COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 045964-96**

Damiana Gulla	Employee
Grieco Bros. Inc.	Employer
Arrow Mutual Insurance Co.	Insurer

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

APPEARANCES
Gerald A. Feld, Esq., for the employee at hearing
Paul M. Moretti, Esq., for the employee on appeal
John A. Morrissey, Esq., for the insurer

CARROLL, J. The employee appeals from a decision awarding her workers' compensation benefits due to a repetitive twisting injury that caused her to leave work on November 15, 1996. The judge concluded that the employee was totally incapacitated until May 1, 1998, the date on which the judge viewed a job in the swatch room at the workplace. From that date onward, the judge awarded partial incapacity benefits, based on the employee's ability to perform the observed job. The employee challenges the judge's finding that the employee could return to work, part-time. We affirm the decision.

Damiana Gulla, forty-seven years old at the time of the hearing, worked as a stitcher, and was required to repetitively twist and reach over her left side to pull clothing from a conveyor belt. In the fall of 1996, Mrs. Gulla started to experience pain in her right hip and low back. She stopped working on November 15, 1996, as the pain had increased in severity. (Dec. 4.)

Initially, the insurer provided the employee workers' compensation benefits without prejudice for approximately one month (see G.L. c. 152, § 8(1));[1] around

[1] Given the specific finding, at Dec. 4, that the insurer paid without prejudice for one month, the December 17, 1997 date mentioned at Dec. 3 is likely a scrivener's error and was meant to read 1996. See Thompson v. Sturdy Memorial Hosp., 10 Mass. Workers' Comp. Rep. 133, 134 (1996).

that time the employee and employer sought jobs that the employee could do. These efforts did not produce a solution and the pay without prejudice ended and the employee filed a claim for benefits. Id.

A § 10A conference order, issued in July 1997, awarded the employee a closed period of § 34 benefits for total incapacity from the day she left work until October 1, 1997. Both parties appealed to a hearing de novo. On September 18, 1997, the employee was examined pursuant to §11A by Dr. Andrew H. Leader-Creamer, whose medical report and subsequent deposition were admitted into evidence. The doctor opined that the employee suffered from musculoskeletal strain, suggestive of inflammatory dysfunction and bursitis of the right hip, causally related to repetitive twisting and lifting at her workstation. The doctor did not find any significant back impairment. (Dec. 5-6.) He opined that the employee should not return to her former job duties as a stitcher. (Dec. 6-7.)

At hearing, the judge had to decide, inter alia, whether the employee was injured as a result of a reconfiguration of the production method which required the employee to repetitively twist and reach and, if so, what, if any, earning capacity the employee had without considering the employee's long time work as a stitcher. As to the question of the employee's ability to perform remunerative work, the employee claimed she could not. (Tr. 31-32.) The judge had to determine whether the employee, a stitcher for thirty years, could perform other work. The employee testified about other work experience she had with the employer in the swatch room, putting labels on material. (Tr. 17-20, 36-38, 57-58.) The impartial doctor specifically cleared the employee to try such a job as the swatch room position, with its minimal physical demands. (Dep. 32, 38.) The insurer moved that the administrative judge conduct a view. (Insurer's Motion for a Site View, dated March 16, 1998.)[2] The judge took a view of the employer's premises on May 1,

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[2] The employee opposed such a view (Employee's Response in Opposition to the Insurer's Motion, dated March 18, 1998). The power to inform itself by a view, within or without the territory of its jurisdiction, is inherent in a court at common law. Wigmore, Evidence §§ 1162, 1163, and notes thereto. General Laws c. 234, § 35, confirms the inherent common law power of the court, sitting with or without a jury, to take a view either upon request of a party or upon its own motion. Madden v. Boston Elev. Ry., 284 Mass. 490, 494 (1933). Indeed, c. 152, §§ 2 and

1998, accompanied by both counsel, the employee and a representative of the employer. The judge made the following findings:

> I observed the job of stitcher and the adjusted work assignment in the Swatch Room. The Employee had on one previous occasion following November 15, 1996 returned to attempt the Swatch Room assignment. She left after several hours with complaints of right hip pain.
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> The Swatch Room job was extremely light work and required no lifting or twisting. In addition, in order to carry the job out, an individual was free to sit or stand and change position at will.

(Dec. 7-8.)[3]

The judge concluded that the employee had sustained an injury as a result of repetitive activity at the workplace and, based on the impartial physician's opinion, was persuaded that the employee was totally incapacitated for a period of time after she left work in November 1996. The judge further concluded that, while the employee had made at least one attempt to return to adjusted work and had felt unable to perform the work at that time, the job he observed at the swatch room was within her capabilities to perform on a four hour per day basis. The judge therefore awarded total incapacity benefits from the date of injury until May 1, 1998, the date of the site view. The judge awarded partial incapacity benefits from that date and continuing based on a weekly earning capacity assignment of $126.75, half of the employee's average weekly wage. (Dec. 8-9.)

11, specifically authorize board members to make inspections, investigations, and inquiries. See also L. Locke, Workmen's Compensation § 492, 580-581 (2nd ed.1981). It is thus appropriate that the judge take a view whenever he determines it would assist him to better understand the testimony that has been presented. Com. v. King, 391 Mass. 691, 694 (1984); Com. v. Rodriquez, 378 Mass. 296, 307 (1979); Guinan v. Famous Players-Laskey Corp., 267 Mass. 501, 522 (1929); Sargent v. Traverse Bldg. Trust, 267 Mass. 490, 495 (1929); Terrio v. McDonough, 16 Mass. App. Ct. 163, 173 (1983); Com. v. Dominico, 1 Mass. App. Ct. 693, 708 (1974). See also Frade v. Costa, 342 Mass. 5 (1961) (master took a view).

[3] The employee could not do the swatch room job when she tried it early on, (Dec. 4, Tr. 17-20, 37-38, 57-58), but the judge had to determine whether she could perform remunerative work since her early attempts. There was much testimony as to what the swatch room job entailed and that it was both a light duty job "offered [ ] to an individual who needed light-duty," (Tr. 38), and a "regular job that was performed by somebody at that company." Id. Certainly, the view taken likely assisted the judge's understanding of just what the swatch room job entailed.

In her appeal, the employee contends that the judge's award of partial incapacity benefits based on the site view was erroneous. The employee maintains that the whole premise for going on the site view was misplaced, because the insurer had not introduced evidence of an available job offer at the hearing to serve as the foundation for taking the site view in the first place. We disagree.

It is undisputed that the employee had attempted to return to work, and particularly had tried the very light duty assignment in the swatch room. (Dec. 4, 7; Employee's Reply Brief, 2; Insurer's Brief, 12.) Thus, it is established that the employer's offer was for an actual and available job – i.e. bona fide – as of the time she attempted the employment.[4] The employee contends, however, that the insurer needed to adduce evidence that the swatch room job offer was still outstanding at the time of the hearing for its proper use in assigning an earning capacity. We consider that the employee's testimony at hearing, together with other record evidence, was a sufficient evidentiary basis upon which the judge could draw the inference that the swatch room job was still available to the employee at that time. See Tr. 38 (swatch room job was "a regular job that was performed by somebody at that company," and offered "to an individual who needed light-duty"; "there were a lot of people working there"); Dep. of § 11A examiner, 32, 38 (The impartial doctor cleared the employee to try such a job as the swatch room position). The conclusion that the swatch room job was available, within the meaning of § 35D(3), is sound.[5]

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[4] The testimony is a bit murky, but it appears that the employee may have briefly performed the swatch room job on more than one occasion – in November 1996 (it is unclear if this was an attempt to continue working or was an attempt to return to work), (Tr. 17-18), in January 1997, (Tr. 19-20), and/or in May 1997. (Employee's Closing Argument, 3-4.) The judge's decision recognized the murkiness. "I find the Employee made at least one attempt to return to adjusted work and felt she was unable to continue at that time." (Dec. 9, emphasis added.)

[5] General Laws c. 152, § 35D, provides, in pertinent part:

> For purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:

As we have noted earlier, whether a view is taken lies within the discretion of the judge. Commonwealth v. Cresta, 3 Mass. App. Ct. 560, 562 (1975). Since the evidence provided a sufficient basis for the judge to infer that the swatch room job was available, the site view was certainly appropriate for the information it could yield regarding the suitability of the job for the employee. Indeed, even without a § 35D(3) job offer, the site view would have been appropriate insofar as it provided information to aid in the judge's general assessment of "[t]he earnings that the employee is capable of earning." G.L. c. 1 52, § 35D(4). As this was not a job tailored for injured workers only, this type of light work could also be considered available on the open job market.

The employee also contends that the site view was not conducted properly. This argument is waived for purposes of this appeal due to the failure to object on that ground at hearing.[6] Commonwealth v. Cresta, supra at 562-563 (appellant made no objection to

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> (3) The earnings the employee is capable of earning in a particular suitable job; provided, however, that such job has been made available to the employee and he is capable of performing it.

6 Although the conduct at the view is not properly before us on appeal it may be useful to place here the following analysis of the proper procedure for taking a view, taken from the oft-quoted and cited case of Commonwealth v. Dascalakis, 246 Mass. 12, 29-30 (1923):

> Its chief purpose is to enable the jury to understand better the testimony which has or may be introduced. The essential features may be pointed out by the counsel. No witnesses are heard. The oath to the court officers having charge of a jury on a view is to the effect that no one shall be suffered to address the jury. There can be no comment or discussion. The jury can simply use their eyes. They can obtain information only through sight. One or two attorneys representing [the parties] go on the view, it being permissible to them, in the presence of each other and of the officers of the court, merely to point out to the jury "marks, matters and things," but not otherwise to speak to the jury.

Although Dascalakis involved a jury trial, it has equal applicability to non-jury hearings where the judge conducts an inspection/investigation under c. 152 in the form of a view, which is not typically conducted with a court reporter or stenographer. The procedure under Dascalakis, should be applied as to do otherwise would not allow the parties to cross-examine on the record. Even if the judge in a bench trial is both the trier of fact and adjudicator of law, at a view his actual capacity is as the former, i.e. the jury. In his capacity as jury, there should be no comment or discussion or witnesses heard. The fact that no evidence should be taken or testimonial comments made during the taking of a view is not limited to jury trials. See Liacos, Massachusetts Evidence, § 11.9 (6th ed. 1994). If the judge wishes to conduct investigation

improper commentary at view; the judge was not required to declare a mistrial); Madden v. Boston Elevated Ry., 284 Mass. 490, 493 (1933) (plaintiff desiring to question validity or effect of any action taken during view by trial judge had duty of objecting at time and could not, after decision, raise question for first time); McMahon v. Lynn & B.R. Co., 191 Mass. 295 (1906) (what was pointed out in a view is a proper ground for objection, as long as such objections are made known at the trial); see also, Hughes, Evidence § 366 (1961) (any improprieties noted at a view must be the subject of prompt objection; failing this protective action the information may be used in the same sense as any other piece of incompetent evidence coming into a case without objection). See also, Torres v. Pine Street Inn, 9 Mass. Workers' Comp. Rep. 359, 360 (1995) (issues not raised and addressed at hearing will not be addressed on appeal).

The administrative judge found that the swatch room job was extremely light work and required no lifting or twisting and that it allowed an individual freedom to sit or stand and change position at will. He also considered the employee's age, education, training, work history, disability and incapacity and found that the employee was capable of performing the swatch room type work on a four-hour per day basis. (Dec. 8.) It is the administrative judge's responsibility "to weigh the evidentiary value of each of the factors in the record bearing on determination of earning capacity of the employee. We may not substitute our judgement of such weight for that of the judge who heard the case." Kolkowski v. Sapphire Eng'g., 9 Mass. Workers' Comp. Rep. 295, 296 (1995). Under the circumstances of the present case, we cannot say that there was reversible error. The decision is affirmed.

So ordered.

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Martine Carroll
Administrative Law Judge

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allowed under c. 152 and wishes to question witnesses or allows parties to do so, this would be beyond the traditional procedure for a view and should be on the record.

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Susan Maze-Rothstein
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **October 30, 2000**
MC/jdm