

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 022165-03

Bernadette Ruusukallio
Toole Properties, Inc.
AIM Mutual Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Costigan)

APPEARANCES
Patrick C. Gable, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision denying its request to discontinue payment of weekly workers' compensation benefits, contending that the administrative judge failed to make subsidiary findings of fact supporting his conclusion. We agree with the insurer's arguments, and recommit the case for further findings.

The employee injured her back while working in 2003. The insurer paid the employee temporary total incapacity benefits, and then filed a complaint for discontinuance of payments. The judge denied the insurer's request at conference, and the case proceeded to a full evidentiary hearing. (Dec. 2.)

The employee underwent a § 11A impartial medical examination by Dr. Steven Silver. In his report of January 4, 2006, Dr. Silver opined that the employee suffered from a work-related chronic lumbar strain, and indicated that the employee had not yet reached a medical end result. He further recommended that the employee undergo a discogram to examine her radicular and lateralizing symptoms. (Dec. 2-3.)

The judge's decision is inadequate for our review because of the paucity of factual findings. The insurer correctly argues that the decision falls within the classic model of the long-disfavored recitation of testimony, rendering our task of review impossible. See Messersmith's Case, 430 Mass. 117, 120 (1959).

The judge describes the employee's testimony with the introduction, "She

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reports....” The judge then observes that the impartial physician “would place far less restrictions on Ms. Ruusukallio than her own testimony would suggest,” and notes that the employee “may have a much more inflated sense of what her work restrictions are than can be strictly accounted for by the medical evidence.” (Dec. 2-3.) However, the judge does not sort out that conflicting evidence, and simply concludes that:

“Dr. Silver’s opinions do suggest that until a discogram has been performed, [the employee] is not yet at a medical end result. As long as she is actively pursuing this treatment, an earning capacity would be premature.” (Dec. 3.)

The insurer correctly argues that the diagnostic imaging study of a discogram has nothing to do with the issue of whether this employee has a capacity to return to some sort of gainful employment. Further, the decision has no analysis of the employee’s vocational factors pursuant to Frennier’s Case, 318 Mass. 635, 639 (1945), and Scheffler’s Case, 419 Mass. 251, 256 (1994). The judge’s conclusion that the employee proved her total incapacity is without the support of subsidiary findings. Crandall v. ELAD Gen. Contracting, 16 Mass. Workers’ Comp. Rep. 51, 55 (2002). Recommittal for further findings of fact is appropriate. G. L. c. 152, § 11C.

Accordingly, the decision is recommitted for further findings consistent with this opinion.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Filed: **December 6, 2007**

William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge