COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 58795-94**

William McCarty	Employee
Wilkinson & Co.	Employer
National Union Fire Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Maze-Rothstein and Wilson)

APPEARANCES
Michael C. Akashian, Esq., for the employee
Edward F. McGourty, Esq., for the insurer

CARROLL, J. In this case's third visit to the reviewing board, the most recent hearing decision following recommittal is the subject of cross-appeals. See McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285 (1997) and 15 Mass. Workers' Comp. Rep. 76 (2001). We summarily affirm the decision as to all of the insurer's arguments. We see merit in one of the employee's arguments on appeal, regarding the administrative judge's reassessment of the employee's earning capacity from the § 11A medical examination date, September 13, 1995, to date and continuing. Because the evidence in the record fails to support the judge's earning capacity assignment, we recommit the case once more.

It is unnecessary to recount the facts of the case that are contained in the first two decisions. Pertinent to this appeal are the following findings on the employee's earning capacity:

> Mr. McCarty is an articulate and well-groomed individual with a good work history. He has pursued a college education with impressive grades since his accepted industrial injury, thus demonstrating a keen intellect and an ability to grasp new concepts. At his present age of 38, he is a seasoned worker not yet past his prime working years and lives in an area where the construction, finance and hi-tech business sectors are vibrant. I find that there are no physical, medical, social, educational, or vocational impediments to his seeking and obtaining work in any other construction trade as either a worker or manager, or in changing to any career field that suits his interests. No evidence has been submitted that the

> employee would be exposed to epoxy and the entire epoxy resin complex [his medical restriction] in any occupation other than as a tile-setter [his former employment]. Therefore, I find this sole medical restriction is not a limiting factor if Mr. McCarty changes his occupation.
>
> I find that in today's economy, he would have an earning capacity of at least $880.00 per week ($22.00 per hour), or slightly higher than the current state-wide average weekly wage in the commonwealth. I assign this earning capacity as of the date of the Impartial Medical Examination (September 13, 1995) when his Section 35 benefits were terminated under the prior Decision. Although this earning capacity is somewhat higher than the state-wide average weekly wage in effect at that time, it falls squarely into the range of what experienced construction workers in Greater Boston were earning at that time. . . .
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> Since the earning capacity of $280.00 assigned during the period May 2, 1995 to September 1995 was not disturbed by the prior appeals, that amount is not revisited here as it remains law of the case. In that prior period, Mr. McCarty was still experiencing some of the painful symptoms in his hands that restricted him from many occupations, and he had not yet completed his recent collegiate experience. Both of these now-changed factors played a role in determining that modest earning capacity in the earlier Decision.

(Dec. 20-21.)

While the record is clear and undisputed that the employee had been a tile-setter and grouter, working through the Local 3 Bricklayers & Allied Craftsmen in Boston, for approximately thirteen years prior to his industrial injury, (Dec. 6), the employee could not go back to that line of work. (Dec. 19-20.) There is no evidence that the employee had any other experience as a construction worker. Therefore, the judge's $22.00 per hour earning capacity based on "what experienced construction workers in Greater Boston were earning [in 1995]" – cannot stand.

Moreover, the finding in the last paragraph quoted above, that the employee had completed his college career, is an assumption likewise not based in evidence. At the time of the last recommittal hearing in 1997 – at which evidence was taken – the employee was in his second year of full time college, having transferred to Tufts University. (Dec. 6; November 21, 1997 Tr. 29-31.) However, there is no evidence in the record as to the employee's status after that time. There is no basis for this decision

to suggest that the employee has attained his college degree. Findings must be based on evidence properly before the judge, Fritch v. Cape Associates, 9 Mass. Workers' Comp. Rep. 389, 390 (1995), or the conclusions drawn from those findings are arbitrary and capricious. McCarty, 11 Mass. Workers' Comp. Rep. at 288, citing Bursaw v. B.P. Oil Co., 8 Mass. Workers' Comp. Rep. 176 (1994). The economic impact of a college degree – as opposed to just courses taken towards a degree – cannot be overlooked. Moreover, not all degrees result in lucrative professional options. We must note that, without evidence that the employee has graduated college, we are looking at a tile-setter – albeit one who is bright, articulate, well-groomed and able to grasp new concepts – starting out, in all likelihood, as an *entry level employee* embarking on *an entirely new career*. As such, the judge's assignment of a $22.00 per hour earning capacity is arbitrary and capricious. See Lolos v. Monsanto Co., 12 Mass. Workers' Comp. Rep. 83, 84-85 (1998).

Accordingly, we recommit the case for further findings on earning capacity and which have support in the evidence.

We award the employee's attorney a fee of $1,285.63 under the provisions of G.L. c. 152, § 13A(6), as the employee prevailed as against the insurer's appeal.

So ordered.

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

Filed: **July 9, 2002**
MC/jdm

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Sara Holmes Wilson
Administrative Law Judge