COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS | **BOARD NO. 030763-16**

Said Ahmed	Employee
City of Boston	Employer
City of Boston	Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Harpin)

This case was heard by Administrative Judge Herlihy.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Ryan R. Keogh, Esq., for the self-insurer

CALLIOTTE, J. The self-insurer appeals from a decision ordering it to pay the employee § 34 temporary total incapacity benefits from December 28, 2016, to March 20, 2017, and § 35 benefits thereafter based on a minimum wage earning capacity of $10.00 per hour for 30 hours per week. The self-insurer argues that the minimum wage earning capacity used by the judge is incorrect, and should be modified to $11.00 per hour. The self-insurer also argues that the judge's finding the employee was limited to working only 30 hours per week is not grounded in the evidence. We summarily affirm on the second argument, but make the correction in the minimum wage as requested by the self-insurer.

The employee, thirty-five years old at hearing, came to the United States in 1995. He began attending middle school here, and completed his education with a Master's degree in human services. (Dec. 4; Tr. I, 9-10.) At the time of his injury he was working for the employer as a community field coordinator, which required traveling to different schools, managing attendance, disciplining and counseling students, making home visits and meeting with parents. Id. On November 9, 2016, the employee slipped at work, hit the back of his head, hip and leg, and experienced pain in his lower back. The judge found the employee totally disabled from the date of injury until March 20, 2017, at which time Dr. Robert Levine opined he could resume his regular work without

restrictions. (Dec. 6.) The judge found that Dr. Levine's opinion was based on his understanding that the employee's work was light duty, id., a premise the judge did not adopt. Accordingly, based on the fact the employee had not worked since the date of the accident, and had a continuing need for physical therapy and medical treatment, she found he was able to work 30 hours per week earning a minimum wage of $10.00 per hour, or $300.00 per week, beginning on March 20, 2017. (Dec. 7, 9.) Based on his average weekly wage of $1,423.49, and his § 34 compensation rate of $854.10, his § 35 rate was $640.58, the maximum § 35 rate. (Dec. 9.)

On appeal, the self-insurer does not challenge the assignment of a minimum wage earning capacity. It challenges only the amount of the minimum wage, correctly pointing out that the minimum wage on March 21, 2017, when the employee's § 35 benefits began, was not $10.00 per hour, but $11.00 per hour. G.L. c. 151, § 1, as amended by St. 2014, c. 144, § 30 (2014). The employee agrees that the applicable minimum wage was $11.00 per hour on the date the judge determined the employee was partially incapacitated. However, he maintains that the judge's use of $10.00 per hour was simply a clerical or scriveners' error, and that, at any rate, the error is harmless because it does not affect the employee's § 35 compensation rate, which would remain at the § 35 maximum rate of $640.58, whether the assigned earning capacity was based on $10.00 or $11.00 per hour minimum wage.[1]

We agree with the self-insurer that the judge's assignment of a minimum wage earning capacity which is less than the applicable minimum wage in the Commonwealth, is not only arbitrary and capricious, but contrary to law, as the record contains " 'no factual source or reasoned explanation for [that] figure.' " Spencer v. JG MacLellan

[1] General Laws c. 152, § 35, provides that the partial incapacity rate is "sixty percent of the difference between [the employee's] average weekly wage before the injury and the weekly wage he or she is capable of earning after the injury, but not more than seventy-five percent of what such employee would receive if he or she were eligible for total incapacity benefits under section thirty-four." The employee's § 34 rate is $854.10. The maximum § 35 rate is 75% of that, or $640.57. Because a minimum wage of $10.00 per hour or $11.00 per hour, at 30 hours per week, yields a benefit higher than the maximum § 35 rate, the employee's compensation rate remains the same under either minimum wage figure.

Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 150 (2016), quoting Dalbec's Case, 69 Mass. App. Ct. 306, 316 (2007). Thus, it requires correction, even though the employee's compensation rate will not be affected by the change in earning capacity at this time. See Spencer, supra ("the minimum wage in the Commonwealth establishes the floor below which the hourly earning capacity rate assigned by the judge cannot fall").

Accordingly, as requested by the self-insurer, we correct the employee's minimum wage earning capacity to $11.00 per hour, the minimum wage in effect on March 21, 2017, when the judge found the employee became entitled to § 35 partial incapacity benefits. The decision is affirmed on all other issues.

So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Filed: ***August 29, 2018***