COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023732-13**

Barry Carragher	Employee
UMass Boston/HRD	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Herlihy.

APPEARANCES
Adam J. Troupe, Esq., for the employee
Arthur Jackson, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals from a decision awarding the employee §§ 34 and 35 benefits, alleging the decision contains several errors requiring reversal. While we do not agree that reversal would be appropriate, we recommit the case for further findings on extent of disability from the date of injury, and on earning capacity, consistent with this decision.

The employee, fifty-two years old at the time of the hearing, became a plumber after high school. In 2004 he injured his neck when he moved awkwardly while sleeping, resulting in a C6-7 anterior cervical discectomy and arthrodesis on December 30, 2004. He subsequently recovered from that injury and returned to work. (Dec. 7.) Sometime in 2008 or 2009, after ten years of self-employment, he went to work as a plumber for the employer. (Tr. 12.) On September 11, 2013, the employee felt stiffness in his neck after working with a hammer drill for about an hour. He sought treatment and subsequently came under the care of Dr. Ansay, a neurosurgeon. (Dec. 4-5.)

The self-insurer paid the employee § 34 benefits without prejudice until April 5, 2014. On May 6, 2014, the employee filed this claim for § 34 incapacity benefits from

April 6, 2014, to date and continuing.[1] Following the October 15, 2014, § 10A conference, the judge ordered the self-insurer to pay § 34 benefits from April 6, 2014, to August 25, 2014, and § 35 benefits from August 26, 2014, to date and continuing. Both parties appealed that order. At hearing, the employee modified his claim to seek § 34 benefits from the date of injury, September 11, 2013, and continuing.[2]

On January 5, 2015, the employee was examined by the § 11A impartial physician, Dr. Jeffrey Zilberfarb, an orthopedic surgeon. Finding that the report of Dr. Zilberfarb did not adequately address the employee's pre-existing condition in evaluating causal relationship, the judge allowed the self-insurer's motion to admit additional medical testimony. (Dec. 2-3.)

The judge found the employee suffers from pre-existing cervical spondylosis, and that he underwent a C6-7 anterior cervical discectomy and arthrodesis in December of 2004, from which he recovered. The judge also determined that the employee sustained an industrial injury while using a drill on September 11, 2013,[3] and that injury was a major but not necessarily predominant cause of his disability and need for treatment. The judge ordered payment of weekly § 34 benefits in the amount of $609.69, from September 11, 2013 to January 5, 2015, and payment of § 35 benefits in the amount of $448.14, from January 6, 2015 to date and continuing.[4] (Dec. 8-9.)

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[1] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016).

[2] The self-insurer sought to discontinue benefits as of October 29, 2014, the date of its IME physician's report. (Tr. 6; Ex. 3.)

[3] Notably, the judge credited the employee's testimony that the drill he was using had the same effect as a jackhammer. (Dec. 8.) The impartial physician, Dr. Zilberfarb, testified that, "the vibrations associated with [the smaller rotary hammer]" used by the claimant, "would cause increased risk of having either a cervical herniated disc or a lumber herniated disc." (Dep. 17-18.)

[4] The judge found a corresponding earning capacity of $269.25, calculated from a 15 hour workweek at an hourly rate of $17.95. (Dec. 8.)

On appeal, the self-insurer first argues the judge erred by finding that the employee's work injury was a "major cause" of the employee's ongoing disability as defined by § 1(7A).[5] The self-insurer takes issue with the judge's adoption of Dr. Zilberfarb's opinions that, a) the employee suffered a herniated disc; b) the piece of equipment utilized by the employee when he was injured was a "hammer drill" not a jackhammer; c) the prior fusion was not considered in the major cause calculation; and d) his diagnosis of the employee's neck problem was mistaken. We disagree.

"Findings of fact, assessments of credibility, and determinations of the weight to be given the evidence are the exclusive function of the administrative judge." Pilon's Case, 69 Mass.App.Ct. 167, 169 (2007). A judge is free to credit one medical opinion over another, and here the judge adopted Dr. Zilberfarb's opinion that the industrial injury of September 11, 2013 was the major cause of his disability and need for treatment. The judge credited the employee's testimony that the drill he used had the same effect as a jackhammer, and specifically noted that:

> Dr. Zilberfarb remained steadfast in his opinion, premised on the axiom the drill "acted in the fashion of a jackhammer[,"] (Zilberfarb Depo. At 19.), that "…the incident with the jackhammer was the major cause of his disability subsequent to the injury of September 11, 2013 regarding his injury […] at least 51%[.]" (Id. at 20.)[6]

(Dec. 5.) Credibility findings made by the administrative judge are final, and thus findings of fact will not be reversed unless the judge's decision was arbitrary and

[5] General Laws c. 152, § 1(7A), states in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[6] While there seems to be some suggestion by the self-insurer of error because the rotary hammer used by the employee was not the same as a jackhammer, (Ins. br. 16,17), we note that ample explanation of the differences between the two was provided and explored in detail during the deposition of Dr. Zilberfarb. (Dep. 16-21.)

capricious. See Wilson's Case, 89 Mass.App.Ct. 398 (2016). We thus see no reason to disturb the judge's findings on causal relationship.

The self-insurer next argues that the judge erred in awarding § 34 benefits, from September 11, 2013 to January 5, 2015, because there was no medical opinion adopted to support an award for total disability during this entire time frame.

The judge adopted Dr. Zilberfarb's opinion that as of January 5, 2015 the employee was partially disabled. At his deposition, Dr. Zilberfarb also opined he agreed with the report of the treating physician, Dr. Janet Limke, who stated that as of January 29, 2014, the employee should eventually be able to get back to work as a plumber, and that he would not be restricted from sedentary to light work. (Dep. 28.) However, Dr. Zilberfarb's adoption of Dr. Limke's opinion was not unequivocal regarding when the employee became partially disabled. The judge quoted the following testimony from Dr. Zilberfarb's deposition:

> *Attorney Jackson: And what would be the basis for our reason for indicating he could return to work at that time?*
>
> *Dr. Zilberfarb: Well, again, I'm just basing that on the note that we just looked at on January 29, 2014. It doesn't say that he can return back to work as a plumber at that time. It says that he should be able to get back to work as a plumber and that on that date that she saw the patient, January 29, 2014, that light duty could be considered if it were available.*
>
> *Attorney Jackson: An[d] you agree with that?*
>
> *Dr. Zilberfarb: Yes.*

(Dec. 6 [italics in original]; Dep. 28-29). The judge categorized Dr. Zilberfarb's assessment of Dr. Limke's earning capacity assessment as speculation, a reasonable interpretation based on the facts given in the relevant testimony.[7] (Dec. 5-6.) The judge thus chose not to recognize an earning capacity until January 5, 2015, the date of Dr. Zilberfarb's report. (Dec. 9.)

[7] The judge found, "Dr. Zilberfarb emphasized Dr. L[i]mke's opinion did not state the employee is able to work as a plumber on January 29, 2014 and she speculated a possibility of considering light duty work." (Dec. 5.)

However, this does not relieve the employee of the burden of proof for every element of his claim. Sponatski's Case, 220 Mass. 526, 527-528 (1915). Here the judge made no findings of fact in support of any § 34 award from the claimed date of injury through January 5, 2015, the date of Dr. Zilberfarb's report. As the judge is required to make findings of fact and rulings of law on all issues in dispute, we recommit for further findings on this issue for the claimed period.[8] M. G. L. c. 152, § 11B.

Finally, the self-insurer alleges the judge erred by finding the employee was only capable of working fifteen hours per week without performing an incapacity analysis or relying on medical evidence to support this determination.

The judge must support the earning capacity assigned by explaining its factual source with a reasoned explanation. The three factors to be considered when assigning an earning capacity are, 1) the employee's medical limitations; 2) the employee's employment capabilities, including age, education, work experience and transferable skills; and 3) the market for the employee's skills. Eady's Case, 72 Mass.App.Ct. 724, 727 (2008).

The judge adopted Dr. Zilberfarb's opinion that the employee has a partial impairment and took into account the employee's age, work experience and education, in addition to adopting the opinion of the vocational expert that the employee has transferable skills and a sedentary work capacity.[9] (Dec. 6, 7.) Other than citing the length of time the employee has been out of work and referencing his "neck pain," which she made no specific findings about, the judge did not provide a "factual basis" for a fifteen hour per week work limitation, and we cannot determine whether the judge conducted a proper analysis. Praetz v. Factory Mut. Eng. & Reseach, 7 Mass. Workers'

[8] We note that the self-insurer has paid employee § 34 benefits "without prejudice" from September 11, 2013 through April 5, 2014. (Self-Ins. br. 1). We have previously stated that payments made "without prejudice to either party" means that "the insurer is not bound to acceptance of the underlying entitlement, and the employee will not be subject to recoupment." Sicaras v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69, 73 n. 2 (2005).

[9] The adopted earning capacity wages of $17.95/hour is the lowest amount in the range provided by the vocational expert, the highest amount being $20.45/hour. (Dec. 7.)

Comp. Rep 45 (1993). There is no explanation as to why the employee is limited to only 15 hours of work per week, and we ascertain no corresponding medical evidence that would require such a finding.

Accordingly, we recommit the case for further findings consistent with this decision regarding benefits from the claimed date of injury through January 5, 2015, as well as the § 35 earning capacity issue. In the interim, the self-insurer should continue paying benefits consistent with the March 25, 2016, hearing decision, as they represent the maximum amount of benefits the employee could receive pursuant to § 35, and the employee did not appeal the hearing decision.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: October 11, 2017