COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026819-93**

Stephen T. Bradley	Employee
Commonwealth Gas Company	Employer
Commonwealth Energy Systems	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, Smith and McCarthy)

APPEARANCES
John K. McGuire, Jr., Esq., for the employee
Michael A. Fager, Esq., for the self-insurer

WILSON, J. The self-insurer appeals from a decision in which an administrative judge awarded the employee partial incapacity benefits based on the stipulated average weekly wage of $1,469.00, and an earning capacity of $240.00 per week. (Dec. 16.) The employee had returned to light duty work for the employer after his accepted industrial accidents of June 22, 1993 and August 25, 1993. (Dec. 2.) The employee's claim was for a closed period from March through September 1996, when the employer locked out all members of the union in a labor dispute.[1] (Dec. 2-4.) For the reasons that follow we affirm the decision.

The parties agreed to the following statement of the issues in controversy at the hearing, which the judge included in his decision:

1. In light of G.L. c. 152, § 35D(3), § 35D(4) and § 35D(5), is the Employee entitled to any weekly benefits pursuant to G.L. c. 152, § 35 and § 36B(2) for the period March 31, 1996 to September 23, 1996, when:
   (a) he had been working at a particular suitable job, see G.L. c. 152, § 35D(3), at Commonwealth Gas Company since approximately May 1, 1995;
   (b) he was working at this particular suitable job, see G.L. c. 152, § 35D(3), at Commonwealth Gas Company immediately prior to March 31, 1996;

[1] According to the employee's testimony, he is a member of the United Steelworkers of America. (Tr. 52.)

(c) he could not continue doing this job after March 31, 1996 and continuing to September 23, 1996 only because of a lockout from March 31, 1996 to September 23 , 1996 in connection with a labor dispute;

(d) he had, prior to March 31, 1996, been receiving weekly benefits pursuant to G.L. c. 152, § 35 and § 35D(1) based on an average weekly wage of $1,469.00 per week and paid wages ranging from $930 to $1100 per week since approximately May 1, 1995 up to March 30, 1996; and

(e) he received $347.00 per week in unemployment compensation benefits for the period March 31, 1996 to September 23, 1996, so that application of the dollar-for[-]dollar offset of G.L. c. 152, § 36B(2) would mean, based on mathematical computation, that he would be entitled to no weekly benefits for the period March 31, 1996 to September 23, 1996, if the wages he had previously received, of $930 to $1100 per week, represented his appropriate earning capacity pursuant to either G.L. c. 152, § 35D(3), § 35D(4) or § 35D(5), for the period March 31, 1996 to September 23, 1996?

2. If so, to what weekly benefits is he entitled?
3. By bringing this Claim has the Employee violated G.L. c. 152, § 14(1)?

(Dec. 4-5.)

The employee was injured while performing his duties as a serviceman, which required daily lifting of up to 100 pounds, with the average being eight to twenty pounds, as well as force-intensive work with wrenches and hammers with frequent bending. (Dec. 6-7.) In November 1995, the employee was "medically retrogressed" in accordance with his union contract to a job as customer service clerk-special, in which he made telephone calls to set up appointments and did filing. (Dec. 6.) It was this job that the employee was performing when the employer locked out its employees on March 31, 1996, because the labor contract had expired and no agreement on a new contract had been reached. (Dec. 6.) According to the employee's treating physician, whose opinion the judge adopted, a clerical job was within the medical restrictions imposed on the employee for his diagnosed condition of a chronic thoracic strain. (Dec. 8.) The employee was paid more than $23.00 per hour for doing the light duty clerical and filing work, due to his union contract provision that he would continue to receive the wages

paid for his skilled serviceman work, even while doing work that did not merit such high wages.[2] (Dec. 11-12.)

The judge determined that the wages that the employee received for the light duty clerical job were an anomaly, in the nature of a gratuity, based on contractual provisions of "medical retrogression." Thus, such wages were "artificially inflated" and did not reflect the market value of the work the employee was performing. (Dec. 11-12.) Accordingly, the judge found that the wages the employee had been earning at that stipulated "particular suitable job" under § 35D(3), made available to him by the employer prior to the lockout, was not a proper measure of his earning capacity during the lockout, the period in dispute. (Dec. 11.) As a result, the judge assessed the employee's earning capacity in accordance with § 35D(4), using his own knowledge and judgment to compute a dollar amount that the employee was "capable of earning," where no direct evidence was presented on the issue. (Dec. 11.) Following the analysis set out in Scheffler's Case, 419 Mass. 251, 260-261 (1994), the judge concluded that the employee was capable of earning $240.00 per week from March 31, 1996 to September 23, 1996, given his physical limitations causally related to his industrial injury and his vocational profile. (Dec. 13.) The judge allowed the self-insurer to take a § 36B(2) credit against the § 35 benefits awarded, $407.48 per week, based on the employee's receipt of weekly unemployment compensation benefits of $347.00 per week during the disputed period, which order is not challenged by the self-insurer on appeal. (Dec. 16.) The judge also denied the self-insurer's claim for § 14 penalties against the employee for bringing a frivolous claim. (Dec. 14-15.)

The self-insurer contends in its appeal that the employee did not suffer a loss of earnings attributable to his industrial injury during the lockout. Rather, the self-insurer argues, the employee's loss of earnings was caused by economic factors brought about by the labor dispute between the employee's union and the employer. See Driscoll's Case, 243 Mass. 236, 239 (1922)(inability to work resulting from depressed condition of

[2] The judge found that the employee had no computer training or skills, does not know shorthand or have typing skills, and has no special office skills. (Dec. 6.)

industry in which employee is engaged not compensable under the Act); Pierce's Case, 325 Mass. 649, 656 (1950). We do not agree.

It is well-settled that the reviewing board will not reexamine the factual determinations of the administrative judge, if there is evidence to support the findings, unless different findings are required as a matter of law. Bajdek's Case, 321 Mass. 325, 326 (1947). The general findings of the judge will be sustained where possible. Zucchi's Case, 310 Mass. 130, 133 (1941). We think that the judge's reasoning and analysis in this case fits soundly within the scope of his authority under the provisions of the Act. See Scheffler's Case, 419 Mass. 251, 256 (1994), and case law set out infra that presents facts analogous to the lockout context of this case.

The self-insurer's argument is premised on the following hypothesis. The self-insurer maintains that the employee's hourly wage of $24.01 for light duty work after his injury, guaranteed to employees with at least ten years service under the union contract, must be considered "in the context of the labor market in which ComGas and the union exist[.]" "If a particular labor market supports such an employer as ComGas, with the high wages it pays its employees, that does not constitute an artificially high wage scale [ ]" for determining earning capacity for performing light duty. (Self-insurer brief 10-11.) The self-insurer thus attacks, as contrary to law, the judge's finding that the employee's post-injury hourly wage for his light duty filing job was artificially inflated, and therefore not an appropriate figure for the determination of the employee's capacity to earn while performing such work in the general labor market. (Dec. 12-13.)

We cannot see the logic in the proposition espoused. There is nothing in the record evidence that would compel the judge to find that a similar position with the same union at another employer was available to the employee, such that this "union labor market" concept might actually have some credence. Certainly ComGas was not a part of the labor market for union members, such as the employee, whom it had locked out. As is his prerogative, the administrative judge aptly and explicitly exercised his knowledge and judgment in determining the employee's earning capacity in a case where there was no direct evidence on the issue. (Dec. 11.) See Mulcahey's Case, 26 Mass.

App. Ct. 1 (1988); Nicholson v. Consolidated Freightways, 11 Mass. Workers' Comp. Rep. 119 (1997). The judge determined that to find a filing job available in the general labor market paying more than $23.00 per hour would be erroneous, as such wages were an anomaly, in the nature of a gratuity and, therefore, should have no impact on the analysis of earning capacity. (Dec. 11-12.) The judge found that there was no other job in the general market that would have provided the employee with such a wage for performing the work involved. (Dec. 11.) We reject the self-insurer's challenge to those factual assessments.

We consider the lockout at issue in the present case analogous to a lay off. As with a lockout, the termination of employment in a lay off is involuntary on the part of the employee and for reasons unrelated to his medical condition. The self-insurer makes no attempt to distinguish the many cases in which laid off employees are held to be entitled to weekly compensation benefits. See infra. At oral argument, the self-insurer discounted the lay off analogy on the basis that, while a lay off traditionally has reflected the general labor market and work available for an employee in similar fields, i.e. "the depressed condition of the industry in which the employee [is] engaged[,]" Driscoll's Case, supra at 239, the condition of the labor market did not have anything to do with this particular lockout. The lockout was an outgrowth of this employer's contract with the employee's union, the self-insurer contends, and the loss of earnings suffered by all such union employees was strictly an economic injury due to that labor dispute. This seems to be at cross- purposes with its position, detailed above, that the employee's artificially inflated post-injury wage should be considered as part of the general labor market. In any event, we offer the following analysis in response to the self-insurer's selective view of the case law.

Of the many workers' compensation cases addressing the interplay between weekly benefits entitlement and lay-offs, we find four most instructive: Johnson's Case, 242 Mass. 489 (1922); Septimo' s Case, 219 Mass. 430 (1914); Percival's Case, 268 Mass. 50 (1929); and, in a somewhat different way, Bajdek's Case, 321 Mass. 325 (1947). In Johnson's Case, supra, the employee returned to work after his industrial

injury, for the period from December 1917 until July 1921, at his pre-injury wage. The employee then lost his position due to a downturn in industrial conditions. Id. at 491. The court noted that, since that lay-off, the employee's work-related physical disability had adversely affected his ability to earn wages, and he could only work within restricted limits. Id. The court reasoned:

> While it is true that the employee in common with others must bear the loss resulting from business depression, this does not mean that when the earning capacity is reduced by reason of the injury, there may not be recovery even though business conditions may have become contemporaneously less favorable. It well may be that the reason why the employee suffered no loss in wages from December 1917, until 1921 was the abnormal conditions produced according to common knowledge by the great war. Opinion of Justices, 231 Mass. 603, 610. *Apparently this is an instance where exceptionally high wages and unusually favorable industrial conditions as to labor enabled the employee to avoid an impairment of earning capacity which otherwise the physical injury would inevitably have caused.* It is only the recession of those conditions which now has brought to light in the lowered weekly wage the natural result of the employee's injury. This was the conclusion of the Industrial Accident Board and it cannot be said to be unwarranted in law.

Johnson's Case, supra at 492-493 (emphasis added). In the present case, the "exceptionally high wages" "due to an unusually favorable" union contract likewise should be no bar to the judge's setting a lower earning capacity after that job ended for non-medical reasons.

Similarly, in Septimo's Case, supra, the court addressed a case in which an injured employee returned to work for wages very close to his pre-injury average weekly wage. However, when the employer shut down due to a decrease in business, the employee claimed total incapacity benefits for that period of his lay off. The court recounted the findings of the arbitration committee:

> While [employment at similar wages as before the injury] was evidence that the employee was not wholly incapacitated for work, yet it was not conclusive.
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> The committee of arbitration found that it was probable, considering his injured condition that he would not have been able to obtain work or to earn anything elsewhere. The record shows that he was seriously crippled and disabled. . . . When the grave character of these injuries is considered, we cannot say, without

> the evidence before us, that the finding of total disability for work of the employee was not warranted.

Id. at 432. In the case at hand where the employee's physical impairment was undisputed, the fact that the employee was prevented from working for the employer due to economic reasons likewise should not bar compensation.

In Percival's Case, supra, the employee had returned to work after an industrial injury, and was doing the same kind of work and receiving the same wages as before the injury. That job was discontinued, however, and a new position was created for the employee elsewhere in the employer's organization. The employee did not accept this position and claimed compensation benefits instead. Id. at 53. The court pointed out that the employee had presented evidence of his reduced efficiency after he had returned to work, which supported the board's conclusion that the employee was entitled to partial incapacity benefits. The court reasoned:

> There is nothing in the facts found by the single member, and affirmed by the board, in regard to employee's [unaccepted] opportunity for employment [with the employer] in Worcester which is inconsistent with the board's finding of partial incapacity. *Nor is there anything necessarily inconsistent therewith in the finding that after his injury the employee worked for the employer for a year at the same kind of work and for the same wages as before his injury.* [citations omitted.]
>
> We cannot say that the finding that the employee's ability to earn wages was reduced one-half was not warranted. . . . [T]he members of the board were 'entitled to use their own judgment and knowledge in determining that question.' [citations omitted.] *The board was not concluded by the wages paid to the employee by the employer after the injury.* [citations omitted.] Nor was the employee's earning capacity necessarily determined by the wages which according to the testimony would have been paid to him if he had accepted the position offered to him in Worcester. The weight to be given to this testimony in the light of all the circumstances of the offer was for the board.

Percival's Case, supra at 54-55 (emphasis added). In light of the instant circumstances involving this employee's "created" light duty position, we too do not think that we should second-guess this judge's fact-finding. The judge in Percival's Case was "entitled to use [his] own judgment and knowledge" and was not bound by the wages paid by the

employer prior to the termination of the job due to economic reasons. Id. We think the same reasoning prevails here.

Finally, in Bajdek's Case, supra, the court addressed the claim of an employee who chose to leave his light duty job, an inventory clerk, when it appeared that a lay-off was imminent. As in the present case, the employee had returned to work at the same or better rate of pay as his average weekly wage, even though he could no longer perform his pre-injury work as a stock clerk. Id. at 327-328. The employee left that job for a lower paying, but more stable, light duty position. "The insurer urge[d] that the claim for further compensation should be dismissed [because] the employee [was] able to do practically the same work as he did prior to his injury, and that *he left his employment for reasons not associated with the accident*." Id. at 328 (emphasis added). The court answered:

> The evidence did not require a finding that the employee was able to perform practically the same work as before. Indeed, there was testimony to the contrary permitting a finding that he could no longer alone do the lifting required of a stock clerk. The issue was whether there was an impairment of earning capacity. Federico's Case, 283 Mass. 430, 432. *The board was not concluded by the mere fact that during his employment as [light duty] inventory clerk he received wages equal to, or more than, those he had received as stock clerk.* Percival's Case, 268 Mass. 50, 54-55, and cases cited. With respect to the contention that he left the employ of the insured for reasons unconnected with his injury, the board could have concluded that the employee's belief that he would be laid off under the union seniority rule was reasonable, and that while his leaving the insured was voluntary in the sense that the decision was his own, the underlying ground was his desire to remain employed consecutively and without interruption. *In any event, we cannot say as a matter of law that the circumstances of his changing jobs prevented a finding of partial incapacity.*

Bajdek's Case, supra at 329 (emphasis added). Thus, even in the event of an arguably voluntary leaving, benefits were awarded. Just as in Badjek, the issue presented here was whether there was an impairment of earning capacity. The administrative judge concluded that there was, given the involuntary nature of the lockout and notwithstanding the high wages earned prior to the lockout.

The common threads running through these cases and the present case are clear: The judges all found that the respective employees suffered continuing incapacities related to their industrial injuries, even though they returned to some type of work prior to leaving again for non-medical reasons. Moreover, the fact that employees earned as much in light duty jobs as they did performing full duty before their injuries did not bar findings of lower earning capacities when those light duty jobs ended or were threatened. Numerous other decisions reinforce this point: see, e.g., Donnelly's Case, 243 Mass. 371, 374 (1923); Dragon's Case, 264 Mass. 7 (1928); Carmossino's Case, 268 Mass. 35 (1929). See generally L. Locke, Workmen's Compensation §§ 324, 325 (2d ed. 1981). The self-insurer's citation to cases, such as Driscoll's Case, 243 Mass. 236 (1922), is to no avail. Driscoll's Case is distinguishable as it did not appear in that case that the employee's efficiency in his former employment was impaired by the injury. See also Capone's Case, 239 Mass. 331 (1921); Percival's Case, supra at 54. In the circumstances of the case before us, we cannot say that the judge committed an error of law in finding a reduced earning capacity in the open labor market and ordering benefits.

The self-insurer also asserts that § 35D mandates that the employee's earning capacity must be set at the amount he earned at the light duty job, the $23.00-$24.00 per hour that he was earning before his industrial injury. It is undisputed that § 35D(1) requires the employee's actual weekly earnings upon returning to work to be used for determining the employee's earning capacity for that period. The question is, how should § 35D be applied when that light duty job was no longer available to the employee during the lockout? The self-insurer contends that the provisions of paragraphs (3) and (5) govern the claim, thereby requiring the judge to compute present earning capacity using the same amount earned by the employee upon returning to the light duty job. Those provisions provide 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: -

> (3) The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it.
>
> (4) The earnings that the employee is capable of earning.
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> (5) For purposes of this chapter, a suitable job or employment shall be any job that the employee is physically and mentally capable of performing, including light work, considering the nature and severity of the employee's injury, so long as such job bears a reasonable relationship to the employee's work experience, education, or training, either before or after the employee's injury.

G.L. c. 152, § 35 D(3) (4) and (5), as amended by St.1991, c. 398, § 65. The self-insurer argues that the light duty filing job "has been made available" and was clearly suitable employment. Therefore, the employee's earning capacity during the lockout must reflect the weekly wages earned at that position. Although the employee does not dispute the suitability of the light duty job, he counters that the judge's treatment of the provisions of § 35D was correct: that the provisions of paragraphs (3) and (5) did not apply when that job was no longer available, as was the case during the lockout. The judge determined that the statutory reference to availability in the past was not legally significant, and that because the job was not available to the employee during the disputed time period, it could not be used to compute earning capacity for that period. (Dec. 10-11.)

The judge's interpretation of the statute is reinforced by an analogous provision of § 8(2)(d), added to the statute in 1991, which makes clear that the "particular suitable job" under § 35D(3) must "remain[] open to the employee" in order to serve as a basis for the computation of the employee's earning capacity.[3] "If reasonably practicable, [a

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[3] General Laws 152, § 8(2)(d), as amended by St. 1991, c. 398, § 23, provides in its entirety:

> (2) An insurer paying weekly compensation benefits shall not modify or discontinue such payments except in the following situations:
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> (d) The insurer has possession of (i.) a medical report from the treating physician, or, if an impartial medical examiner has made a report pursuant to section eleven A or subsection (4) of this section, the report of such examiner, and either of such reports indicates that the employee is capable of return to the job held at the time of injury, or other suitable job pursuant to section thirty-five D consistent with the employee's physical and mental

statute] is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law." See Taylor's Case, 44 Mass. App. Ct. 495, 501 (1998); Walsh v. Commissioners of Civil Service, 300 Mass. 244, 246 (1938). Under § 8(2)(d), the requirement that the job offer remain open in order to authorize the insurer's modification of benefit payments, see footnote 3 infra, leads to only one reasonable inference in such a case as the present one: When the employee's job no longer remains open, the reduction of benefit payments based on the wages earned at that job is left without its mooring in the statute and loses its legitimacy. It logically follows that the relationship between the parties reverts to the pre-job offer status at that point, with the employee's earning capacity to be calculated using the applicable provisions of § 35D(4), "the earnings the employee is capable of earning[,]" without regard for the wages earned in the now unavailable job.

Moreover, apart from consideration of the language of §8 (2)(d) and as a matter of sound policy, § 35D(3) must itself be read to avoid an arbitrary and irrational result in this case. See Betances v. Consolidated Service Corp., 11 Mass. Workers' Comp. Rep. 65 (1997). To be sure, the statute refers to the suitable job having "been made available," rather than to present availability. We conclude, however, that the literal application of the subsection in this case, where the judge considered that the artificially inflated wage earned at that suitable job was not what the employee was "capable of earning" when the job was no longer available, would controvert the intent of the Act to return injured workers to the workplace and compensate them for their causally related loss of earning

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> condition as reported by said physician and (ii) a written report from the person employing said employee at the time of the injury indicating that such a suitable job is open and has been made available, and remains open to the employee; provided, however, that if due, compensation shall be paid under section thirty-five; provided, further, that if such employee accepts said employment subsequent to a modification or termination pursuant to this paragraph, compensation shall be reinstated at the prior rate if the employee should cease work in accordance with paragraph (c) of this section or should be terminated by the employer because of the employee's physical or mental incapacity to perform the duties required by the job[.]

(emphasis added).

capacity. (Dec. 12.) Under the literal construction of the statute urged by the self-insurer, employers would be encouraged to create make-work positions with high wages, and then to discontinue those jobs, thereby establishing a high earning capacity under subsection (3), simply because the position was made available. We cannot support this result. We see the intent behind the use of the past tense in the statute as meaning that for a portion or all of the claimed incapacity period a suitable job made available to an employee, who then does not accept the employer's offer, need not be left open in perpetuity in order to be used in the earning capacity computation.[4]

> We are guided in our interpretation by Meunier's Case, 319 Mass. 421 (1946):
>
> The legislative intent in enacting a statute is to be gathered from a consideration of the words in which it is couched, giving to them their ordinary meaning unless there is something in the statute indicating that they should have a different significance; the subject matter of the statute; *the pre-existing state of the common and statutory law; the evil or mischief toward which the statute was apparently directed*; and the main object sought to be accomplished by the enactment. None of its words is to be rejected as surplusage, and none is to be given undue emphasis. Each is to be accorded the appropriate weight and meaning which *the context and an examination of the statute as a whole* show the framers of the statute intended it to have.

Id. at 423 (emphasis added). It is crucial to the understanding of this case to remember that it was not the employee who was responsible for leaving his light duty position. As such, the self-insurer's citation to Major v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 90, 93-94 (1993), establishing that an employee who moves away does not become the beneficiary of § 35D (3) by making a suitable job unavailable, is wholly inapposite. And while the self-insurer charges the judge with "ignoring many years of legal precedent as to what is and is not covered by M.G.L. c. 152" in his construction of § 35D, (Self-insurer brief 10), we conclude that "the pre-existing state of the common and statutory law" does not support the self-insurer's arguments. Meunier's Case, supra. We agree with the judge's findings and conclusions in his construction of § 35D, under which he appropriately applied paragraph (4) and assigned the employee's earning capacity at

[4] It is not contended that the job was made available during any portion of the disputed claim.

the amount the employee was "capable of earning." See also Shaw's Case, 247 Mass. 157, 160-161 (1923)(extra pay provided by employer to partially incapacitated employee was a gratuity not subject to being calculated into earning capacity).

The self-insurer contends that the employee must show a change in his medical status in order to be awarded benefits after the light duty job was no longer available. The argument is without merit. The self-insurer here refuses to pay weekly compensation because the employee was locked out of a light duty job where, by nature of the collective bargaining agreement, he earned an inflated wage. At hearing, the employee sought merely to establish the open market value of his earning capacity at a similar light duty position, and to base an award of § 35 partial incapacity benefits on that earning capacity. Change in medical status is not a necessary part of the employee's burden of proof, as the only thing at issue here was the loss of an "unusually favorable" union contract position. See Johnson's Case, supra. Had the employee sought total incapacity benefits, instead of the partial incapacity benefits that he did seek, a medical change would have been a necessary part of the claim. See Foley's Case, 358 Mass. 230 (1970). As that was not the case, there was no error.

As a final matter, the self-insurer insists that the employee's claim is so meritless that § 14 penalties for a frivolous claim should be imposed against him. Our affirmation of the administrative judge's careful and detailed decision is sufficient answer to the claim for a penalty.

The decision is affirmed. The self-insurer shall pay employee counsel a fee of $1,193.20 under the provisions of § 13A(9).

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Sara Holmes Wilson
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: May 11, 1999

Smith, J. dissenting. The judge erred as a matter of law in failing to perform the analysis required when an injured worker claims compensation. His omission of the primary analytical step disrupted the harmonious relationship between the workers' compensation system and the unemployment benefits system. See Pierce's Case, 325 Mass. 649, 656-657 (1950) (policy against double recovery of unemployment and workers' compensation).

Section 35 of the workers' compensation act only provides compensation for incapacity for work *resulting from the injury*. G.L. c. 152, § 35, as amended by St. 1991, c. 398, § 63. " '[I]t is only by the elimination of all variables except the injury itself that a reasonably accurate estimate can be made of the impairment of earning capacity attributable to the injury.' " Sjoberg's Case, 394 Mass. 458, 463 (1985), quoting Arizona Pub. Serv. Co. v. Industrial Comm'n, 16 Ariz. App. 274, 277 (1972). In determining the extent of incapacity, § 35 requires that the judge discount the effects of unrelated factors. Scheffler's Case, 419 Mass. 251, 256 (1994), quoting L. Locke, Workmen's Compensation § 321, at 375-376 (2d ed. 1981). Thus no compensation is provided for wage loss resulting from business conditions. See Korobchuk's Case, 277 Mass. 534, 536 (1931); Pierce's Case, 325 Mass. at 656. Such losses are covered by the unemployment system, which in fact did provide benefits to the employee in this case. (Dec. 4-5; Tr. 48, 54-55.)

An injured employee, in common with others, must bear the loss resulting from business conditions. Lavallee's Case, 277 Mass. 538, 539 (1931). Because of the combination of unemployment benefits and the erroneously calculated workers' compensation benefits, Bradley did not bear the economic burden of the lockout in common with his fellow union workers; he received monies in excess of the amount received by other locked-out employees. It is undisputed that the labor dispute and the resulting lockout caused Bradley's unemployment. He could not continue working *only* because of the lockout. (Dec. 4, agreed statement 1(c); Tr. 7.) Bradley's physical condition did not change. (Dec. 8-9; Tr. 38-41.) He worked in his high paying clerical union job until the lockout and immediately returned to that job when the lockout ended.

(Dec. 4, agreed statement 1(b); Dec. 6; Tr. 54-57; 61.) The judge erred in not taking the economic loss resulting from the lockout into account and measuring Bradley's earning capacity by the amount that he would have been able to earn if there were no lack of work. See Lavallee's Case, 277 Mass. at 539.

Under § 35D, the judge must use the *highest* amount of several alternative earning capacity calculations. One method of calculation is "[t]he earnings that the employee is capable of earning." G.L. c. 152, § 35D(4). Bradley's actual earnings, both before and after the lockout, constitute prima facie evidence of the amount that he is capable of earning. See Welch v. A.B.F. Systems, 9 Mass. Workers' Comp. Rep. 407, 411 (1995); Sjoberg's Case, 394 Mass. at 462 ("actual post-injury earnings will create a presumption of earning capacity commensurate with them"). While a judge is free to draw on his expertise "in the *absence* of testimony as to the earning capacity of the employee,"[5] he may not use his private knowledge as a substitute for evidence in the record, to overcome the prima facie effect of the actual wages paid. See Daniels v. Board of Registration in Medicine, 418 Mass. 380, 389-390 (1994).[6]

The judge viewed the employee's actual post-injury wages as akin to a "gratuity." (Dec. 12.) Webster's Dictionary defines "gratuity" as something given voluntarily over and above what is due. Webster's Third New International Dictionary 992 (1981). The record does not rationally support the judge's finding that Bradley's actual wages, paid pursuant to a collective bargaining agreement, were gratuitous. To the contrary, Bradley himself testified that he was working in a regular union position and not in a special light duty job. (Tr. 53.) His wages were set by the union contract; their payment was compelled by the terms of that agreement. Collective bargaining is the essence of a free

[5] Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988), quoting O'Reilly's Case, 256 Mass. 456, 458 (1929) (emphasis supplied).

[6] " 'The board may put its expertise to use in evaluating the complexities of technical evidence. However, the board may not use its expertise as a substitute for evidence in the record.' D'Amour v. Board of Registration in Dentistry, 409 Mass. 572, 583 (1991), quoting Arthurs v. Board of Registration in Medicine, . . . 383 Mass. [299] at 310. 'An agency or board may not sit as a silent witness where expert testimony is required to establish an evidentiary basis for its conclusions.'

labor market system and produces wages that accurately reflect the value of that union labor. It is arbitrary and capricious to characterize such wages as "artificially inflated," [7] or an "anomaly,"[8] and for that reason to disregard them.

Moreover, the case law permitting a judge to disregard actual earnings has been rendered obsolete by § 35D. In enacting § 35D, the Legislature responded to the Supreme Judicial Court's challenge in Sjoberg's Case, 394 Mass. at 460 to specify a method of computing the average weekly wage an employee is able to earn post-injury. According to Laurence S. Locke:

> The legislature tried to meet the concerns of the business community that prior determinations of the industrial accident board or decisions of the courts had authorized too lenient an interpretation of partial disability. The Reform Bill undertook to establish certain criteria to be used in determining loss of earning capacity, in new Section 35D, effective November 1, 1986, and applicable to injuries occurring before as well as after that date . . . . *This effectively replaces the Supreme Judicial Court decision in Sjoberg's Case, 394 Mass. 458, 476 N.E.2d 196 (1985), which authorized the industrial accident board to disregard actual earnings if other circumstances warranted a finding of lesser earning capacity.*

L. Locke, Massachusetts Workers' Compensation Reform Act of 1985,[9] § 8.4 at 50 (West Publishing Co., 1986) (emphasis added).

Section 35D supplants the prior common law on the calculation of post-injury earning capacity, rendering inapposite the cases cited in the majority opinion to support a disregard of actual earnings. "Prior to 1985, the Legislature had not specified the method for computing the average weekly wage an employee was capable of earning after sustaining a work-related injury, and much was left to the department's specialized knowledge and technical competence. . . However, § 35 must now be read with § 35D . .

D'Amour v. Board of Registration in Dentistry, supra, quoting Langlitz v. Board of Registration of Chiropractors, 396 Mass. 374, 381 (1985)."

[7] Dec. 11.

[8] Dec. 11, 12.

[9] Supplementing Locke, Massachusetts Workmen's Compensation, 2d (Practice Series Volume 29).

., as added by St. 1985, c. 572, § 45 . . . " Bradley's Case, 46 Mass. App. Ct. 651, 653 (1999).

"Section 35 benefits are intended to compensate an employee for a loss of earning capacity *caused by a work-related injury*." Bradley's Case, supra (emphasis supplied). In determining post-injury earning capacity, the judge is required to consider all the employee's vocational assets, including his union membership. See Scheffler's Case, supra. Bradley was able, by virtue of his union membership to command a high wage, despite his impairments. He did not lose that capacity during the lockout for reasons *resulting from the injury*. The highest wage that Bradley earned post-injury came from his particular suitable union job. That work had been made available to him immediately before and after the lockout. Section 35D(4) requires the judge to use that figure in § 35's benefit calculation.

Moreover, even if Bradley's actual post-injury wages do not reflect his § 35D(4) earning capacity during the lockout, § 35D may still require that they be used to measure his compensation entitlement. Section 35D(3) contains no requirement that post-injury wages continue to be paid. If the Legislature had wanted to limit a judge's ability to apply § 35D(3) to those situations where the employer kept the job open, it knew how to do so. Compare the language of § 35D(3), added by St. 1985, c. 574, § 45, which uses the past tense, "has been made available," with that of § 8(2)(d), which additionally requires that the job "is open" or "remains open." The language added to § 8(2)(d), by St. 1991, c. 398, § 23, expanded the ability to modify and terminate compensation, permitting unilateral discontinuances and modifications with the additional protection of continued availability. There is no reason to believe that in amending § 8(2)(d) in 1991, the Legislature intended to engraft a current availability requirement onto § 35D(3), a previously enacted section of the Act governing judicial calculations of post-injury

earning capacity.[10]

"Where the Legislature used different language in different paragraphs of the same statute, it intended different meanings." Ginther v. Commissioner of Ins., 427 Mass. 319, 324 (1998). The absence in § 35D(3) of the requirement that the job remain open should be construed to permit its application to situations where the job no longer is available. Although malingering is not present in this case,[11] the law was intended to deter it, and should be interpreted with that goal in mind. Writing into § 35D(3) a requirement that suitable work remain open would require a judge to ignore the wages paid by suitable light duty work, which had been refused by an employee, unless the employer kept the refused job vacant. Such an interpretation is impractical, enables malingering, and thus undercuts the legislative goal of a speedy return to suitable employment.

The suitability language of § 35D(3) and (5) further indicates the Legislature's intent to compensate only for actual wage loss that clearly and directly stems from the residual effects of a work injury, rather than from other causes. Here it is undisputed that the wage loss was precipitated by the labor dispute.

In conclusion, because the judge refused to adjust for the lockout's contribution to the employee's wage loss, (Dec. 14), and excluded from consideration the wages the employee had actually earned post-injury, (Dec. 10), the decision is contrary to the law of G.L. c. 152, §§ 35 and 35D. I would reverse it and recommit the case for further findings of fact applying the legal principles discussed above.

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[10] On August 26, 1991, Associated Industries of Massachusetts (AIM) submitted a memo to Senator Lois Pines, Senate Chairman, and Representative Suzanne Bump, House Chairman, Joint Committee on Commerce and Labor urging workers' compensation reform. AIM felt strongly that any reform package must at a minimum contain a provision achieving the use of automatic discontinuance for failure to accept a documented bona, fide offer of light duty. Id. at 3. In the debate on S. 1742, on November 21, 1991, Senator Pines said that one goal was to create incentives to encourage workers to go back to work: "We are a laughing stock across the country." State House News Service, Nov. 21, 1991, 3. "There are dishonest employees in this system taking advantage of employers." Id. at 4.

[11] One is reminded of the old proverb, "hard cases make bad law."

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Suzanne E.K. Smith
Administrative Law Judge