

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
INDUSTRIAL ACCIDENTS

BOARD NO. 015304-04

Robert Healy
Richard Burbridge
AIM Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant¹)

The case was heard by Administrative Judge Hernandez.

APPEARANCES

Robert L. Noa, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee on appeal
Michael K. Landman, Esq., for the insurer

HORAN, J. The employee appeals from the second hearing decision in this case, challenging the judge's finding he was only partially incapacitated as of January 10, 2006. The employee maintains the wages he received for part-time employment were not indicative of "substantial" and "non-trifling" work. (Employee br. 14.) See Frennier's Case, 318 Mass. 635, 639 (1945). We affirm the decision.

In Healy v. Richard Burbridge, 22 Mass. Workers' Comp. Rep. 109 (2008), we recommitted this case for the judge to address only the issue of the employee's earning capacity, given that he had testified to earning wages from part-time work. Id. at 111. Without taking further evidence, the judge issued the second hearing decision to address that issue. Based on the employee's testimony that he had earned \$75 per week picking up his neighbor's children from school to provide temporary babysitting services, "that he worked approximately eight hours a week, and experienced no physical difficulties in performing his driving duties," and "that he was capable of performing this driving job, if available, on a full time

¹ Judge Fabricant recused himself and did not participate in panel deliberations.

basis,” the judge found that, as of the January 10, 2006 hearing, the employee was capable of earning \$75 per week. (Tr. 62-63; Dec. 13-14.) The judge ordered the insurer to pay § 35 benefits from that date forward at the maximum rate of \$186.30 per week, based on the employee’s average weekly wage of \$414.00, and an earning capacity of \$103.50.² (Dec. 19.)

We find no support for the employee’s argument the \$75 he received for providing driving and babysitting services are not “earnings” as that term is plainly understood. The employee’s contentions that his activities manifest only a “sporadic” ability to work, and that \$75 per week is too “trifling” an amount to support an earning capacity finding, are defeated by the plain language of § 35D, which provides, in relevant 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.


(Emphasis added.) See Nason, Koziol and Wall, *Workers’ Compensation*, 29 M.P.S. (2003) § 18.18, pp. 67-68 (§ 35D(1) effectively overruled court’s decision in Sjoberg’s Case, 394 Mass. 458 (1985), which had authorized board to disregard actual earnings as the employee’s minimum earning capacity.) Accordingly, we affirm the decision.

² We note the inconsistency in the judge’s initial finding the employee was capable of earning \$75 per week, (Dec 14), and his later order of § 35 benefits based on an earning capacity of \$103.50. (Dec. 19.) The employee argues only that the judge erred by assigning him any earning capacity. He does not quarrel with the inconsistency in the earning capacity findings, or challenge the *amount* of the earning capacity assigned. See e.g., Rezendes v. City of New Bedford Water Dep’t., 21 Mass. Workers’ Comp. Rep. 45, 50-51 n.2 (2007)(issue not appealed is deemed waived); compare Mahoney’s Case, 76 Mass. App. Ct. 1108 (2010)(memorandum and order issued pursuant to rule 1:28)(where employee argued judge made inadequate findings with respect to partial disability *as well as* inadequate factual findings and analysis with respect to earning capacity amount, court affirmed finding of partial disability and remanded for additional factual findings and analysis on earning capacity amount). We note whether the employee’s earning capacity is \$75 or \$103.50, the maximum weekly § 35 benefit is the same: \$186.30, based on his average weekly wage of \$414.00. G. L. c. 152, § 35.

Robert Healy
Board No. 015204-04

So ordered.


Mark D. Horan
Administrative Law Judge


Patricia A. Costigan
Administrative Law Judge

