COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 040541-96**

Daniel L. Bolton	Employee
Charles P. Blouin, Inc.	Employer
Hartford Insurance Group	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy & Smith)

APPEARANCES
Matthew J. Maiona, Esq., for the employee
Cynthia A. Canavan, Esq., for the insurer

WILSON, J. The insurer's complaint to modify or discontinue the employee's benefits was denied and dismissed. The insurer appeals, arguing that the decision of the administrative judge is not supported by the evidence and must be reversed. Because the judge's findings on both the degree of incapacity and the testimony of the insurer's vocational expert lend scant support to the award of § 34 benefits, it is appropriate to recommit the case for further findings.

Daniel Bolton was fifty-six years old at the time of the hearing. The holder of a G.E.D. certificate and a CDL-Class A driver's license, the employee was employed as a truck driver since 1966, and for this employer since 1993. (Dec. 3.) On October 15, 1996, while unloading metal HVAC materials at a job site, he injured his left, minor wrist. The insurer accepted liability for the injury and paid § 34 weekly benefits for temporary, total incapacity. (Dec. 3; Tr. 5.) He has not worked since the injury and underwent surgery on the left, minor wrist in April 1997. (Dec. 3-4.)

The insurer's complaint for modification or discontinuance of benefits was denied at the § 10A conference. The insurer appealed to a hearing de novo. (Dec. 2.)

The employee was examined on April 13, 1998 pursuant to § 11A. The § 11A physician diagnosed radiocarpal arthritis of the left wrist, status post four corner fusion,

and ultimate scaphoid excision, causally related to and aggravated by the work injury. (Dec. 4-5.) He opined that the employee was left with continued stiffness and pain in the left wrist, most likely secondary to radiolunate arthritis, that the employee was unable to use his left, upper extremity for repetitive gripping or lifting activities and he would likely be limited to sedentary tasks such as clerical work requiring use of only his right upper extremity. The § 11A physician concluded that the employee had an ongoing, partial and permanent disability related to the left, upper extremity injury. (Dec. 5.)

The insurer introduced testimony of its vocational expert, who conducted a labor market survey and authored a report based on that survey. The vocational expert, who observed the employee testify, identified several potential job opportunities that might be available to the employee. Most of the jobs identified were entry level positions, including heavy equipment sales, customer service positions, construction estimating assistant, dispatcher and dispatcher supervision. Although the judge found the expert to be a "candid and helpful witness[,]" he did not specifically adopt or reject her opinions. (Dec. 6.)

The judge found that the employee experiences pain in his left hand and wrist that affects his concentration and concluded that the employee remained temporarily and totally incapacitated from work. (Dec. 6-7.) The insurer appeals to the reviewing board on the basis that the evidence does not support the judge's conclusion.

We agree that the judge must explain in greater detail why the sedentary jobs described by the vocational expert would not be suitable for the employee, who was limited in the use of his minor left wrist but retained the use of his dominant upper extremity. "The burden of proving incapacity rests with the employee, [citation omitted] even where compensation has been awarded and the insurer is applying for discontinuance[.]" Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988). The sole medical evidence on physical impairment in this case was a conclusion that, despite the limitations on the use of the left arm, the employee was capable of sedentary work. The insurer's vocational expert identified job opportunities that are facially consistent with those medical limitations. In particular, where the judge commented that the vocational

expert was "candid and helpful[,]" (Dec. 6), and there is no obvious reason why the employee is unable to perform those jobs, we are left to speculate as to why the jobs suggested were not suitable sedentary employment for the purposes of establishing an earning capacity.[1] On these facts, and in the absence of precise findings on the degree of the employee's pain and loss of concentration, we are unable to determine how the judge concluded that Mr. Bolton remained temporarily and totally incapacitated. Is the pain and loss of concentration minor and occasional, or severe and constant? Only by assessing where the employee's symptoms fall within those ranges can the administrative judge properly determine the effects of those symptoms on his earning capacity. We should be able to review the judge's findings and clearly understand the rationale of the ultimate conclusion. Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). See Anderson v.Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65, 67 (1990) (explaining that specific findings on pain and physical disability were sufficient to withstand insurer's challenge).

On recommittal, the judge should explain how this fifty-six year old employee's education, work history and training combine with the effects of his work-related medical limitations to impair the employee's ability to perform the types of sedentary jobs put into evidence by the insurer's expert. See Scheffler's Case, 419 Mass. 251, 256 (1994). Also, see Ballard's Case, 13 Mass. App. Ct. 1068, 1069 (1982) (rescript op.). Cf. Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988)(no need to make findings on specific employment possibilities where record contains no evidence thereof). Moreover, as contended by the insurer, the judge should complete his analysis of physical disability and incapacity with findings on the employee's testimony about his activities. See Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 681 (1995).

[1] This is not to say that the judge is bound by the uncontroverted testimony of the vocational expert, or that he has an obligation to specify reasons for rejecting such testimony. See Coelho v. National Cleaning Contractor, 12 Mass. Workers' Comp. Rep. 518, 521-522 (1998).

We therefore find it appropriate to recommit the case for explicit findings on the employee's degree of incapacity that are supported by the record evidence. See Judkins's Case, 315 Mass. 226, 227 (1943); Ballard's Case, supra at 1069.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: March 16, 2000

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Suzanne E.K. Smith
Administrative Law Judge

MCCARTHY, J. dissenting There seems to be no dispute that Mr. Bolton can never return to his life long occupation as a truck driver. Neither can it be disputed that Bolton is physically capable of doing sedentary work. That established, the critical factual question is, what work? Loss of earning capacity involves more than a medical evaluation of physical impairment. Physical limitations affect individuals in different ways. The loss of function of an upper extremity would presumably diminish or destroy the earning capacity if a firefighter, a police officer or a tradesman using tools. This same loss would conceivably have no effect on the earning capacity of a lawyer or teacher.

What did the judge find that Mr. Bolton would bring to the work place? He is a fifty-eight year old who has been out of work since his accepted left upper extremity injury on October 15, 1996.[2] A Marine Corps veteran, he has a high school general equivalency certificate. Other than various motor vehicle licenses, he has no special work credentials or skills. Not only does he lack any special training or work background, "he experiences pain in his left hand and wrist and that pain affects his concentration." (Dec. 6.)

[2] Bolton's entitlement to temporary total benefits under § 34 must have exhausted in October 1999.

Given this profile, it is not all surprising that the one with the burden of making the call, the hearing judge who had the invaluable and unique opportunity to hear and observe Mr. Bolton, found that he continues totally incapacitated from work of any consequence.[3] The judge did not act arbitrarily or capriciously or commit legal error. In my view, it is inappropriate to return the case to him for further findings. I would affirm his decision.

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William A. McCarthy
Administrative Law Judge

[3] Though the judge found the insurer's vocational expert's testimony to be "helpful and candid" that is a far cry from adopting it. This testimony presumably served to illuminate for the judge how unrealistic it would be for the employee to slot into the jobs described by the vocational expert. The reviewing board has specifically found that a hearing judge is not obliged "to specify his reasons for rejecting the . . . testimony of the . . . vocational expert." Coelho's Case, 12 Mass. Workers' Comp Rep. 518, 521 (1998).