COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 008989-18**
Thomas Galvin	Employee
North Central Correctional Center	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Paul S. Danahy, Esq., for the employee
Robin G. Borgstedt, Esq., for the self-insurer

KOZIOL, J. The employee appeals from a decision awarding §§ 13 and 30 medical benefits for treatment rendered for his January 16, 2018, right shoulder injury, but denying and dismissing his claim for weekly benefits, and reducing his attorney's fee under G.L. c. 152, § 13A(5). We vacate so much of the judge's order as denied and dismissed the employee's claim for weekly § 34 benefits and reduced the attorney's fee payable to employee's counsel. We recommit those portions of the decision for the judge to reconsider and take further action as discussed herein.

In this case of first impression, we examine the interplay between G.L. c. 152, and G.L. c. 41, § 111F. Since August 31, 1998, the employee has been employed on a full-time basis as a correctional officer for the self-insured employer. In 2017, the employee also began working as a part-time police officer for the Town of Rutland (the Town). To maintain his status as a part-time police officer, the employee was required to work three shifts per month for the Rutland Police Department. (Dec. 6.)

On January 16, 2018, the employee was working the 11:00 PM to 7:00 AM shift at the Northeastern Correctional Center in Concord. At approximately 5:30 AM, while conducting a search of an inmate's cell, he was involved in a physical altercation with the

inmate and felt a "pinch in my right shoulder and just tightness after that." (Dec. 5.) The employee's shift commander and a co-worker were present when the incident occurred, and his shift commander instructed him to complete an industrial accident packet. (Dec. 5.) The employee worked the remainder of his shift plus 2-1/2 hours of overtime, which included time spent filling out the industrial accident packet. Id. Thereafter, the employee continued to work his regular shifts as a correctional officer without any lost time and without requesting "any modification to his work duties or any reasonable accommodation." (Dec. 5, 7.) Indeed, on March 22, 2018, the employee reported to work as a correctional officer at 11:00 PM, and completed his full-duty shift at 7:00 AM on March 23, 2018. (Dec. 7.) He did not report to his next shift at the North Central Correctional Center, which was scheduled to begin at 11:00 PM on March 23, 2018. (Dec. 7.)

On March 23, 2018, prior to the commencement of his next work shift, the employee ruptured his Achilles tendon while participating in a charity basketball game as a member of the Rutland Police Department's team. (Dec. 5.) He was transported by ambulance from the basketball court to UMass Memorial Medical Center where his leg was placed in a cast, and he was informed that surgery would be required to repair his Achilles tendon. (Dec. 6.) The judge found, "he was unable to use crutches and [left the hospital] by means of a wheelchair. His wife drove him home, and that night he ordered a so-called hands-free crutch, which '. . .looks like a peg leg. It's a crutch that you use your leg and not your arms. All the weight goes in your knee.' " (Dec. 6.) The judge found the employee used this device for "about 4 months, and never used regular crutches." Id.

On April 4, 2018, the employee underwent surgery to reattach the Achilles tendon. Thereafter, he received physical therapy for that injury "pretty much the whole year." (Dec. 6.) Dr. Abhay Patel, the surgeon who performed the Achilles tendon surgery, released the employee to return to work on May 7, 2019. (Dec. 7.) From March 23, 2018, through May 6, 2019, the employee received $1,000.00 per week from the Town pursuant to G.L. c. 41, § 111F. (Dec. 6.)

The present claim was filed by the employee on April 19, 2018, seeking medical benefits pursuant to §§ 13 and 30, as well as weekly § 34 total incapacity benefits, beginning March 23, 2018, for the January 16, 2018, injury to his right shoulder. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice may be taken of board file). His claim was accompanied by a March 30, 2018, medical report from his primary care provider, relating the employee's shoulder pain to the January 16, 2018, altercation with the inmate, diagnosing him with a right shoulder strain, and stating he was unable to perform his regular work duties pending evaluation by an orthopedist. Id. The self-insurer denied the claim. Prior to the claim proceeding to a § 10A conference, the employee began treatment with an orthopedist, Dr. Stephen Desio, who recommended the employee undergo right shoulder surgery. By conference order dated November 23, 2018, the administrative judge denied the claim, and the employee appealed. (Dec. 3.) When the employee informed his private health insurer that his workers' compensation claim had been denied, that insurer paid for the shoulder surgery performed by Dr. Desio on January 9, 2019. The employee's post-operative care included physical therapy, and he returned to work full duty on May 7, 2019. (Dec. 9.)

On May 18, 2019, the employee was examined by a § 11A impartial medical examiner, Dr. Charles Kenny.[1] At hearing, the employee sought weekly § 34, or in the alternative § 35, benefits from March 23, 2018, through May 6, 2019, as well as payment of §§ 13 and 30 medical benefits stemming from his right shoulder injury. (Dec. 1.) The parties stipulated that the employee's average weekly wage from the self-insured employer was $1,493.77. (Dec. 2.) Following the testimony, both parties submitted additional medical evidence and filed written closing arguments.

Regarding the employee's right shoulder injury, the judge accepted and adopted the following statements from Dr. Desio's May 3, 2018, office note:

> The patient presents for evaluation of right shoulder pain. He is status post a left shoulder arthroscopic acromioplasty and rotator cuff repair 1 year ago. He

[1] The judge allowed the employee's subsequent motion seeking a finding that Dr. Kenny's report was inadequate regarding the time period prior to his examination of the employee. (Dec. 3; Tr. 6.)

> presents today stating that he was involved in an inmate altercation at the jail as a correctional officer on January 16. He states he felt like he tweaked his shoulder somewhat. He did not miss any time because of the injury and started doing some exercises that he remembered from the left shoulder surgery. He states that the shoulder did feel better, but the pain never subsided. He then, in a nonwork related injury, tore his Achilles tendon of his left leg and had surgery on or about March 23, 2018. He states that initially having to use crutches made his right shoulder more painful. He describes the pain as a dull ache over the anterior lateral aspect of the shoulder which is worse with overhead activity and lifting. . . . He remains out of work because of his Achilles tendon surgery. . . . Dx: complete rotator cuff tear or rupture of the right shoulder, not specified as traumatic.

(Dec. 8.) The judge adopted Dr. Desio's November 12, 2018, opinions that, 1) the employee had a full thickness tear of his right rotator cuff, which required the recommended surgical repair consisting of an arthroscopic acromioplasty and rotator cuff repair, and caused him to be restricted to limited lifting, carrying, pushing and pulling due to weakness in his right shoulder; and, 2) the work injury of January 16, 2018, is a major contributing cause of the employee's current condition, disability, need for treatment and subsequent treatment. (Dec. 9.) Following the January 9, 2019, shoulder surgery, the employee had 16 weeks of physical therapy for his shoulder, which was extended to May 3, 2019, in order to build up his strength. (Dec. 9.) The judge found Dr. Desio advised the employee to be out of work through April 18, 2019, and cleared him to return to work with no restrictions after he completed his physical therapy on May 5, 2019. (Dec. 8, 9.)

The judge also adopted Dr. Kenny's opinions that, 1) the employee had "one or more of the following" pre-existing conditions: "right shoulder acromioclavicular osteoarthritis and degenerative rotator cuff tendinitis; rotator cuff tear, left shoulder, s/p repair;" 2) "the work incident of 1/16/18 combined with the pre-existing condition to cause or prolong the disability and need for treatment;" 3) "the work-related injury became a major but not necessarily predominant cause of the Employee's disability and need for treatment on 1/16/2018," and the "surgery and other procedures to treat the right shoulder pathology were reasonable, necessary, and causally related to the work-related

incident of 1/16/2018." (Dec. 9-10.) The judge adopted Dr. Kenny's opinion that the employee had reached a medical end result regarding his right shoulder, he was not disabled, and the work-related injury "is no longer a major cause of the Employee's disability or need for treatment." (Dec. 10.)

Based on these findings of fact, the judge concluded the employee had proven that his work-related injury of January 16, 2018, "was a major cause for the need for treatment of his right shoulder and that the medical treatment he received for his shoulder injury was reasonable." (Dec. 15.) Thus, he ordered the self-insurer "to pay for all medical services rendered in treatment of the Employee's right shoulder injuries." Id.

However, the judge found the employee was not entitled to any weekly benefits under Chapter 152, for his right shoulder injury. The judge found that, although the employee received $1,000.00 per week in § 111F benefits at all times relevant to this dispute, "The employee did not earn $1,000.00 per week while working as a part-time police officer. His impression is that his $1,000.00 per week benefit under M.G.L. c. 111F [sic] was based on the salary of a full-time Rutland Police Officer in his first year on the force." (Dec. 6.) The judge then concluded that although the employee proved that, as a result of the shoulder injury, he was "totally incapacitated from January 9, 2019 until May 6, 2019," his "receipt of benefits pursuant to M.G.L. c. 41, § 111F for the entire period of disability and in an amount exceeding temporary total incapacity benefits otherwise payable to him precludes an award of weekly incapacity benefits to him." (Dec. 15.) As a result, the judge denied and dismissed the employee's claim for weekly incapacity benefits. (Dec. 15.) He also reduced the employee's attorney's fee payable under § 13A(5), to $4,000.00 from the statutory figure of $5,969.79 in effect on the date of decision, August 13, 2020.[2] (Dec. 14-15.).

[2] Circular Letter 354, issued October 9, 2019, and applicable on the date this decision was filed, increased the legal fee due an employee's attorney for a hearing under § 13A(5) to $5,969.79. See G.L. c. 152, § 13A(10)(providing for the yearly adjustment of attorney's fees payable under § 13A(1)-(6) on October first of each year).

The judge based his denial and dismissal of the employee's claim for incapacity benefits on the ground that, pursuant to Mizrahi's Case, 320 Mass. 733 (1947), our decision in Dean v. Access Nurses, Inc., 30 Mass. Workers' Comp. Rep. 115 (2016), and his review of G.L. c. 41, § 111F, G.L. c. 152, § 34, and G.L. c. 152, § 69, "the public policy of the Commonwealth is that employees shall not receive double compensation for the same period." (Dec. 13.) The employee argues on appeal that the judge erred in drawing the conclusion that his claim must be denied and dismissed because any order of weekly incapacity benefits under Chapter 152 would result in a prohibited double recovery. There is merit to the employee's argument.

We begin by noting that while Mizrahi and Dean are instructive, they differ from this case in a manner that is critical to the analysis. In Mizrahi, the employee was receiving total incapacity benefits, under the longshoreman's and harbor workers' compensation act, for a hand injury he sustained while working for the employer. While he was receiving those benefits, he underwent surgery to repair double hernias he previously sustained while working for the same employer, and sought ten weeks of total incapacity benefits under Chapter 152, for the incapacity resulting from the hernia repairs. Id. at 383. The court stated that "for those same ten weeks he has been paid . . . total incapacity compensation under the Federal act, amounting, according to the record, to slightly more than the State act would give him." Id. at 384. The court upheld the denial and dismissal of the employee's claim for total incapacity benefits noting, "[s]ince both the compensation which the employee has received under the Federal act and that which he seeks under the State act are posited upon the same period of time, no amount of reasoning from technicalities can conceal the fact that the employee claims double compensation for the same loss." Id.

In Dean, the employee was a traveling nurse and resident of California, whose work-related injury occurred in Massachusetts. The employee received "unemployment/disability benefits" under California law for a portion of the time that she subsequently claimed entitlement to incapacity benefits under Chapter 152. Dean, supra

at 117-118. Noting that the "bar against double recovery has long been reflected in Massachusetts case law and legislation," we stated:

> With respect to workers' compensation payments made in two states, the law is clear. An employee who has received workers' compensation benefits in another state may apply for and receive benefits in Massachusetts, "but the amount paid on [the] prior award in [the other] state will be credited on the second award." Lavoie's Case, 334 Mass. 403 (1954)]; McLaughlin's Case, 274 Mass. 217, 222 (1931)(because '[t]he employee cannot have double compensation,' New Hampshire workers' compensation benefits must be deducted from a subsequent award under chapter 152).

Dean, supra, at 122. We concluded, "[g]iven the fundamental policy against double recovery, we think the judge's decision to allow the insurer to take credit for the stipulated amount of benefits paid in California was correct." Id. at 124.

In both Mizrahi and Dean, the incapacity occasioned by the work-related injuries resulted in only one economic loss, or one set of lost earnings, for the court to consider. Even though Mizrahi had two injuries, while insured by two different compensation schemes, he sustained those injuries in only one employment, and his earnings lost from that employment as a result of his hand incapacity, were already being replaced at a rate in excess of what he could receive under Chapter 152 for the incapacity associated with the hernias. Dean had just one injury for which she was paid, in part, under California law. Thus, those cases are unlike the present case where the employee claims simultaneous disability resulting from two separate injuries, incurred in two separate employments, with each employment being governed by separate and distinct compensation schemes that, on their face, do not purport to cover, or consider, any earnings lost in the other employment. We believe the key to analyzing this case lies in recognizing the economic loss, or lost earning capacity, that the employee experienced as a result of the injuries and determining whether either compensation system could pay, or did pay, the employee for the lost earnings incurred in the other job.

We start by observing that, had the employee's Achilles tendon injury arisen out of and in the course of part-time employment with another employer covered by Chapter

152, the employee would be entitled to only one incapacity payment, despite the fact that his entitlement to benefits for both injuries would run simultaneously. Laverde v. Hobart Sales and Service, 18 Mass. Workers' Comp. Rep. 214, 218-220 (2004)(even though employee did not collect weekly benefits for knee injury, employee was not entitled to "full-slate" of benefits for knee injury where he collected benefits for a back injury, but was simultaneously disabled by both injuries, and the two injuries were "each wholly responsible for 'one and the same [partial] incapacity' "). However, where both employments are covered by Chapter 152, the employee's single incapacity payment would be based on his concurrent wages earned from both employments pursuant to G.L. c. 152, § 1(1).[3] Thus, the employee would be compensated based on a more realistic measure of the earnings lost as a result of one incapacity.

The employee correctly argues that, because police officers are not covered by Chapter 152, consideration of any earnings lost from his job as a police officer are beyond the reach of § 1(1).[4] Thus, the self-insured could not be ordered to pay any weekly benefits to replace earnings the employee's shoulder injury may have caused him to incur from his inability to work as a part-time police officer with the Town. See Lubofsky v. Lowe's Home Centers, Inc., 29 Mass. Workers' Comp. Rep. 109, 118-119 (2015)(wages from United States Postal Service job could not be considered in calculation of average weekly wage of injured employee). Therefore, the employee

[3] General Laws c. 152, § 1(1), provides, in relevant part, "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." Section 1(6) defines an "insured" or "insured persons" as "an employer who has provided by insurance for the payment to his employees by an insurer of the compensation provided for by this chapter, or is a self-insurer under subparagraph (a) or (b) of paragraph (2) of section twenty-five A, ..."

[4] We acknowledge that an exception to this rule is made in G. L. c. 152, § 1(4), for "any reserve or special police officer" who is injured while employed by, and paid directly by, a contractor under very specific circumstances not relevant here. See O'Connor v. M.B.T.A., 35 Mass. Workers' Comp. Rep. ___ (4/14/21)(discussing limited circumstances where police officers may be compensated under Chapter 152).

argues, there is no opportunity for double recovery here. (Employee br. 10.) He also correctly points out that nothing in Chapter 152, "prohibits the receipt of benefits pursuant to Section 111F while a person is receiving benefits under Chapter 152.[5] Likewise, Section 111F contains no preclusion to receipt of benefits under Chapter 152 while a person is receiving benefits pursuant to Section 111F." Id. So far, we agree.

The employee further argues that "there was no danger of double dipping or double recovery," (Employee br. 10), because nothing in § 111F indicates that his wages from the self-insured employer could be factored into the payments he received from the Town for disability stemming from his Achilles tendon injury: "Only the Employee's wages as a police officer for [the Town] were considered in calculating those benefits." Id. This statement is not entirely accurate.

On its face, § 111F requires only the payment of the wages the injured officer loses from his job as a police officer:

> Whenever a police officer . . .is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, . . . he shall be granted leave without loss of pay for the period of such incapacity; provided that no such leave shall be granted for any period . . . after a physician designated by the board or officer authorized to appoint police officers. . . determines that such incapacity no longer exists.

General Laws, c. 41, § 111F.

However, while nothing in § 111F, indicates that an injured officer, such as the employee, may receive any payment other than payment for the loss of wages earned as a police officer, the employee admitted the payments he received were based on the wages earned by a first-year full-time police officer. (Tr. 47.) The administrative judge clearly was troubled by the amount of the payments the employee received from the Town:

[5] The self-insurer argues G.L. c. 152, § 69 prohibits such payments because G.L. c. 41, § 111F designates payments as "regular pay." (Self-insurer br. 10.) The judge did not accept that argument by the self-insurer but correctly noted that the policy behind the prohibition against being paid wages while receiving compensation, as stated in § 69, is consistent with the concept that double recovery cannot occur. See Graham v. Boston School Committee, 9 Mass. Workers' Comp. Rep. 287, 290 (1995).

> The employee was coy about the amount of earnings that he made as a Rutland Police Officer, being no more specific than testifying to the requirement that he work 3 shifts per month. On the other hand, he was quite clear that he did receive **$1,000.00** per week under §111F for the entire period from his basketball injury and his return to work for both jobs, simultaneously. There is no evidence as to the manner how [sic] the Town of Rutland calculated that payment amount.[11] Fortunately for our purposes, the manner of calculation is immaterial. His average weekly wage as a Corrections Officers was $1,493.77, and the § 34 rate would be **$896.26**. Thus, he was receiving under M.G.L. c. 41, § 111F more money than his § 34 rate would be, and as a consequence he is not entitled to any weekly incapacity benefits under M.G.L.A. c. 152.
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> [11] I cannot conceive of how he could have been earning $1,000.00 a week as a part-time Police Officer, and particularly if he was working just three shifts per month. I am not going to speculate as to how the Town of Rutland arrived at his wages.

(Dec. 13)(emphasis and footnote in original).

The employee argues the judge incorrectly focused on the payments he received under § 111F, stating the judge,

> has no authority or jurisdiction to review payment made to the Employee under Section 111F. The Administrative Judge may not agree with the amount paid to the Employee by the Town of Rutland pursuant to § 111F but the Administrative Judge does not have the authority or jurisdiction to review those payments.

(Employee br. 10-11.) Here, nothing in evidence before the judge indicated that the Town of Rutland paid the employee $1000.00 per week in order to replace the wages he lost due to his inability to work at the self-insured employer as a result of his Achilles tendon rupture. Without this evidentiary link, we agree that the judge's assumptions that this was the case, and that the payments fully compensated the employee for his lost earnings as a corrections officer, were arbitrary and capricious. Thus, we agree with the employee that, on the facts before him, the judge erred by concluding that the employee was not entitled to *any* weekly incapacity benefits under Chapter 152. See Kszepka's Case, 408 Mass. 843, 848 (1990)(where it is not possible to determine that there would in fact be a double recovery, assumption that there is one is faulty).

Nonetheless, we do not agree with the employee that the judge was prohibited from considering any payment he received from the Town because, as a matter of law, the payments the employee received from the Town do have a bearing in analyzing this case. The relevant statutory provision that explains why those payments must be considered, and which also explains why the employee received $1,000 per week for his work as a part-time police officer, is G.L. c. 32, § 85H, which was not cited by the self-insurer, and was missing from the judge's analysis. General Laws, c. 32, § 85H, provides, in pertinent part:

> If a . . . special or intermittent police officer or a town or a reserve police officer . . . is disabled because of injury or incapacity sustained in the performance of the person's duty through no fault of the person and is thereby unable to perform the usual duties of the person's regular occupation at the time the injury or incapacity was incurred, the person shall receive from the city or town for the period of the injury or incapacity the amount of compensation payable to a permanent member of the police . . . force thereof, . . . for the first year of service therein . . . provided, however that no compensation shall be payable . . . for any period after a physician designated by the board or officer authorized to appoint police officers . . . in the city or town determines that the injury or incapacity no longer exists. All amounts payable under this section shall be paid at the same time and in the same manner as, and for all purposes shall be considered to be, the regular compensation of the police officer. . . .

The Supreme Judicial Court discussed the operation and import of the interplay between G.L. c. 41, § 111F and G.L. c. 32, § 85H in Jones v. Wayland, 380 Mass. 110 (1980). First, the court noted, "there is no requirement that an individual seeking benefits under this portion of § 85H must formally request them." Id. at 118. "To qualify for § 85H benefits the 'regular occupation' at issue 'must constitute [] at least a substantial source of income for the injured officer.' " Becker v. Town of Newbury, 72 Mass. App. Ct. 807, 813 (2008), quoting from Murphy v. Dover, 35 Mass. App. Ct. 904, 905 (1993). Thus, if the employee fits within the scope of the statute, the Town "had no option but to make the payments called for by this portion of § 85H." Jones, supra at 117-118. The Court then discussed these benefits:

> Under §111F, qualifying police and firefighters continue to *receive their normal police or firefighting pay*. While this sum may amount to a full weekly pay

check in the case of a regular officer, it may also be the far smaller sum earned by a special officer who worked only a few hours per week prior to his injury.

We believe that § 85H reflects the legislative concern over the adequacy of benefits afforded by § 111F to certain public safety officers injured in the line of duty. The "reserve, special and intermittent police" and "call fire fighters" covered by §85H represent those public safety officers most likely to be reliant on other jobs as their primary source of income. The compensation benefits of § 85H, we conclude, *are designed to compensate these officers for the inability to perform such other work*.[13] Read in this light, "regular occupation" means employment distinct from that as a police officer or firefighter.

The policy behind such a compensation plan is clear: those individuals willing to submit themselves to the dangers inherent in police and fire work while still looking to another job as a substantial source of support should not be made to suffer economically in the event that they are rendered incapable of performing this other employment due to an injury sustained while serving as a public safety officer.

Furthermore, by providing such compensation benefits the Legislature has also assured that towns which rely on the services of part-time public safety officers will be able to recruit such persons. Finally, by providing any such officer injured in the line of duty with possible eligibility under both § 111F and § 85H, the Legislature has discouraged the indiscriminate use of such special officers in lieu of regular police and firefighters.

Our construction gives full effect to both § 85H and § 111F and their differing legislative goals. We read these provisions as complementary. While § 111F requires a showing that the officer is "incapacitated for [police or firefighting] duty," *eligibility for § 85H compensation benefits turns instead on the injured officer's ability to perform the "usual duties of his regular occupation."*

[13] Rather than calculating the precise amount of income lost due to an officer's inability to perform such other work on a case by case basis, the Legislature has chosen the rough but equitable solution of determining § 85H compensation benefit payments by reference to a fixed amount: the first year salary of a permanent police officer or fire fighter.

Jones, supra, at 118-120(emphasis supplied)(footnote original).[6]

[6] Although § 85H speaks in terms of "reserve or special or intermittent police officer," a "part-time police officer" is covered by the statute as stated by the court in Jones, supra. See also, Ware v. Town of Hardwick, 67 Mass. App. Ct. 325, 329 (2006)("A part-time police officer who

Thus, while not basing the payments on what the employee actually earned per week in his full-time job with the self-insured, the Town made the payments prescribed by the statute, which are intended, in principle, to compensate the employee, at least in part, for his lost earnings from his full-time job with the self-insured employer, as a result of his Achilles injury sustained while working as a police officer. Indeed, "the statute is designed to cushion the blow of a loss of current income." Becker, supra. at 813. In this manner, by enacting § 85H, the Legislature may be seen as building into § 111F a rough substitute for concurrent wage replacement for injured officers whose service as part-time police or fire fighters does not constitute their primary means of earning a living. As recognized by the Court in Jones, supra, § 85H does not provide an exact dollar for dollar replacement of the employee's wages, so unlike the concurrent wage provision of § 1(1), this wage replacement may not be complete. However, because these payments are from another workers' compensation scheme, they must be considered in our analysis. Mizrahi, supra at 737.

Here, the weekly payments the employee received from the Town exceeded the weekly amount the employee could receive in § 34 benefits from the self-insurer for the same period by $103.74 per week, and that is all that can be said at this point about those payments. Without a stipulation of fact or other findings of fact concerning the employee's actual weekly compensation rate as a part-time police officer, prior to the application of § 85H, the judge could not assume that any amount of payment the employee may receive under Chapter 152, would cause a complete double recovery in this case.[7] Moreover, we note that under Chapter 41, officers receiving § 111F

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is disabled while working on his part-time job and who is thereby unable to work at his 'regular' job is entitled to statutory 'injured on duty' benefits under G.L. c. 32, § 85H").

[7] In Becker, supra, the Court discussed the origins of § 111F, observing that through amendments to Chapter 152 other government employees were included in our Act's coverage, but the statute was never expanded to cover police and firefighters. Thus, § 111F was enacted to fill the "gap" in coverage, and, "when faced with a question regarding the proper construction of § 111F, both this and the Supreme Judicial Court consistently have referred to construction of analogous provisions of the workers' compensation statute." Id. at 809. The Court continued:

compensation are "granted leave without loss of pay for the period of such incapacity," and as a result are "entitled to full pay while injured," not a percentage of their wage as dictated by Chapter 152. It is not clear the judge considered this difference either. Becker, supra at 810 n. 4.

To the extent the payments the employee received under § 111F exceeded his true average weekly wage as a part-time police officer, and thus represent payments for his inability to work at the self-insured due to the Achilles tendon injury, we view them as being akin to receiving compensation for the same period of incapacity in another jurisdiction. Such awards do not preclude an award under Chapter 152, but allow for the amount paid on a prior award in another jurisdiction to be credited against the award here. See Lavoie's Case, 334 Mass. 403, 410-411 (1956); Dean, supra. To the extent the judge found the employee was "coy about his earnings with the Town," (Dec. 13), the employee was never asked what he earned per week as a part-time officer. Rather, he was only asked "how many days per week" he worked as a part-time police officer, to which he responded, "I'm required to work three shifts a month, but I don't recall exactly how many shifts I worked in a month." (Tr. 47.) Accordingly, in this case of first impression, where the record is deficient, we recommit the matter for further proceedings, including taking additional evidence, to allow the judge to make further findings of fact and enable him to determine the amount, if any, that the employee may be entitled to under Chapter 152. See Kourouvacilis v. F.L. Roberts & Co., 12 Mass. Workers' Comp. Rep. 100, 103 (1998)(on recommittal additional evidence allowed as necessary to perform judicial function).

> Against that backdrop, we think that "pay" under § 111F ordinarily should be determined by the average weekly wage the police officer or fire fighter earned during the year preceding her incapacitating injury. That wage is the baseline for calculating benefits under the workers' compensation statute, see G.L. c. 152, §§ 1(1), 34, 34A, 35, and, given the origin of § 111F, is an appropriate reference for use when calculating the "pay" of injured fire fighters and police officers.

Becker, supra at 809-810. (Footnotes omitted).

Next the employee argues the judge erred in limiting the duration of the employee's total incapacity, as a result of the shoulder injury, to only the closed period following the date of his shoulder surgery, January 9, 2019, through May 6, 2019, the day before his return to full-duty work. The employee asserts that his incapacity commenced on March 23, 2018, when he "experienced immediate shoulder pain just attempting to use crutches," and that on March 30, 2018, his primary care provider advised him to be out of work until he was evaluated by an orthopedist. (Employee br. 12.) We observe that, although the judge found the employee was unable to use crutches, (Dec. 6), he did not make these specific findings. Nonetheless, he did adopt Dr. Desio's statements that after the Achilles injury " 'initially having to use crutches made his right shoulder more painful.' " (Dec. 8, 9.) The employee additionally argues that the adopted opinions of Dr. Desio required the judge to find the employee disabled from March 23, 2018, through the date of surgery, January 9, 2019. (Employee br. 12.) The judge's findings regarding the employee's incapacity associated with the employee's right shoulder injury are limited to his conclusion that the employee proved "it is more likely than not that his industrial injury on January 16, 2018 caused him to be totally incapacitated from [his date of surgery] January 9, 2019 until May 6, 2019." (Dec. 15.) We agree that, on its face, this conclusion does not appear to be consistent with the adopted opinions of Dr. Desio concerning the time period prior to the surgery of January 9, 2019, and we acknowledge there are insufficient findings of fact for us to determine if correct rules of law have been applied to the incapacity analysis in this case. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). On recommittal, the judge must make further findings of fact and rulings of law regarding the employee's claimed disability and incapacity during the relevant time period in dispute, March 23, 2018, through January 9, 2019.

We now address the remaining issue raised by the employee on appeal. The employee argues the judge erred in reducing the attorney's fee payable to his counsel. We agree. The judge discussed the issue as follows:

> I am awarding a reduced amount of the attorney's fee, based on the facts that (a) the Employee has not prevailed in his claim for disability benefits, (b) Counsel's inclusion of a description in the Employee's Closing Argument of a description of the January incident that went beyond any testimony and would tend to make it seem more injurious; and (c), Counsels [sic] inclusion in his submission of 551 pages of medical records of UMassMemorial [sic] Medical Center of numerous pages that were redundant and/or consisted of authorization forms signed by the Employee or other immaterial matter. It is obvious to me that these records were merely lumped in with other medical records and sent to me to wade through. The weight of the evidence does not mean the literal weight of the documents. A more diligent editing of the file prior to submission as an Exhibit would have been appropriate and appreciated.

(Dec. 14.)

General Laws, c. 152, § 13A(5) states, in pertinent part, "an administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney." Here, neither of the first two reasons given by the judge for reducing the fee comports with those specified by statute. First, the employee prevailed in obtaining an award of medical benefits, and the judge's decision shows he found that the employee's claim for weekly benefits failed as matter of law, not for a lack of effort on the part of the attorney. See Hopkins v. Digital Equipment Corp., 13 Mass. Workers' Comp. Rep.295, 296 (1999)(error to reduce fee on ground employee obtained less than the full amount of benefits sought). Second, the judge's statement regarding the employee's closing argument does not reflect a lack of effort on the part of the employee's attorney. In fact, at the hearing the judge stated that filing a closing argument was "completely voluntary" and was not required. (Tr. 8.) It cannot be said that writing and filing a document, in support of his client's case, which was not required by the judge, is evidence of a lack of effort on the part of the attorney.[8]

[8] We observe that, regarding the closing argument, the judge pointed to nothing specific as being objectionable or showing a lack of effort. We have reviewed the closing argument and do not see where the description of the incident "went beyond the testimony," as it appears to track the employee's testimony almost verbatim. In any event, it must be recognized that a closing argument is not evidence, and it represents counsel's last chance to vigorously advocate for his client by presenting the case in the light most favorable to the employee. To the extent the judge

The third reason the judge factored into his decision to reduce the attorney's fee, is the only one that arguably reflects a proper basis for reducing the fee: specifically, that the judge found the attorney exhibited a lack of effort by offering in evidence a voluminous medical record which contained some irrelevant information. On appeal, the employee argues he had the records certified pursuant to G. L. c. 233, § 79G, and, as such, he could not permissibly cull out pages from those certified records. (Employee br. 15.) Pursuant to 452 Code Mass. Regs. § 1.11(4), "the admissibility of evidence and the competency of witnesses to testify at a hearing shall be determined under the rules of evidence applied in the courts of the Commonwealth." Moreover, "medical reports in general are 'independently admissible' at department hearings pursuant to G.L. c 233, § 79G." Higgins's Case, 460 Mass. 50, 62 (2011). The certification of these records is not acknowledged by the judge in his decision. However, by having the records certified, the attorney appears to have been protecting his client's interests by ensuring against any objection that might have been filed by opposing counsel regarding their admissibility. See Pavao v. Chase Collections, 13 Mass. Workers' Comp. Rep. 39, 41& n.1 (1999) (judge's admission of medical record over objection of employee was reversible error where records were otherwise inadmissible and insurer failed to have records certified pursuant to G.L. c. 233, § 79G).

Because two of the three grounds relied upon by the judge for reducing the attorney's fee were improper on their face, and we are unsure whether the judge adequately considered the circumstances surrounding the third ground he gave for reducing the fee, we vacate the order reducing the attorney's fee as well.

We vacate so much of the decision as denied and dismissed the employee's claim for weekly incapacity benefits, and the order reducing the employee's attorney's fee. We recommit both issues to the judge to take further evidence regarding the employee's claim for incapacity benefits and to make further findings of fact and rulings of law on

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may not have believed portions of the employee's testimony, the recitation of that testimony does not reflect a lack of effort on the part of the attorney.

both issues as discussed herein. In addition, on recommittal, the judge must make further findings of fact and rulings of law concerning the employee's claimed incapacity from March 23, 2018, through his date of surgery, January 9, 2019.

So ordered.

Catherine Watson Koziol
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: ***May 3, 2021***