COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036630-92**

Ann Deyette	Employee
University of Massachusetts Medical Center	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Maze-Rothstein & Carroll)

APPEARANCES
Judith B. Gray, Esq., for the employee
Omar Hernandez, Esq., for the self-insurer

LEVINE, J. The employee appeals from a decision denying her claim for § 34A benefits and awarding § 35 benefits instead. Because the judge made inconsistent findings with regard to a proffered job and with regard to his earning capacity determination, we reverse the decision and recommit the case.

The forty-four year old employee is a high school graduate without special training or skills. Her employment history includes positions in secretarial work, collections, medical billing and customer service. She worked as a collector for the self-insurer. She suffered an accepted industrial injury in the nature of repetitive use syndrome, eventually involving both her arms and hands. (Dec. 4.)

The self-insurer paid the employee §34 benefits until they were exhausted on August 7, 1995. The employee brought a claim for § 34A benefits which the self-insurer opposed. A conference order issued awarding the employee § 35 benefits based on an earning capacity of $125.00 per week. The employee appealed to a hearing de novo. (Dec. 4, 1.)

Pursuant to § 11A of the Act, Dr. Anthony Caprio examined the employee. He diagnosed the employee with "status post overuse syndrome with status post shoulder-hand, chronic pain syndrome with elements of thoracic outlet syndrome." (Ex. A; Dep. 15; Dec. 9.) The judge found the employee's medical condition to be related to the industrial injury. (Dec. 11.) Dr. Caprio opined that the employee was totally disabled from her former occupation and seriously doubted she would ever again obtain gainful employment. (Ex. A.) He opined that the employee's left major extremity was functionally useless due to chronic pain. (Dec. 9.) He agreed with another doctor's opinion that the employee was permanently and totally disabled. (Dep. 74-75.)[1]

The employee has a pattern of chronic pain and discoloration in her left hand, with numbness, a blue color and a cold feeling. The employee has a weak grip. (Dec. 5.) At home, the employee does some basic laundry and some limited cooking. She receives assistance with these activities, as well as with driving, from one or more of her children. She takes six Vicodin tablets daily. Her hands tend to get cold and freeze up into a curled position for which she applies hot water pads. Showers, however, seem to be the best therapy, and she showers during the morning and afternoon. She also naps for one and one half hours in the morning and afternoon because she has trouble sleeping at night. (Dec. 6.) Nevertheless, the judge found that activities of the employee, recorded on video, "belie her testimony of alleged daily inactivity." (Dec. 10.)

The self-insurer made a job offer to the employee. The position is that of a "meeter-greeter," which involves greeting visitors to the self-insurer's facility and giving directions to various sites. This is not a full-time position; it allows for sitting and standing; no telephone work or writing are required; the employee would be allowed to nap twice per day as required; she also could use a shower. If the employee could not drive herself to work, transportation would be provided. (Dec. 7.) The judge deemed the job unsuitable, finding, on balance, that

[1] No medical evidence in addition to that given by Dr. Caprio was allowed in evidence pursuant to § 11A. However, there was no objection to the question put to Dr. Caprio as to whether he agreed with the other doctor's opinion on disability.

> the position may require physical exertion beyond the employee's abilities and the use of medications besides her Vicodin would impact her ability to sustain this job.[2] Also, the specific duties are not delineated.

(Dec. 7-8; see also Dec. 10.)

Despite finding the job offered by the self-insurer unsuitable, the judge nevertheless found that the employee has a part-time work capacity:

> Despite her impairment, she admits ability to stand and my observations of her reflect by video and on two occasions at hearing, the employee's ability to move her left arms [sic] (albeit she had a bottle on her left arm each time).[3] Hence, I find [the employee] is capable of working in a work environment where she need not do repetitive work nor prolonged sitting, standing, nor lifting with her left arm. This would include checking in members at a health/recreation center part time. Accordingly, I find she is capable of working 20/25 hours per week earning $5.00 - $5.50 per hour. This would allow her to go to pain management-counselling as required, take her medication and do her exercises appropriately. If necessary, such a job would more likely permit the employee to split her shift into 2 hour segments so she can shower/nap during the day as well.

(Dec. 10-11.)

The judge's finding that the job of "meeter-greeter," offered by the self-insurer, is unsuitable for the employee but then finding an earning capacity based on the employee's ability to work in an "environment where she need not do repetitive work nor prolonged sitting, standing, nor lifting with her left arm" are findings that are internally inconsistent.

The judge's own description of the meeter-greeter position, summarized above, (Dec. 7), comports with the judge's description of a work environment which would allow the employee to work. The judge attempts, apparently, to distinguish the meeter-greeter position from his abstract suitable work environment by finding that the meeter-greeter position "may require physical exertion beyond the employee's abilities . . . .

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[2] The judge found that the employee "has taken a myriad of medications with Vicodin being her main form of prescriptive drug but including Amitryptline, Flerexil, steroid blocks, use of a tens unit and at one time, MS Contin, laced with morphine for her pain. She is in pain management as well." (Dec. 5.)

[3] "At hearing, she clutches on a rubber bag (presumably a hot water bottle on left minor extremity)." (Dec. 5.)

Also, the specific job duties are not delineated." (Dec. 7-8.) However, there is no basis in the evidence to support these findings.[4]

Cathy Loiselle, the self-insurer's workers' compensation case manager, testified as to the proffered job. The job's duties are to greet and give directions to people as they enter a particular floor in one of the self-insurer's buildings. (May 1, 1996 Tr. 5, 19). The employee would have to have some type of working knowledge of where the offices are on that floor; she would be required to look at a map to indicate where a particular office might be. (Id. at 20, 21.) This testimony given by Ms. Loiselle specifies the duties of the job. The judge was not warranted in finding that the specific duties were not delineated. See Judkins's Case, 315 Mass. 226, 228 (1943) (findings must be adequately supported by the evidence). Moretti v. Moretti Construction Co., 10 Mass. Workers' Comp. Rep. 98, 99 (1996) (if the findings lack evidentiary grounding, they are arbitrary). Nor was the judge warranted in finding that "the position may require physical exertion beyond the employee's abilities." The judge himself found that the job was extremely accommodating of the employee's limitations and needs. See p. 2 supra; Dec. 7. There was evidence that a blind person and a person who cannot sit for greater than ten or fifteen minutes are employed in that position. (May 1, 1996 Tr. 5-6.) There is no basis in the evidence to support the judge's speculation that the position may require physical exertion beyond the employee's abilities. Moretti, supra. Cf. New Boston Garden Corp. v. Bd. Of Assessors, 383 Mass. 456, 472 (1981) (disbelief of any particular evidence does not constitute substantial evidence to the contrary).

Absent the unwarranted reasons the judge found to conclude that the meeter-greeter position was not suitable, there is no basis to distinguish that position from the position constructed by the judge, including that of checking in members at the health/recreation center. Furthermore, the judge does not explain why "the use of medications besides her Vicodin would impact [the employee's] ability to sustain" the

[4] The judge gave a third reason for finding the proffered job not suitable: "the use of medications besides her Vicodin would impact her ability to sustain this job." The evidence does support this finding. (April 23, 1996 Tr. 34-40.)

meeter-greeter position (Dec. 7-8) but would not impact the theoretical position. (Dec. 11.) To find the former position unsuitable but the latter position suitable is inconsistent. The decision, as a result, cannot stand. See Howe v. Rocky Meadow Cranberry, 9 Mass. Workers' Comp. Rep. 704, 706 (1995). Although deference is given to the judge's determination of earning capacity, Mulcahey's Case, 26 Mass. App. Ct. 1 (1998), such determination must not be arbitrary and capricious and requires support by adequate subsidiary findings grounded in the evidence. Lolos v. Monsanto Co., 12 Mass. Workers' Comp. Rep. 83, 84 (1998). See also Beagle v. Crown Serv. Sys. Inc., 10 Mass. Workers' Comp. Rep. 282, 284 (1996).

Accordingly, we reverse and recommit the case. Since the administrative judge who heard the case no longer serves in that capacity, we forward the case to the senior judge for reassignment to a different judge and for a hearing de novo on the extent of the employee's earning capacity.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Filed: **January 26, 1999**