

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 034702-98

Carol McCarthy
University of Massachusetts Medical Center
UMass Memorial Healthcare, Inc.

Employer
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Wilson, Costigan and Levine)

APPEARANCES

John F. Trefethen, Jr., Esq., for the employee
Timothy M. Dunlavey, Esq., for the self-insurer at hearing
Lisa S. Molodec, Esq., for the self-insurer on appeal

WILSON, J. The employee appeals from a decision awarding her partial incapacity benefits on her claim for permanent and total incapacity benefits under G. L. c. 152, § 34A. The employee argues that the judge failed to make clear and specific findings in support of his conclusion that she had a part-time, minimum wage earning capacity. We agree and recommit the case for further findings.

The employee, age fifty-six at the time of the hearing, suffered an industrial injury from repetitive stress to her hands at her job as an administrative assistant. The employee experienced severe complications from the surgery that she underwent on July 7, 1998. Her hand, wrist and arm pain has continued unabated, and she has not returned to work since July 1998. The judge in the instant case found that the employee's condition had not improved since the prior hearing and decision that established liability for the injury and awarded temporary and total incapacity benefits. (Dec. 5-6.)

The employee underwent an impartial medical examination by Dr. Jeffrey L. Zilberfarb, who opined that the employee suffers from probable reflex

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sympathetic dystrophy, improved; right carpal tunnel syndrome status post carpal tunnel release; and bilateral thumb carpometacarpal joint DJD (degenerative joint disease). The doctor concluded that the employee has reached maximum medical improvement. The judge found the employee's lifting restriction to be five pounds with her major right arm, and also restricted her from repetitive use of the right, major extremity and from prolonged typing, based on the impartial doctor's opinions. (Dec. 7-8.)

The judge concluded that the employee was partially disabled from July 7, 2001, the date of the exhaustion of § 34 benefits, to date and continuing, based on the § 11A physician's opinion and the employee's managerial and organizational skills. (Dec. 7.) The judge awarded § 35 benefits based on the employee's average weekly wage of \$568.31 and a part-time earning capacity of \$135.00. (Dec. 9.)

The employee correctly argues that the judge's findings of fact are inconsistent, and that they do not do not support his conclusion that the employee has an earning capacity. The primary source of confusion is the statement, "The employee's condition has not improved since the prior Hearing." (Dec. 6.) That hearing established the employee's entitlement to temporary, total incapacity benefits. That, along with the impartial physician's opinion that the employee has reached maximum medical improvement, would appear to support the employee's present claim for permanent and total incapacity benefits. The only element of the employee's condition that the decision indicates has changed is the diagnosis of improvement in the employee's RSD condition. (Dec. 7.) Yet this is in direct conflict with the finding that the employee's condition has not improved.

The judge needs to make findings of fact that support his conclusion that the employee now has a limited ability to earn, where she did not have any some two years earlier. Without such specific and definite findings that form a foundation for the ultimate conclusion, the reviewing board cannot "determine with reasonable certainty whether correct rules of law have been applied to facts

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that could be properly found.” Praetz v. Factory Mut. Eng’g & Research, 7 Mass. Workers’ Comp. Rep. 45, 47 (1993); G. L. c. 152, §§ 11B, 11C.

Accordingly, we recommit the case for further findings.

So ordered.

Sara Holmes Wilson
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

SHW/lj
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