

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 046676-03

Reginald Eason
Symmetricom Corp.
North River Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, Carroll and Horan)

APPEARANCES

Theresa Brooks Benoit, Esq., for the employee at hearing
Jonathan Harris, Esq., for the employee on appeal
John A. Leone, Esq., for the insurer at hearing
David M. O'Connor, Esq., and Melissa A. Pomfred, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from a decision in which an administrative judge awarded the employee ongoing partial incapacity benefits for a December 19, 2003 industrial injury to his back. Because the judge's calculation of the employee's post-injury earning capacity does not comply with the statutory formula for determining such amounts under G. L. c. 152, § 35D, we recommit the case for further findings on the employee's earning capacity.

The employee injured his right shoulder and lower back when a box fell off of a rack onto him while he was working on the employer's loading deck. (Dec. 5-6.) For the purposes of this appeal, the pertinent facts regarding the employee's post-injury earnings were those stipulated by the parties and incorporated into the decision. (Dec. 3.) The judge's earning capacity findings were based on the specific amounts set out covering nine distinct weeks of post-injury employment:

I find that Mr. Eason has continued to suffer from a partial physical incapacity since the industrial injury of December 19, 2003. Dr. Ayers referenced that incapacity and set specific physical limitations. Mr. Eason was generally in the business of warehouse shipping and receiving work, an activity that requires regular lifting of stock and materials, the weight of which varies from employer to employer. His physical limits have inhibited his ability to return to such employment on a regular basis. Mr. Eason, however, was not totally disabled

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from gainful employment. He is a college graduate who has worked in sedentary positions, although not for a prolonged period.

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Mr. Eason, to his credit, sought reemployment following his industrial injury. His actual average wage for the nine weeks identified by the parties was \$355.63. I find that Mr. Eason has had the capacity to earn \$355.63 per week since the date of injury.

(Dec. 12.) Absent from the judge's assessment of the parties' stipulation of earnings was one non-quantified account of the employee's post-injury employment: "Volt Temporary Staffing a/k/a Volt Services Group, placed Reginald Eason in a full-time position at Mellon Bank from March 30, 2005 through November 18, 2005 as a collections clerk."

(Dec. 3.) The employee's testimony regarding that placement was that he worked at Mellon Bank full-time, and made around \$15.00 per hour. (Tr. II, 85-86.) The employee left work at Mellon Bank because his contract ended, not because of his physical inability to perform the job. (Tr. II, 40.)

The insurer on appeal challenges the judge's analysis of the employee's post-injury earning capacity. Section 35D requires that the judge assign the *greatest* amount derived from the four methods the statute sets out for assigning a weekly earning capacity. That section states in pertinent part:

- (1) The actual earnings of the employee during each week.
- (2) The earnings that the employee is capable of earning in the job the employee held at the time of injury, . . .
- (3) The earnings the employee is capable of earning in a particular suitable job . . .
- (4) The earnings that the employee is capable of earning.

General Laws c. 152, § 35D. See Perez v. Work, Inc., 20 Mass. Workers' Comp. Rep. 117, 118 (2006)(actual earnings establish floor, not ceiling, for earning capacity assignment). Where an employee has actual earnings in any given week, post-injury, those earnings usually establish the minimum earning capacity that a judge must assign

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for that week. See Saletnik v. I-Log, 16 Mass. Workers' Comp. Rep. 430 (2002)(bonus check found to represent earnings over period claimed for §35 benefits).

The stipulation of the parties as to the employee's earnings contained several weeks in which the employee earned more than the \$355.63 assigned by the judge. (Dec. 3.) The judge erred by looking past those actual earnings of the employee for the weeks in which such earnings were established, and instead taking the average of all of the weekly amounts. In doing so, the judge essentially replaced calculation of post-injury earning capacity – which is determined on a week-to-week basis – with the calculation governing pre-injury average weekly wages. See § 1(1). Earning capacity should be calculated specific to the wages earned each week where such calculation is possible and appropriate, not as an average of actual wages.

We note that the difference in the stipulated earnings is based in part on a difference in hours worked at the post-injury jobs. (Dec. 3.) The question necessarily arises as to why, after having worked a forty-hour week, the employee did not have the capacity to work the same amount in subsequent weeks. Cf. Cassola's Case, 54 Mass. App. Ct. 904 (2002)(rescript)(variations in amounts worked post-injury due to flare up of work-related back pain). Although there may be physical and vocational aspects to this hourly variation, the judge must more clearly support his earning capacity analysis with more specific subsidiary findings.

We also note the insurer's assertion that the judge's calculation of earning capacity failed to include the employee's full-time job at Mellon Bank from March 30 through November 18, 2005. We agree that the judge must make specific findings addressing that evidence. (Tr. II, 85-86.)

Accordingly, we recommit the case for further findings consistent with this opinion.

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So ordered.

Bernard W. Fabricant
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

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