COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038369-00**

Deborah Hicks	Employee
Commonwealth Registry of Nurses	Employer
American Home Assurance	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and McCarthy)

APPEARANCES
Michael J. Chernick, Esq., for the employee
David G. Shay, Esq., for the insurer

CARROLL, J. The insurer appeals the denial of its complaint to modify or discontinue the employee's § 35 partial incapacity benefits. One issue raised is dispositive and, for the reasons set forth below, the case is recommitted for further findings.

Deborah Hicks, a thirty-nine year old licensed practical nurse (LPN), was concurrently employed by the Department of Mental Retardation (DMR) and the Commonwealth Registry of Nursing (Registry), when she was injured on September 9, 2000 at work for the Registry. While helping an elderly gentleman stand, Ms. Hicks experienced pain in her midshoulder up into her neck and head. When the pain did not go away after a few days, the employee sought medical attention, and left both jobs for approximately one month. The insurer accepted liability for the injury and paid workers' compensation benefits. After the month, the employee returned to work at her concurrent employer, DMR, at her prior schedule of twenty hours per week, performing accommodated duty, which included no lifting and limited charting. She never returned to work for the Registry. In December 2001, the employee experienced an aggravation of her shoulder injury when she grabbed a falling patient while she was working at her concurrent employment. She was out of work for two weeks, at which time she returned to her baseline status. (Dec. 2-3.)

The administrative judge denied the insurer's complaint for reduction in benefits at the § 10A conference. The insurer appealed to a full evidentiary hearing, (Dec. 2), and the employee underwent a § 11A impartial medical examination. The impartial physician, Dr. Alan Bullock, opined that, as a result of the employee's September 9, 2000 work injury, she has been left with a partial disability that requires her to avoid lifting over 15 to 20 pounds, and to avoid repetitive work involving her neck. Dr. Bullock opined that the employee's neck impairment was such that she would be subject to periodic exacerbations and aggravations, which will temporarily increase her pain before returning to baseline. (Dec. 3-4.) But he also opined that the employee could work full time. (Dep. 42.)

The judge found the employee to be very credible as to her descriptions of her pain and exacerbations. He concluded that the employee suffers from chronic neck pain, causally related to her original work injury, and that she would be subject to periodic temporary exacerbations of that pain. The judge concluded that the employee had the ability to work with restrictions.

The judge adopted the opinion of the impartial physician as to the temporary nature of the employee's exacerbations. The judge denied the insurer's request for reduction in benefit payments, with the exception of the two week period in December 2001, during which she was out of work due to an aggravation that occurred while working for the concurrent employer. The judge concluded that the employee's earning capacity should continue to be based on actual wages from her part-time concurrent employment at DMR. (Dec. 4-5, 3.)

We think that the decision is sustainable as far as it goes. However, we agree with the insurer that the judge failed to analyze the insurer's complaint fully, in that he omitted a vocational assessment and proper application of § 35D for determining the employee's earning capacity. The law is clear that the actual wages the employee earns while

working a twenty-hour week at her concurrent employment at DMR are not dispositive of her earning capacity.[1] Section 35D provides, in pertinent part:

> For the 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.
>
> . . . .
>
> (4) *The earnings that the employee is capable of earning.*

(Emphasis added.) Therefore, on recommittal, the judge needs to make specific findings applying the vocational factors of Frennier's Case, 318 Mass. 635, 639 (1945), and Scheffler's Case, 419 Mass. 251, 256 (1994). In so doing, he must give prima facie weight to the opinion of the impartial physician on medical issues, "which include the doctor's description of the employee's physical ability to perform certain tasks, as well as restrictions the examiner would place on the employee's physical ability to work." Gauthier v. AC Lumber Co., 12 Mass. Workers' Comp. Rep. 120, 122 (1998), citing Scheffler's Case, supra at 257. The judge therefore must make findings explaining what the employee's earning capacity is in light of the impartial doctor's opinion that the employee could work full-time subject to the physical restrictions discussed above.[2]

We recommit the case for such further findings consistent with this opinion.

So ordered.

Martine Carroll
Administrative Law Judge

[1] We note that the judge specifically found that there were no more hours available with her current place of employment, DMR. (Dec. 3.)

[2] Thus, it would be appropriate for the judge to explain why the fact that there are only twenty hours of work available to the employee at her present employment means that her present earning capacity is limited to twenty hours.

Frederick E. Levine
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: **July 22, 2003**
MC/jdm