COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 054424-93**

Adrian White, Sr.	Employee
Town of Lanesboro	Employer
Mass. Interlocal Insurance Association	Insurer

REVIEWING BOARD DECISION
(Judges Smith, McCarthy and Wilson)

APPEARANCES
Katherine Lamondia-Wrinkle, Esq., for the employee
David G. Shay, Esq., for the insurer at hearing and on brief
Ellen Harrington Sullivan, Esq., for the insurer on brief

SMITH, J. The insurer appeals from an administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits. The insurer contends that the administrative judge mischaracterized the medical testimony of the impartial physician on critical medical issues in dispute; failed to properly address and apply the correct legal standard under § 1(7A); and impermissibly shifted the employee's burden of proof to the insurer on the issue of the employee's work capacity. We agree. Because the decision is arbitrary and capricious and contrary to law, we reverse it. G.L. c. 152, § 11C.

On May 1, 1987, Adrian White, Sr. received a personal injury to his low back arising out of and in the course of his employment for the Town of Lanesboro. He was incapacitated for six months, after which he returned to work with a fifty-pound lifting restriction. (Dec. 4.) His claim form in this proceeding does not reference this date of injury. (Employee's Claim dated 12/13/96.) The record contains conflicting evidence as to whether White recovered from effects of this injury. Compare Employee Ex. 2 (opinion of permanent and total incapacity resulting from the May 1, 1987 injury), Employee Ex. 4

(causally relating chronic S1 radiculopathy to injury of May 1, 1987) and Tr. 12-13 (testimony about lifting restrictions from May 1987) with Impartial Dep. 11, 52 (employee asymptomatic before 1993 injury). The decision makes no findings about whether the 1987 injury plays any role in White's medical disability or need for treatment after December 30, 1993.

The claim before us relates to an injury that occurred on December 30, 1993. While working on an electric motor on a boiler, White twisted, re-injuring his back. The insurer accepted liability for the injury and paid § 34 temporary total incapacity benefits. (Dec. 1, 4.) In anticipation of the expiration of those benefits, White filed the present claim that he is now permanently and totally incapacitated as a result of this injury. After a § 10A conference, the administrative judge ordered the insurer to pay White § 34A permanent and total incapacity benefits. The insurer appealed to a § 11 de novo hearing. It raised the following issues: the nature and extent of incapacity; the causal relationship of White's ongoing medical condition to the December 30, 1993 injury; and whether, in light of White's pre-existing degenerative disc disease, the December 30, 1993 injury remained a major cause of White's medical disability and need for treatment, as required by § 1(7A). (Dec. 1.)

Pursuant to G.L. c. 152, § 11C, White underwent an impartial medical examination by Dr. Kurt Wieneke. The impartial examiner's report and deposition testimony were admitted into evidence. After the doctor was deposed and was unable to comment on the extent of White's incapacity prior to the date of the impartial examination, the judge allowed additional medical evidence to address the period of time between the expiration of White's § 34 benefits and the date of Dr. Weineke's examination. (Dec. 3.)

In his decision, the judge summarized Dr. Weineke's testimony as follows:

> It was his [Dr. Weineke's] opinion that the Employee suffers from chronic lumbar disc disease at L4-5 and L-5, S-1. He is unable to work beyond a sedentary to light duty level and must avoid prolonged walking, standing and sitting. He needs frequent position changes and must avoid lifting beyond ten pounds on a regular, repetitive basis. He further opined that the Employee is chronically partially disabled and not able to work as a custodian.

> Dr. Wieneke . . . confirmed [by deposition testimony] that the diagnostic studies showed the Employee had degenerative disc disease at L4-5 and L5-S1 and a frank herniation at L4-5 lateralizing to the left side and impacting with L4-5 neural foramina. As to whether that condition preexisted the 1993 work injury, Dr. Wieneke said, "the 1993 injury did not produce nor was it directly responsible for the degenerative disc disease at both levels." As to the disc rupture, he opined, "there's no way to tell for certain." However, Dr. Wieneke considered the point moot, "it could have preexisted, but I consider it an aggravation of underlying condition."
>
> Further, he opined that the work injury to his back on December 30, 1993 remains the cause of the Employee's present disability. He was not able to quantify the disability in terms of percentage, but stated, "I can't be dogmatic or direct in answering except to say that he had a work aggravation on that date. He was fully employed before that date and he's never worked since. In that sense, his present condition relates to the aggravation."
>
> Finally, when informed that the Employee was also working as a bus driver at the time of his back injury in 1993 it was Dr. Wieneke's position that he could perform either part-time bus driving, 20 hours per week or bus driving on a full time basis up to 40 hours weekly if the Employee would be able to step out of his vehicle and stretch when stopping to let his passengers in or out.

(Dec. 5-6.)

The judge made further findings of fact. He adopted the report of White's treating chiropractor, Dr. Joan Accuosti, regarding the "gap period" of medical disability, along with the physical restrictions imposed by the impartial examiner. (Dec. 6, 8.) He then concluded that White had "sustained a work related aggravation of an underlying condition back injury during the course of his employment on December 30, 1993 . . .." (Dec. 8.) He rejected the testimony of the insurer's vocational expert as premised upon incomplete and inaccurate information. (Dec. 7.) Based on a combination of White's physical restrictions and his limited transferable skills, the judge found White to be totally and permanently incapacitated. He then encouraged the insurer to file a request for discontinuance if a full-time or part-time position driving a school bus, which would allow White to stretch several times an hour or when he stops for passengers, becomes available and is offered to White. (Dec. 8.)

The insurer raises three issues on appeal. First, it contends that the administrative judge mischaracterized the impartial examiner's medical opinion. (Insurer's brief, 9.) Most significantly, the insurer claims that the judge's finding that Dr. Wieneke "opined that the work injury to his back on December 30, 1993 remains the cause of White's present disability[,]" (Dec. 5)(emphasis added), is an incorrect statement of the doctor's actual testimony. (Insurer's brief, 10.) We agree.

Dr. Wieneke testified that the December 30, 1993 injury "remains a cause of the his present disability . . .." (Dep. 40) (emphasis added.) The impartial doctor further stated that he could not "quantify it in terms of percentages[,]" (Dep. 40), nor could he say whether but for the industrial injury of December 30, 1993, White would currently be disabled. (Dep. 41.) The distinction between "a cause" and "the cause" is important if § 1(7A), which modified the definition of personal injury for injuries occurring on and after December 23, 1991, applies. The judge's finding that the impartial physician opined that the 1993 injury remained the cause of White's medical disability lacks any support in the evidence. We reverse the finding, as it is arbitrary and capricious. G.L. c. 152, § 11C.

As to the second issue, the insurer contends that § 1(7A) requires White to establish that the 1993 injury remains a major cause of his ongoing incapacity, and that the judge failed to make adequate findings on that issue. We agree that the decision does not contain sufficient findings of fact and conclusions of law to assure us that the judge applied the correct law to facts that could properly be found. Under § 1(7A), an injury which arises out of and in the course of employment, and combines with a pre-existing condition resulting from a non-compensable injury or disease, is only compensable if the post-December 22, 1991 work injury "remains a major but not necessarily predominant cause of disability or need for treatment." On the other hand, if the combining pre-existing condition is compensable, then § 1(7A) does not come into play. In that case, compensability is determined by the traditional "any causal connection" standard. See Rock's Case, 323 Mass. 428, 429 (1948).

Here, we have a non-industrial pre-existing condition followed by two industrial injuries. (Impartial Dep. 10-12.) If the 1987 injury continues to play any role in White's condition, then the judge's factual error about the extent of contribution of the 1993 injury is harmless. White may recover simply by proving that the 1987 injury continues to participate, even to the slightest extent, in his present incapacity. The judge failed to make the subsidiary findings necessary to determine whether or not § 1(7A) applies. He did not indicate whether White's underlying back condition was caused by his pre-existing non-compensable degenerative disc disease, by the residual effects of his compensable 1987 lower back injury, or by some combination of the injuries and the pre-existing disease. We find it appropriate to recommit the case for further findings of fact on this question.

As a final issue, the insurer maintains that the administrative judge erroneously shifted the burden of proof to the insurer on the issue of present incapacity. The judge adopted the opinion of the impartial examiner that White could return to work at his bus driving job, but then found that White would remain totally incapacitated until he was offered a bus driving job. (Dec. 8.) In so doing, the judge erred as a matter of law.

The burden of proving the extent of incapacity rests on the employee. Ginley's Case, 244 Mass. 346, 348 (1923); Ballard's Case, 13 Mass.App.Ct. 1068 (1982); Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988). Without evidence of an unsuccessful search for suitable work, or a finding that such efforts to find employment would be futile, an award of total compensation to a partially medically disabled employee would be contrary to law. Ballard's Case, 13 Mass. App. Ct. at 1069; Locke, Workmen's Compensation, § 327 (2nd Ed., 1981). White did not look for work. (Tr. 35.) Instead, he maintained that he was too medically disabled to perform any work, (Tr. 52), a fact that the judge did not find. And the judge made no finding that efforts to look for work would be futile. It was not the insurer's task to produce a job for the employee.[1] See Rogers v. Universal Products, Inc., 12 Mass. Workers' Comp. Rep. 199, 205 (1998) (insurer not

required to prove that the employee could work fulltime at greater earnings). Rather, it was the employee's obligation to make all reasonable efforts to obtain suitable employment. Because the award of total compensation was based upon a misallocation of the burden of proof, we reverse it and recommit the case for further findings of fact on the extent of White's incapacity. On recommittal, the judge shall award incapacity benefits based on the highest amount that White is capable of earning with a reasonable use of all his powers, mental and physical. See Federico's Case, 283 Mass. 430, 432 (1933); G.L. c. 152, §§ 34A, 35 and 35D.

We reverse the decision and recommit the case for a new decision consistent with this opinion. On recommittal, the judge may take such additional evidence, as he deems necessary to do justice. Pending the recommittal decision, the conference order shall remain in effect.

So ordered.

_____
Suzanne E. K. Smith
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

Filed: October 28, 1999

_____
William A. McCarthy
Administrative Law Judge

[1] Should an injured worker apply for reemployment by his injury employer, he must be given preference over persons not so employed, provided that the injury employer has suitable work available for him. G.L. c. 152, § 75A.