COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 03975197**

Carlos DeSousa Employee
Sturdy Memorial Hospital Employer
Sturdy Memorial Hospital Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Wilson and Levine)

APPEARANCES
Thomas P. Gay, Esq., for the employee
Linda C. Scarano, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

CARROLL, J. The self-insurer appeals an administrative judge's award of a closed period of § 35 weekly temporary partial incapacity benefits, making two related arguments that require recommittal. The self-insurer contends that the judge erred by failing to properly determine the employee's actual earnings for the purposes of applying § 35D, and in failing to perform an adequate vocational analysis. We agree. As to the other issues raised by the self-insurer, we summarily affirm the decision.

Carlos DeSousa was born in the Azores in 1967. He received his GED in this country in 1992. Prior to going to work for the employer, he worked as a manager and housekeeper for various companies. From 1989 until September 17, 1997, he worked for the employer as a housekeeper on average of twenty hours per week. During much of his employment with the employer, Mr. DeSousa had concurrent employment with various cleaning companies. (Dec. 5.) On July 10, 1997, Mr. DeSousa began working as a grocery selector for Ferrera & Sons, and two months later quit his other concurrent employment with SCC Cleaning, Inc. As a grocery selector, he stocked shelves and picked various household items for customer orders. At the time of his injury, he was working only for the employer and for Ferrera & Sons. (Dec. 6.)

On September 17, 1997, while wheeling a large recycling bin down an incline, the employee injured his right calf and lower back. The next day, he was treated at the employer's emergency room, and a written evaluation was made that he was unable to return to work for one day. (Dec. 6, 9, Self-ins. Exh. 6.) He was advised to contact Occupational Health Services where another physician, Dr. Hurley, examined him and filled out a second report regarding his work status. (Dec. 9-10; Employee Exh. 2.) Mr. DeSousa remained out of work from Sturdy Memorial until approximately September 22, 1997.[1] (Self-ins. brief, 9; Employee brief, 3-5.) Upon his return, he was terminated for allegedly falsifying the report filled out by Dr. Hurley, so that it indicated he was unable to return to work rather than that he could return to work that day with restrictions. (Dec. 7, 10; Employee Exh. 2; Self-ins. brief, 17; Employee brief, 3-5).

The employee's claim for § 35 benefits was denied at a § 10A conference, and the employee appealed to a de novo hearing. (Dec. 3.) Pursuant to § 11A, Dr. Scott Harris conducted an impartial medical examination of the employee on July 30, 1998. (Dec. 6, 12.) Dr. Harris diagnosed the employee with a herniated disc at L4-5, based in part on an MRI and CT scan. He opined to a reasonable degree of medical certainty that the employee sustained an injury at work on September 17, 1997. The impartial physician also opined that the employee would have difficulty lifting over fifty pounds on a regular basis, but noted that he had continued to work for Ferrera & Sons as a grocery selector without losing any time. He believed that Mr. DeSousa had reached a medical endpoint with respect to the herniated disc and that he has a permanent partial disability with mild impairment and work limitations. (Dec. 7-8.)

In his decision, the judge found the report of the § 11A examiner to be adequate. (Dec. 4.) He further found that the employee suffered a back and right leg injury arising out of and in the course of his employment on September 17, 1997. (Dec. 6.) The judge further found no basis for applying § 1(7A), which was raised by the self-insurer. The insurer produced medical records from 1990 which revealed evidence of relatively mild

[1] The employee continued his concurrent employment with Ferrera & Sons without interruption. (Dec. 7.)

left L5-S1 radiculopathy. The judge noted that the employee's industrial injury was at a different level, L4-L5. He therefore found that § 1(7A) was not applicable. (Dec. 8-9.)

The judge also did not accept the insurer's allegations that Mr. DeSousa falsified the medical report filled out by Dr. Hurley of the Occupational Health Services. The judge found credible the employee's testimony that he did not tamper with the report and therefore found no violation of § 14. (Dec. 10-11.)

Finally, the judge found no evidence of a subsequent intervening incident which would break the chain of causal connection. (Dec. 9.) Therefore, crediting the employee's complaints of pain, and his testimony regarding his physical limitations and the necessity of ongoing medication, the judge found the employee temporarily, partially disabled from September 18, 1997 until July 30, 1998, the date of the impartial examination. (Dec. 11-12.) The judge found that the employee's average weekly wage was $551.80, based on his concurrent employment, i.e. his job with the employer, for which he was paid $188.30 per week, and his job with Ferrera & Sons, for which he received $363.50 per week. The judge further found that Mr. DeSousa had an earning capacity equal to actual wages earned at Ferrera & Sons during his period of partial disability; the judge found, without explanation, the employee's actual wages to be $330.50 per week. (Dec. 9, 12, 13.)

The self-insurer appeals, alleging that the judge erred: 1) in failing to properly determine the employee's actual earnings for the purpose of applying § 35D; 2) in failing to perform an adequate vocational analysis; 3) in finding that the employee did not falsify medical records; and 4) by placing the burden of proof as to whether the employee's condition was causally related to a pre-existing condition on the insurer. We find merit in the insurer's first two related arguments, and reverse and recommit this case for a hearing de novo on those issues.

Section 35D requires, in pertinent part, that the employee's earning capacity shall be the *greatest* of: "(1) The actual earnings of the employee during each week[,]" or: "(4) The earnings that the employee is capable of earning." The judge stated that he based the employee's earning capacity on actual wages earned, which he found were

$330.50 per week. (Dec. 13.) In the absence of any subsidiary findings on the employee's post-injury earnings at Ferrera & Sons, we are at a loss to understand how the judge arrived at this figure. Moreover, the evidence does not seem to support the judge's conclusory finding on actual earnings. The employee himself testified that, in September or October of 1997, he completed a probationary period at Ferrera & Sons, and was able to join the union. At that time, he received a raise of approximately $5.00 an hour (from $10.00 to approximately $15.00 an hour). (Tr. 122-125, dated February 12, 1999.) The judge noted that the impartial physician recorded that the employee had not missed any time from his job as a grocery selector. (Dec. 7.) Additionally, the self-insurer submitted wage records from Ferrera & Sons for the period following the employee's injury, which, if accepted by the judge as a true reflection of the employee's earnings, show a significantly higher average weekly wage than $330.50 per week. (Ins. Exh. 4.) As we have said repeatedly, "[i]t is the duty of an administrative judge to address the issues in a case in a manner enabling this board to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g. & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). The judge made no subsidiary findings to support his determination of the employee's earning capacity, and the evidence submitted does not appear to support the finding. Therefore, the case must be recommitted for further findings on the employee's actual earnings after his industrial injury of September 17, 1997.

However, unless the employee's actual earnings were sufficient to bar him from receiving any incapacity benefits, the inquiry does not end there. Compare Baribeau v. General Elec. Co., 14 Mass. Workers' Comp. Rep. 263, 265 (2000) (since employee's actual earnings from a job he was capable of performing were sufficient to bar him from receiving incapacity benefits, there was no need for further analysis). Section 35D requires that the employee's earning capacity be the *greatest* of his actual earnings or the amount he is *capable* of earning. In his conclusion, the judge recited the mantra of "age, education, background, training, work experience, mental ability, and other capabilities."

(Dec. 11, citing Frennier's Case, 218 Mass. 635 (1945).) However, he failed to perform any analysis of how these factors combine with the employee's medical condition to explain his earning capacity. See Scheffler's Case, 419 Mass. 251, 256 (1994). On recommittal, the judge should make subsidiary findings, analyzing how the pertinent elements combine to determine the employee's maximum earning capacity. Russell v. Micron Eng'g., 12 Mass. Workers' Comp. Rep. 183, 185 (1998); Vantsouris v. New England Baptist Hosp., 15 Mass. Workers' Comp. Rep. 238, 241-242 (2001).

Because the judge who heard this case is no longer with the department, this case is recommitted to the senior judge for reassignment to a different administrative judge for a hearing de novo limited to the issue of earning capacity. The decision is summarily affirmed as to the other issues raised by the self-insurer.[2] Pursuant to § 13A(6), the self-insurer is ordered to pay employee's counsel a fee of $1,285.63. See Connolly's Case, 41 Mass. App. Ct. 35, 38 (1996) (prevailing party is "one who succeeds on any significant litigation issue, achieving 'some of the benefit' sought in the controversy"), citing Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978).

So ordered.

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Martine Carroll
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: **May 22, 2002**
MC/jdm

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Frederick E. Levine
Administrative Law Judge

[2] The judge made the threshold determination that § 1(7A) was not applicable under the circumstances of this case. (Dec. 9.) He did add the language "and not proven" with regard to § 1(7A). Id. We take his words to mean "not produced." If, as the self-insurer argues, it was error to say "not proven" we find it to be harmless. The judge's analysis was correct leading to his conclusion that the § 1(7A) defense raised by the self-insurer is not applicable and there is "no basis to make a finding that there is a § 1(7)(A)[sic] problem here." (Dec. 9.)