COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017626-97**

Catherine Tower	Employee
Massachusetts Highway Department	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Wilson and Maze-Rothstein)

APPEARANCES
Christine G. Narcisse, Esq., for the employee
Thomas J. Murphy, Esq., for the self-insurer

CARROLL, J. The employee appeals an administrative judge's decision awarding a closed period of G. L. c. 152, § 34, temporary total incapacity benefits and ongoing § 35 temporary partial incapacity benefits. The employee argues that the judge erred in finding that she injured only her left upper extremity in a fall. In addition, she claims that the judge's determination that she was partially incapacitated and had a $500.00 earning capacity was unsupported by the evidence or by his subsidiary findings. We agree that the judge's findings on what injuries the employee sustained when she fell are inconsistent and inadequate. In addition, we hold that the judge failed to make adequate findings on causation. Therefore, we reverse the decision and recommit the case for further findings on these issues.

Catherine Tower, who has a high school education and a real estate license, and has taken courses in the appraisal of real estate, worked for the Massachusetts Highway Department for approximately forty of her sixty years. At the time of her injury, she was employed as a review appraiser in the Right of Way Department, evaluating the value of real estate involved in eminent domain procedures. Her job required her to travel all over

the state, physically measuring and inspecting real estate. She also performed research in the various registries of deeds, lifting and using large, heavy plan books. (Dec. 4.)

On May 15, 1997, Mrs. Tower tripped on carpeting while at work and fell, breaking a bone in her left non-dominant arm. She was taken by ambulance to UMass Hospital. (Dec. 5.) Two days later she had elbow surgery. Approximately nine months after that, on February 5, 1998, she had a second elbow surgery. At the time of the hearing, she wore a brace on her arm and took a number of medications. (Dec. 5.)

After her fall, Mrs. Tower attempted to return to work on four occasions. Each attempt was unsuccessful because she had difficulty with the travelling and lifting requirements of her job. She last worked in January 1999, after which time she retired, maintaining that she had not been accommodated with appropriate light duty work. (Dec. 4.)

The employee's claim for § 34 benefits, or in the alternative § 35 benefits, from January 14, 1999 and continuing was not accepted.[1] Following a § 10A conference, the judge ordered the self-insurer to pay § 34 benefits beginning on April 27, 1999. Both parties appealed to a hearing de novo. At hearing, the self-insurer maintained that it was not liable for alleged injuries to the employee's back, neck and knees, but did not contest liability for injuries to her left upper extremity. (Dec. 2, 3.) In addition, the self-insurer contested extent of disability and causal relationship. (Dec. 2.)

Prior to hearing, the employee was examined by Dr. Robert Leffert pursuant to § 11A. Dr. Leffert diagnosed Mrs. Tower with a fracture of the left radial head, with evidence of injury to the medial collateral ligament of the elbow and to the joint surface of the capitellum, as well as a fracture of the left distal radius, which resulted in no significant functional deficit in her wrist. Considering only her left upper limb, he saw no objective reason why she could not perform the job from which she had retired.

---

[1] We take judicial notice of documents in the board file which reveal that the self-insurer did pay some weekly benefits without prejudice. (Insurer's Notification of Payment dated May 29, 1997; Agreement to Extend 180 Day Payment-Without-Prejudice Period approved September 9, 1997; Temporary Conference Memorandum dated July 20, 1999.) See P.J. Liacos, Massachusetts Evidence, § 2.8.1, at 25-26 (7th ed. 1999).

Because Dr. Leffert addressed only the employee's incapacity relative to her left upper extremity, the judge granted the employee's motion to submit additional medical evidence due to the inadequacy of the report and the complexity of the medical issues. (Dec. 5-6, 3; Employee's Motion and Brief to Authorize Submission of Additional Medical Evidence, dated June 26, 2000.) The employee submitted the reports of four treating physicians and the records of Marlborough Hospital. The self-insurer submitted the reports and deposition testimony of Dr. Robert Pennell. (Dec. 3.)

In his decision, the judge briefly discussed each medical submission, with the exception of the Marlborough Hospital records. (Dec. 5-8.) He ultimately adopted the opinion of Dr. Pennell, the self-insurer's examining physician, regarding extent of disability. (Dec. 9, 11.) Dr. Pennell examined the employee predominately regarding her left upper extremity and her lower back. The only disability Dr. Pennell found in his examination of the employee was relative to her left elbow. He opined that Mrs. Tower had substantial left upper extremity restrictions with respect to lifting and repetitive movements as well as with pushing, pulling and twisting. (Dec. 6-7, 9.)

As to the occurrence itself, the judge stated that he was "not persuaded by the preponderance of the evidence that Mrs. Tower sustained a personal injury to her back, neck or knee during her fall at work on May 15, 1997." (Dec. 9.) Incongruously, he also found that when she fell at work on May 15, 1997, "she experienced pain in her left arm, hand, elbow and shoulder, she also felt some pain in her *knees and her back*, and her teeth." (Dec. 8, emphasis added.) He concluded that she did injure her left upper extremity in the fall at work. (Dec. 10.) However, he also found that her most disabling condition at the time of hearing related to her back. He further found that she was capable of doing supervisory or advisory work with her employer if it were offered on a modified basis. (Dec. 9.) The judge awarded § 34 benefits from January 14, 1999 to August 4, 1999, the date of Dr. Pennell's first examination. (Dec. 6, 11.) Thereafter, he found the employee partially incapacitated. Taking into account her age of sixty years, her experience and vocational history in real estate appraisal, and her educational

background which included some college level courses, the judge assigned the employee an earning capacity of $500.00 per week. (Dec. 11.)

The employee appeals, arguing that the judge ignored medical records which reveal a history of injury to her back, neck and knees. Further, the employee maintains that neither the evidence nor the subsidiary findings support the judge's conclusion that she can earn $500.00 per week. We agree that the judge's decision is flawed in its findings as to what personal injuries the employee sustained and in its lack of findings on causal relationship, and we recommit the case for further findings on these issues. In light of his new findings, the judge may need to re-examine his determinations on extent of incapacity and earning capacity.

The term "personal injury" under § 26 "has been broadly defined to include 'whatever lesion or change in any part of the system produces harm *or pain* or a lessened facility of the natural use of any bodily activity or capability.' " Fitzgibbons's Case, 374 Mass. 633, 637 (1978), quoting Burns's Case, 218 Mass. 8, 12 (1914) (emphasis added). There is no question that the employee suffered a personal injury to her left upper extremity when she fell at work in 1997. The remaining question is whether she also injured her back, neck and/or knees in the fall. The judge found that Mrs. Tower experienced pain not just in her left upper extremity when she fell, but also in her back and knees. (Dec. 8.) However, he also found that she did not sustain a personal injury to her back and knees. (Dec. 9.) These findings appear to be inconsistent. To make matters more confusing, the judge found that, at the time of hearing, Mrs. Tower's back pain was much worse than in 1997, and was, in fact, her most disabling condition. (Dec. 8, 9.) The judge made no other findings regarding the source of this back pain.

We should be able to look at the judge's subsidiary findings and understand the logic behind his ultimate conclusion. His general findings should emerge clearly from the matrix of the subsidiary findings. Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). Where subsidiary findings are lacking, imprecise or internally inconsistent, a decision cannot stand. Messinger v. Bethlehem Steel Corp, 13 Mass. Workers' Comp. Rep. 309, 312 (1999). Here, the judge's conclusion that the

employee injured only her left upper extremity does not logically follow from his subsidiary findings crediting the employee's complaints of feeling pain in her back when she fell at work. In addition, though the judge found that the employee did not injure her knees in the fall, Dr. Pennell, whose opinion the judge adopted, opined to the contrary (though he believed that the knee injuries had resolved by the time of his examination). (Pennell deposition exhibit 3.) On recommittal, the judge must revisit the issue of what injuries the employee suffered in her fall and state specifically on what evidence he has relied.

In so doing, the judge must necessarily address the issue of causal relationship, which he has not explicitly done except with respect to the left upper extremity. (Dec. 11.) Though generally it is not necessary to reach the issue of causation when there is a finding of no personal injury, where the judge has found that the employee experienced back and knee pain when she fell and currently has disabling back pain, he must make findings on the causal relationship of her back and knee conditions to her work fall. In addition, he must base those determinations on expert medical testimony. See Josi's Case, 324 Mass. 415, 418 (1949). Here, the judge did not clearly adopt any medical opinion on causation. Though he stated that he adopted the opinion of Dr. Pennell, he discussed that opinion only relative to the extent of medical disability,[2] concluding "that

---

[2] The judge recited the doctor's observations:

> Dr. Pennell examined the employee predominantly regarding her left upper extremity and her lower back (Dep. trans. p. 7). Dr. Pennell notes that in her exam Mrs. Tower exhibited a very mild neck movement restriction and a virtual [sic] normal range of neck motion (Dep. trans. p 9) and that her back bending movements were remarkably good (Dep. trans. p. 10) Dr. Pennell remarks that lumbar x-rays and a lumbar MRI are essentially normal (Dep. trans. p 13) Dr. Pennell did notice signs of tendinitis in the left elbow (Dep. trans. p 14) Dr. Pennell asserts that Mrs. Tower had substantial left upper extremity restrictions with respect to lifting and repetitive movements and with pushing, pulling and twisting. (Dep. trans. p 15) The only disability that Dr. Pennell found in the exam was relating to the left elbow (Dep. trans. p 16) Dr. Pennell believes Mrs. Tower is able to work within her left upper extremity restrictions.

(Dec. 6-7; punctuation as in original.)

as of August 4, 1999 Mrs. Tower is able to work with certain restrictions that are permanent and which all relate to her left non-dominant hand." (Dec. 9.) In his general findings, the judge referenced Dr. Pennell's opinion only under the heading "Disability/Incapacity." (Dec. 11.) Under the heading, "Causal Relationship," he merely stated, "I do find that the employee's left arm disability is causally related to the employment," id., a conclusion that was not actually at issue.

The confusion regarding the judge's findings on causation is exacerbated by the fact that the decision mentions only one physician's opinion on causal relationship, that of Dr. Roland Caron. The judge stated that Dr. Caron opined that, "Mrs. Tower is experiencing a *post-traumatic* degenerative process in her neck, elbow, low back and knees . . . ." (Dec.8, emphasis added.) Though this opinion, as well as others expressed by Dr. Caron, could support a conclusion on causal relationship opposite to that which he seems to have reached, the judge did not specifically adopt or reject it. Moreover, he neither adopted nor rejected any other physician's opinion on causal relationship, nor did he discuss the medical records from Marlborough Hospital, which arguably support the employee's claim. We should be able to tell on what medical evidence the judge has relied in coming to his conclusion on causal relationship, and we cannot do that here. See Allen v. Luciano Refrigeration, 15 Mass. Workers' Comp. Rep. 346, 350-351 (2001). On recommittal, the judge should clearly adopt a medical opinion on causal relationship.

We add one final note. The self-insurer did not claim that the heightened "remains a major cause" standard of § 1(7A) applies. Therefore, the employee's case is analyzed under the simple "as is" causation standard. See Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 130 (2002); Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82 (2000). Thus, if the employee's 1997 work injury was "even to the slightest extent a contributing cause of [her] subsequent disability," the self-insurer here would be liable. Rock's Case, 323 Mass. 428, 429 (1948). Dr. Pennell's conclusions that the back and neck complaints are not causally related to the 1997 work injury seem to be based, at least in part, on his assumption that any contribution by a pre-existing condition would negate causal relationship. He opined: "There were some

significant preexisting medical conditions that contributed to and increased her disability and these were the chronic recurring complaints referable to her neck and lower back and lower extremities and whatever condition caused her to have x-rays of the left elbow on 9/07/90." (Pennell deposition exhibit 3.) To the extent Dr. Pennell's opinion assumes a higher standard of causation, the judge may not rely on it. However, because the judge has not indicated that he has relied on Dr. Pennell's opinion on causal relationship, or, if he has, what part of the opinion he has adopted, nor has he stated on what legal standard he based his causal relationship finding, we cannot tell if he has applied the law on causal relationship correctly in this case.[3] See Crowell, supra at 4.

We therefore reverse the decision and recommit the case for the judge to reconsider his finding that the employee suffered a personal injury only to her left upper extremity. The judge should make clear findings, applying the correct legal standard of simple causation, on what injuries are causally related to her 1997 fall at work. In light of these new findings, he may need to re-examine his conclusions on extent of incapacity and earning capacity.

So ordered.

_____
Martine Carroll
Administrative Law Judge

_____
Sara Holmes Wilson
Administrative Law Judge

Filed: **July 21, 2003**
MC/jdm

_____
Susan Maze-Rothstein
Administrative Law Judge

[3] It is particularly important that the judge clarify his findings and apply the correct legal standard with respect to the employee's back, since he found that the employee felt pain in her back when she fell, (Dec. 8), and that her back is currently her most disabling condition. (Dec. 9.)