COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 047459-03

Danuta Goroch	Employee
Alec H. Jaret, D.M.D.	Employer
Continental Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Costigan)

APPEARANCES

William E. Howell, Esq., for the employee
Douglas K. Birkenfeld, Esq., for the insurer

HORAN, J. The parties cross-appeal from a decision awarding the employee § 35 partial incapacity benefits. We recommit the case for further findings.

The employee, a dentist, filed the present claim for workers' compensation benefits due to deQuervain's tenosynovitis in her right dominant arm. The employee, who had wrist pain, ceased working for the employer on October 9, 2003. Thereafter, she worked as a horse trainer at Suffolk Downs and practiced dentistry part-time. (Dec. 694-696.)

While the decision contains detailed findings, we need only note that Dr. Hillel D. Skoff, the § 11A impartial medical examiner, did not have, at least initially, access to the employee's complete medical record. (Dec. 698-699.) Dr. Skoff originally opined there were three causes of the employee's injury and subsequent disability: her dentistry work with the employer, her work as a horse trainer, and her part-time work as a self-employed dentist. (Dep. 33.) When he so opined, Dr. Skoff was unaware that the employee's treating physician, Dr. Rima Downs, had previously written a note clearing the employee to return to work as of October 10, 2003 − the day after she stopped working for the employer. (Ex. 12.) After being apprised of Dr. Downs's return to work note, Dr. Skoff then dismissed the employee's work with the employer as a cause of her disability. (Dep. 38.)

The judge adopted Dr. Skoff's initial opinion and awarded the employee ongoing § 35 benefits based on an earning capacity of $673 per week. However, the judge permitted the insurer to

assign the employee a higher earning capacity based on its assessment of the information contained in the employee's bank statements. (Dec. 703-704; Exs. 23-37.)

The insurer argues the decision is arbitrary and capricious because the judge failed to make findings on Dr. Downs's October 10, 2003, return to work note (Ex. 12), and Dr. Skoff's deposition testimony addressing that document. Importantly, in light of Dr. Downs's opinion that the employee was no longer disabled, Dr. Skoff reversed his opinion regarding the causal relationship between the employee's pre-October 10, 2003 work activities and her subsequent disability: "I would agree that you could not then claim that the exacerbation which came after 10/10/03 would be caused by [work activities with the employer]." (Dep. 38.) The quoted language invokes the application of Perangelo's Case, 277 Mass. 59 (1931), in which the court held that an expert physician's opinion which changes based upon different foundational facts must be taken as his final opinion on the medical issue in dispute. Id. at 63-64. Here, the judge adopted Dr. Skoff's initial causation opinion - later changed on the basis of Dr. Downs's note - without explanation. Because the return to work note so affects Dr. Skoff's causation opinion, it is appropriate to recommit the case for the judge to address this crucial evidence. See Pike v. Mass. Dept. of Mental Retardation, 21 Mass. Workers' Comp. Rep. 191, 196 (2007)(recommittal for finding of fact on crucial event, that of death of employee's husband and its alleged effect on employee's work schedule); Melo v. Manganaro Corp., 10 Mass. Workers' Comp. Rep. 12, 16-17 (1996)(recommittal where judge did not make proper findings on facts essential to employee's claim, but merely recited testimony); see also Cibene v. Brentwood Realty Trust, 8 Mass. Workers' Comp. Rep. 172 (1994)(where erroneous finding went to key factual issues in case, recommittal required for further findings).

The employee's appeal also raises a meritorious issue. We agree with the employee that the judge erred by authorizing the insurer to determine the employee's earning capacity based on its interpretation of the employee's bank statements. It is up to the judge to determine, based on the formulae set forth in G. L. c. 152, § 35D,[1] the amount of the employee's earning capacity.

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[1] General Laws c. 152, § 35D, provides, in relevant 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:
>
> (1) The actual earnings of the employee during each week.

Accordingly, we recommit the case for further findings of fact consistent with this opinion.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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> (2) The earnings that the employee is capable of earning in the job the employee held at the time of injury, provided, however, that such job has been made available to the employee and he is capable of performing it. . . .
>
> (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. . . .
>
> (4) The earnings that the employee is capable of earning.