COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 005508-10**

Antonia Miranda	Employee
Huntington Hotel Corporation	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Levine)

The case was heard by Administrative Judge Herlihy.

APPEARANCES
Mary B. Klegman, Esq., for the employee
Michael K. Landman, Esq., for the insurer

HORAN, J. The employee appeals from a decision awarding her, inter alia, partial incapacity benefits. (Dec. 7.) We affirm the decision in part, and recommit the case for further findings of fact.

On March 6, 2010, the employee, working as a housekeeper, suffered a compensable back injury lifting trash. (Dec. 4.) Subsequently, she underwent two back surgeries. (Dec. 5.) The insurer paid the employee § 34 incapacity benefits until their statutory exhaustion on April 10, 2013. (Dec. 4.) The employee then claimed entitlement to § 34A incapacity benefits from April 11, 2013, forward. (Dec. 2.)

The judge awarded the employee § 34A benefits at conference, but only from December 9, 2013, to December 9, 2014. Both parties appealed. (Dec 2.)

Pursuant to § 11A, prior to the hearing the employee was examined by Dr. George P. Whitelaw. His February 24, 2014 report was admitted into evidence at the hearing. He was deposed thereafter. Neither party moved to submit additional medical evidence. (Dec. 2.)

At the hearing, the employee again claimed § 34A benefits from April 11, 2013, forward; the insurer denied the extent of the employee's disability. (Dec. 2-

3.) The employee and Scott Gambale, an investigator retained by the insurer, were the only witnesses at the hearing. (Dec. 1.) Mr. Gambale's report of his surveillance of the employee was admitted into evidence. (Dec. 2; Ex. 5.)

The judge found that on December 4, 2013, Mr. Gambale observed the employee over a four and one-half hour period, beginning with her trip to a bank, which was followed by her "walking through the mall with three other women while shopping." (Dec. 5.) The employee admitted she had made trips to the mall, but maintained she did not always walk there. (Dec. 6; Tr. 33.) In fact, the employee maintained her back pain limited her ability to walk, sit and stand. (Tr. 17-20, 22, 25-27, 30, 33.) The judge did not credit this testimony: "I am not persuaded that the employee is limited in her ability to walk, sit and stand."[1] (Dec. 6.)

The judge adopted Dr. Whitelaw's opinion that the employee was unable to return to housekeeping work, but could perform light duty work involving sitting, standing or walking for up to four hours. (Dec. 5-6; Dep. 9-10.) The judge concluded the employee had an earning capacity, and awarded § 35 benefits at the rate of $333.35 from December 4, 2013, and continuing.

The employee raises several issues on appeal. We address three, and otherwise summarily affirm the decision.

First, the employee argues the judge mischaracterized Dr. Whitelaw's opinion regarding the employee's ability to sit, stand, or walk for up to four hours. Based on the totality of his testimony, we conclude the judge's interpretation of Dr. Whitelaw's opinion was reasonable. Dr. Whitelaw explained his opinion regarding the employee's disability was "based upon the – something that's very difficult to assess, which is her pain," (Dep. 9), and that, "the only way I can assess that is based upon her testimony, what she tells me and what she tells you . .

[1] In light of the judge's adoption of Dr. Whitelaw's opinion concerning the employee's residual functional capacity, we consider this finding to mean the judge did not accept the employee's testimony regarding the degree to which her pain limited her ability to sit, stand or walk.

. [at] the hearing. . . ." (Dep. 10.) However, after the doctor was informed about the employee's activities at the mall, he was asked if she could perform lighter work as a cashier for twenty hours a week. He replied, "I don't see that as being unreasonable, no." (Dep. 10.)

The judge was under no obligation to credit the employee's testimony that her pain prevented her from re-entering the workforce. (Tr. 31-32.) See Pilon's Case, 69 Mass. App. Ct. 167, 169 (2007)("assessments of credibility . . . are the exclusive function of the administrative judge"). Rather, she was free to adopt Dr. Whitelaw's opinion that, while the employee's pain would prevent her from working as a housekeeper, she was able to perform lighter, part-time work. (Dep. 10.) See Clarici's Case, 340 Mass. 495, 497 (1960)(judge may adopt portions of medical testimony deemed credible). Accordingly, we affirm the judge's decision insofar as she concluded the employee was only partially incapacitated as of December 4, 2013.

Next, the employee contends the judge erred by failing to articulate the amount of the employee's earning capacity, and the basis for it. We agree, and recommit the case for further findings on this issue. Eady's Case, 72 Mass. App. Ct. 724, 726 (2008); Dalbec's Case, 69 Mass. App. Ct. 306, 31-317 (2007); See G. L. c. 152, § 35D.

Lastly, the employee argues the judge failed to address the period claimed between April 11, 2013 and December 4, 2013. We agree, and recommit the case for further findings addressing this period.

Because the employee has prevailed, in part, an attorney's fee may be due under G. L. c. 152, § 13A(7). Accordingly, employee's counsel may submit a fee petition to this board, accompanied by a fee agreement with the employee. No fee shall be due or collected from the employee without our approval.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **May 28, 2015**