COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 037671-14 009689-16 009699-16**

Daniel Vargas	Employee
General Electric Co.	Employer
Electric Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Calliotte and Long)

The case was heard by Administrative Judge Bean.

APPEARANCES
Judson L. Pierce, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

HARPIN, J. The insurer appeals the administrative judge's order to pay ongoing § 35 partial incapacity benefits, reasonable and necessary medical treatment, and a legal fee to employee's counsel. We recommit the case for further findings.

Daniel Vargas, the employee, was sixty-two years of age at the time of the judge's decision. He was born in Costa Rica and came to the United States in 1973. The bulk of his work experience is that of a machinist, and he was employed in that capacity with General Electric (hereinafter "GE") for more than thirty years. (Dec. 293.)

The employee suffered three separate industrial accident events while in the course of his employment. On February 26, 2010, the employee slipped on a wet floor. Although he did not fall, he hit his head on a stair and hurt his back and neck. He received a course of physical therapy and continued to work with restrictions. Surgery was recommended, but the employee declined and opted to live with his pain. (Dec. 293.) On July 17, 2013, the employee suffered his second industrial accident while tightening fixtures. He experienced pain in his right elbow, arm and neck. His medical treatment for this injury was a cortisone shot in his upper extremity and radio frequency

denervation of the medical branch nerves in his low back. The employee did not miss any time from work, but continued to work with restrictions. (Dec. 294; Ex. 3.)

In 2014 the employee became eligible for a retirement buyout package from the employer. For those sixty years old and with fifteen years of service, the company offered retirement, with a monthly pension of $4,800.00 and a one-time $100,000.00 bonus. (Dec. 294.) The employee decided to accept the offer. Id.

On September 29, 2014, the day the employee testified was his final day of work,[1] he reported to the Lahey Clinic complaining of back pain. (Dec. 294-295.) After his retirement[2] the employee continued to treat for back, neck and arm pain. (Dec. 295.)

Dr. David C. Morley Jr., the impartial physician, examined the employee on November 10, 2016. In his report, which was entered into evidence as Exhibit 3, the medical expert offered a diagnosis of multiple injuries in the course of his work for GE as a machinist, including acute cervical sprain/strain superimposed on preexisting cervical spondylosis, disc degenerative disease, right lateral epicondylitis, and multiple injuries to his back. Additionally, the § 11A examiner opined the employee's work at GE aggravated his preexisting degenerative cervical and lumbar disc disease, and caused the right lateral epicondylitis. (Dec. 291, 295.) Dr. Morley's deposition was taken on April 7, 2017, with the transcript of his testimony submitted to the judge on April 21, 2017. (Insurer br. 10.) The parties submitted medical documentation to address the "gap"

[1] The employee accepted an early retirement package negotiated by his union. (Dec. 4). The employee testified that his last day of work was September 29, 2014, (Tr. 24), which the judge found as fact. (Dec. 294). However, the paperwork the employee and his supervisors signed was dated September 30, 2014, which was listed as his "termination date." (Ex. 9.) The retirement package which he accepted was not effective until October 1, 2014, conditional upon his termination from service on September 30, 2014. (Ex. 13.) Jenae Miklowcic, the employer's Human Resources manager for the employee's shop at the time he retired, testified that an employee not on "active payroll" on September 30, 2014, such as someone who was disabled, would not have been eligible for the retirement package. (Tr. 101-102.) She noted that the employee must have signed his retirement papers on September 30, 2014. (Tr. 103.)

[2] The employee's treating chiropractor wrote a note dated September 30, 2014, that stated the employee could not work. (Dec. 5; Ex. 11.)

period prior to the § 11A examination; however, none of the medical records submitted postdated September 30, 2014. (Dec. 292, 295.)

Relying on the medical opinions of the impartial examiner, coupled with the employee's credible testimony, the judge determined that the employee was partially disabled as a result of the several industrial injuries suffered over the years while employed at GE. The judge found the employee "explained he took [the retirement package] because he was in pain and having a difficult time at work with the required lifting, bending, pushing and pulling." (Dec. 294.) The judge found the employee had worked in pain for years before his last day, and that he left because he was sixty years old, it was time to retire, and he could not continue to injure himself at work. Id. Further, the judge reasoned that the employee's extensive work schedule pre-retirement was "completely logical and understandable." [3] (Dec. 296.) The judge found this pattern demonstrated the employee had an earning capacity, although no longer as a machinist. Given the employee's lack of skills, the judge assigned a minimum wage earning capacity of $440 per week. Id.

Accordingly, the judge ordered the insurer to pay § 35 partial incapacity benefits from October 1, 2014, and continuing, based on an average weekly wage of $2,907.99 and a weekly earning capacity of $440.00. The insurer was also ordered to pay for all reasonable and necessary medical treatment related to the work injury dates and to pay the employee's counsel a fee and expenses pursuant to § 13A(5). (Dec. 297.)

The insurer raises three issues on appeal, and we address them in turn. First, the insurer contends that the judge failed to consider all the medical evidence. The insurer argues that the judge failed to either list, reference, or discuss the deposition of the impartial examiner and failed to rule on objections raised at that deposition. It correctly asserts that the decision must be recommitted to the judge for consideration of the deposition testimony. Gleason v. Trial Courts – Court Officers, 31 Mass. Workers' Comp. Rep. 113, 115 (2017)(failure to list or consider medical evidence submitted at

[3] Just prior to his retirement, the employee worked many hours of overtime and had weeks where he worked 79 hours, 69 hours and 62 hours. (Dec. 296.)

hearing requires recommittal for consideration of that evidence); Amorim v. Tewksbury Donuts, Inc., 31 Mass. Workers' Comp. Rep. 93, 95 (2017)(failure to rule on objections during medical depositions cannot be considered harmless error and recommittal is necessary). The employee agrees that recommittal for further findings is warranted on this point alone. (Employee br. 5-6.) The decision therefore will be recommitted to the administrative judge for consideration of the omitted medical evidence, and for further findings associated with it, as well as for rulings on the objections registered at the deposition.

Next, the insurer asserts that the judge failed to address two issues raised at hearing. First, it argues the judge failed to consider § 35D in determining the employee's earning capacity, specifically that the employer always accommodated the employee's restrictions without wage loss, and the modified job he was doing at the time of his retirement continued to be available to the employee.[4] Second, it argues the judge failed to take into account McDonough's Case, 440 Mass. 603, 604 (2003) and Baribeau's Case, 62 Mass.App.Ct. 1115 (2004)(Memorandum and Order pursuant to Rule 1:28), when he did not consider whether the employee's "voluntary" retirement made him ineligible for wage replacement benefits under Chapter 152. (Insurer br. 14-15; Ex. 2, Insurer's Hearing Memorandum.) The employee counters that, although the judge did not make an explicit finding of involuntary retirement, he found in effect that the employee did not retire voluntarily, thus making the § 35D argument irrelevant. The employee points to the judge's findings that the employee worked on restricted duty as a machinist until he retired, and was thereafter disabled from that restricted position, because he was in pain and having a difficult time performing even the restricted duty, due to the required "lifting, bending, pushing and pulling." (Employee br. 8; Dec. 294.)

[4] The employee asserts that the judge's listing of § 35 as an issue (Dec. 291) was a typographical error, as the judge merely inadvertently left out the "D" following § 35, and therefore he did consider all the insurer's issues. (Employee br. 7.) There is no merit to this assertion, as the judge does not discuss § 35D in the body of his decision, which makes it clear he did not consider the issue.

The employee argues that his receipt of retirement benefits is not a bar to receiving incapacity benefits, citing, among other cases, Arslanian v. Dept. of Mental Retardation, 21 Mass. Workers' Comp. Rep. 83, 93-84 (2007), and Bradley's Case, 56 Mass.App.Ct. 359, 360-361 (2002), for the proposition that any employee is entitled to compensation benefits if he is unable to work due to the effects of his industrial injury, regardless of his reason for leaving work. (Employee br. 12.)

We agree with the insurer that its issues were properly raised in its hearing memorandum, and that the judge failed to adequately address them. G.L. c. 152 § 11B; Ramm v. Commonwealth Gas Co., 30 Mass. Workers' Comp. Rep. 137, 144 (2016)(judge must address every issue raised at hearing, including defenses). On recommittal, once the judge has appropriately considered and made rulings on the § 11A deposition testimony, he must consider and make further findings on the issues raised by the insurer.

In regard to the employee's arguments made in his brief, they may have merit, but we do not address them at this time because the matter must be recommitted for further findings. Until that occurs, the application of the relevant law to the facts must wait.

Finally, the insurer proffers that the employee is precluded from receiving incapacity benefits as he voluntarily retired from a job that met his physical restrictions without any loss of earning capacity. (Insurer br. 16-20.) As this topic is covered by the insurer's second issue on appeal, we need not address it further.

The award is vacated and the matter is recommitted to the administrative judge to consider the deposition of the § 11A examiner, rule on objections raised in it, and address all other issues properly raised by the parties at hearing, making further findings as discussed in this opinion. The judge specifically must make new findings on whether the employee's retirement was voluntary or involuntary, and what effect that determination will have on his claim for benefits.

So ordered.

_____
William C. Harpin
Administrative Law Judge

_____
Carol Calliotte
Administrative Law Judge

_____
Martin J. Long
Administrative Law Judge

Filed: March 5, 2019