well as the need for past and future treatment, and that the employee's 2015 surgery was causally related to the 2009 work injury. (Dec. 10.)

The judge credited the employee's testimony that the pain and limitations he experienced as a result of his 2009 work injury motivated his decision to retire in 2014.

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[3] The parties stipulated to an average weekly wage of $1,534.83 at the time of his retirement. (Dec. 13-14.)

[4] The judge also adopted Dr. Nairus' opinion that a 2015 incident, when the employee fell at home while trying to break up a fight between his dogs, was also a major cause of the employee's right shoulder condition and partial disability. (Dec. 10.) However, she found the employee was engaging in "reasonable and normal activities" and that the 2015 injury "was a natural consequence of the 2009 industrial injury to the right shoulder and thus it falls within the sphere of coverage to be provided by the insurer liable for that injury." (Dec. 13.) We note that § 1(7A)'s "a major cause" affirmative defense was not raised.

Even though his job with the Town as a full-time gas and plumbing inspector was a lighter job, he had to give up the gas inspections because they sometimes involved climbing a ladder. He is able to perform the plumbing inspection duties for the Town, which are very light, and can range from zero to ten hours per month. Even with the inspector job, he has to stop and relax his arm after using the computer keyboard. (Dec. 12, 14.) Considering the fact that he has a high school education and his work experience is limited to plumbing and maintenance work, along with the adopted medical evidence and the employee's age, the judge found the employee partially incapacitated as a result of the August 24, 2009, industrial injury. (Dec. 11-12.)

With respect to earning capacity, the judge found:

> In this case, given the nature and terms of employment while working as a plumbing inspector for the Town . . . , it is impracticable to compute the wages of the Employee on a weekly basis. Because of the structure of the job as a full time town inspector, whose workload is determined by number of permits pulled, the standard formula for calculating wages cannot be applied. There are weeks when the Employee was paid less than his average weekly wage for the Department of Corrections and weeks when he was paid more. The Employee testified that he did not submit his invoices weekly; sometimes he would wait and submit several together and then he would receive a check the next week.
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> I believe the Employee when he testified that these wages represented the invoices that he submitted at one time, not what he made in an individual week. The Self-insurer suggests that only the weeks that the Employee received paychecks should be considered and the rest of the weeks where he did not receive a check should be taken out of consideration. I find this case to be analogous to Cassola's Case, 54 Mass. App. Ct. 904 (2002), where an automobile salesman earned more than his pre-injury average weekly wage in some weeks and less in other weeks. The court analyzed the § 35 benefit entitlement not in terms of week by week assessment of actual earnings but as a whole. Like the car salesman, the Employee has good weeks and weeks where he does not have any inspections, thus the calculation should be the average for the year. Due to the nature of the business of being a town inspector, the Employee's income will naturally fluctuate.
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> The average weekly wage, according to this calculation, would be $519.33 for 2015; in 2016 (now working only as a plumbing inspector having given up the gas inspections) the average would be

> $242.50; and for the months available in 2017 it would be $424.23. However, given the fluctuations in wages actually earned, if the Employee did not have the inspector job, he would be capable of earning minimum wage. Accordingly, I find the Employee's earning capacity to be $440/week based on his age, education, work experience and physical restrictions unless the wages he earned as inspector exceeded $440/week in which case the earning capacity would be the actual wages calculated on an annual basis.

(Dec. 15-16.)[5]

Accordingly, the judge ordered §35 weekly benefits, based on the employee's average weekly wage of $1,534.83; from November 15, 2014, to December 31, 2015, at the rate of $609.30 per week, based on an earning capacity of $519.33 per week; from January 1, 2016, to December 31, 2016, at the rate of $680.90 per week, based on an earning capacity equal to the 2016 minimum wage of $400; and, from January 1, 2017, to date and continuing at the rate of $656.90 per week, based on an earning capacity equal to the 2017 minimum wage of $440, with the caveat noted above that if the employee's total wages for the year divided by 52 exceeded the minimum wage, the self-insurer was authorized to make an adjustment based on actual wages. (Dec. 18.)

On appeal, the self-insurer challenges the judge's method of calculating the employee's earning capacity, alleging it is inconsistent with §§ 35D(1) and (4).[6] It also argues that the judge's finding of partial disability since the employee's retirement is arbitrary and capricious and is not supported by the medical evidence. We summarily

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[5] We note that in the last paragraph quoted above, "average weekly wage" was intended to reference the average wages earned post-injury as part of the earning capacity evaluation. In this context, it is not a reference to "average weekly wages" as defined by G.L. c. 152, §1.

[6] General Laws, c. 152, §§ 35D(1) and (4) state 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:

> (1) The actual earnings of the employee during each week.
> . . . .
> (4) The earnings the employee is capable of earning.

affirm the decision as to the second issue. For the following reasons, we also affirm as to the judge's findings regarding earning capacity.

In establishing an earning capacity, a judge must assign the greatest amount the employee can earn as derived from four methods as set forth in G.L. c. 152, § 35D. This includes the "actual earnings of the employee during each week," § 35D(1), and "[t]he earnings that the employee is capable of earning," § 35D(4). Given that the employee's work hours varied while he was employed with the Town, the judge cited Cassola's Case, 54 Mass. App. Ct. 904 (2002), in support of her analysis of post-injury fluctuating wages. Since the nature of Cassola's employment was one in which income would naturally fluctuate depending on the number of automobile sales made, the employee had good and bad earning weeks. Id. at 905. As a result, the judge averaged the employee's earnings to arrive at an "average" earning capacity. Since the employee's "bad" earning weeks were below his pre-injury average weekly wage, while his "good" earning weeks exceeded it, the employee argued that he should be paid §35 benefits for the weeks in which his earnings fell below his pre-injury average weekly wage. The administrative judge in Cassola rejected the employee's requested approach, denying him any §35 weekly benefits. Id. at 904.

In affirming the judge's decision, the Appeals Court stated the employee failed to meet his burden of proving his low earning weeks were due to his injury, rather than to the nature of the business of selling cars. Nonetheless, the court concluded, "Although the administrative judge did not refer to the statute in his decision, his 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, s. 35D(4), which were in excess of his pre-injury average weekly wage." Cassola's Case, supra at 905. In Cassola, whether the employee's earnings were averaged or whether the judge simply considered his capacity to earn based on his "good" earnings weeks, the result would be the same, i.e., the employee would not receive § 35 benefits. Thus, the court did not actually endorse averaging an

employee's earnings in all situations, but held that an employee was not entitled to receive weekly benefits based on low earnings weeks not attributable to his injury. Id.

In the instant case, where the employee's post-injury earnings are lower than his pre-injury average weekly wage, his situation is more akin to that of the employee in Goodhue v. Federal Express, 29 Mass. Workers' Comp. Rep. 167 (2015). In Goodhue, the issue was how to determine the employee's earning capacity where he worked for twenty-seven weeks in seasonal employment after his injury. The judge applied the approach used by the administrative judge in Cassola, averaging the total earnings over the period worked, because of an absence of evidence of specific weekly earnings. See also Saletnik v. I-Log, 16 Mass. Workers' Comp. Rep. 430 (2002). Specifically, the judge in Goodhue calculated the employee's earning capacity by dividing his total earnings, over the twenty-seven week period that he worked, by that number of weeks. Id. at 169, n. 6. In affirming the judge's earning capacity determination, we noted:

> Because there was no evidence of specific weekly earnings, the most appropriate method of calculation available to the judge was dividing the reported aggregate earnings by the total number of weeks. *Cf.* Cassola's Case, 54 Mass. App. Ct. 904 (2002)(denial of § 35 benefits during "bad" earning weeks appropriate where fluctuating wages found to be "the nature of the business.").

Goodhue, supra at 171 n.10.

Here, the judge found it was not possible to determine the employee's weekly earnings due to the fact that he submitted his invoices in batches rather than weekly, and was paid accordingly. (Dec. 7-8, 15.) The judge's averaging method is thus supported by Goodhue. It is definite that the employee here worked over a 52-week period, but, as in Goodhue, there was no way for the judge to fairly determine, with precision, the employee's wages on a week-by-week basis in 2014, 2015, or 2016. The judge clearly found that the employee's actual earnings at his position with the Town represented the greatest amount he could earn during the period of his employment. Payment records and the employee's own testimony that his invoices and paychecks did not necessarily

reflect his weekly earnings,[7] (Dec. 15), provided the support for averaging his earnings to determine earning capacity during the claimed disability period in 2014 and 2015. Beginning in 2016, where the employee's earnings as a plumbing inspector for the Town were lower than the minimum wage, the judge found he could earn minimum wage. (Dec. 16.)

Subsection (4) of § 35D allows the judge broad discretion in determining the employee's earning capacity. See Kelley v. General Electric Company, 12 Mass. Workers' Comp. Rep. 176 (1998). The approach the judge used here is informed by that used by the administrative judges in Cassola, supra, and Goodhue, supra, based on the fluctuating weekly wages inherent in the nature of the post-injury employment. In this situation, the yearly averaging approach is in accordance with G. L. c. 152, § 35D(4): "[t]he earnings that the employee is capable of earning." There was no error in the judge's earning capacity findings. The decision met the goal that should inform a determination of post-injury earning capacity, and appropriately includes the actual earnings of the employee during specific periods of time. Because, in the circumstances presented here, averaging the earnings of the employee is the most appropriate method of calculating earning capacity (dividing the reported aggregate earnings by the total number of weeks), we see no reason to disturb the judge's findings.

The self-insurer argues that the standard, pre-injury average weekly wage calculation method should be used when computing the employee's actual earnings, because he worked fewer than 52 weeks a year with the Town. (Self-ins. br. 14; Tr. 85.) While it is true that only § 35D(1) specifies an "each week" approach to determining an employee's earning capacity, the concept of "lost weeks" is a unique legislative method of establishing an employee's pre-injury average week wages, and is explicitly set out in G.L. c. 152, § 1(1).[8] Neither § 35D(1) nor the other three subsections of § 35D refer to or

[7] The employee testified that he reported his earnings on his Form 126 based on when he was paid; not based on when he actually performed the work (Tr. 91-92.)

[8] The relevant portions of G.L. c. 152, §1 are as follows:

incorporate a "lost weeks" approach to determining an employee's post-injury earning capacity. Moreover, the judge credited the employee's testimony that he collected the invoices and submitted them in batches so there is no way to determine how many or what weeks the employee did not work.

The self-insurer's assertion that the employee's capacity for work is much higher than the judge found merits a brief discussion. The self-insurer argues that the employee testified he could physically do up to eight inspections in one day. (Self-ins. br. 21, Tr. 98.) A review of the employee's testimony is contrary. Even though the employee only worked between five and ten hours a month, per his testimony and pay records, the self-insurer interprets his testimony as that he could have worked all, or even more, hours. The context of the self-insurer's series of questions was how many inspections could be done in light of how long it took to physically perform an inspection, not how many inspections the employee was physically capable of performing in the course of a day.[9]

The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings:

(1) "Average weekly wages," the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district. In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several insured employers and self-insurers shall be considered in determining his average weekly wages. Weeks in which the employee received less than five dollars in wages shall be considered time lost and shall be excluded in determining the average weekly wages; provided, however, that this exclusion shall not apply to employees whose normal working hours in the service of the employer are less than fifteen hours each week.

[9] The employee testified that eight inspections could be accomplished in a day based on the amount of time it took to perform an inspection; however, he further testified that given his

The judge found the employee credible, and credibility findings are the sole province of the fact finder when weighing the evidence. Carucci v. S & F Concrete, 13 Mass. Workers' Comp. Rep. 405 (1999). We will not disturb the judge's findings of fact unless they are wholly without evidentiary support, or are tainted by errors of law.

Finally, the self-insurer argues that the judge expanded the parameters of the dispute before her when she ordered the self-insurer to pay partial incapacity benefits at a rate higher than that claimed by the employee on the Form 140 Conference Memorandum filed by the parties at § 10A conference. Since the employee's claim at conference was for partial incapacity benefits at a rate of $567.35, based on a claimed earning capacity of $589.24, the self-insurer argues that, while the judge could find that the employee had an earning capacity that was higher than claimed, it was improper to award partial incapacity benefits that were more than the employee was actually claiming. (Self-ins. br. 17.) We disagree.

The employee appealed the conference order, and is thus entitled to litigate the results of that order regarding his claim for incapacity benefits and to obtain a better result at hearing. Cf. Staff v. Lexington Builders, Inc., 31 Mass. Workers' Comp. Rep. 99, 104 (2017)(where employee did not appeal from conference order and never sought leave to file late appeal, he could not obtain a better result than the average weekly wage claimed and ordered at conference). Moreover, it is well settled that hearings are de novo proceedings, and conference orders are not part of the hearing evidence and should not bear on the judge's hearing disposition. Frey v. Mulligan Inc., 16 Mass. Workers' Comp. Rep. 364, 368, n. 4 (2002); Grande v. T-Equip. Constr. Co., 10 Mass. Workers' Comp. Rep. 379, 381 (1996).

Given that both parties appealed from the conference order, and the issue of the employee's earning capacity was on appeal, to agree with the self-insurer that an entry in Section 15 of the Form 140 Conference Memorandum dictates a ceiling for earning capacity at the hearing would be contrary to the concept of a hearing *de novo*.

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physical limitations, he would not be able to perform that many inspections every day. (Tr. 98-101.)

We discern no error in the judge's findings. The decision is affirmed. The insurer is instructed to pay employee's counsel a fee of $1,745.44, pursuant to G.L. c. 152 § 13A(6).

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: **October 28, 2020**