COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 034893-16**

Debra L. Carmody	Employee
North Shore Medical Center	Employer
Partners Healthcare System, Inc.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Rosado.

APPEARANCES
Charles C. Donoghue, Esq., for the employee
Christina Schenk-Hargrove, Esq., for the insurer

KOZIOL, J. The insurer appeals from a hearing decision ordering it to pay the employee § 34, temporary total incapacity benefits, from December 28, 2016 to March 6, 2017, and from April 10, 2017, and continuing. On appeal, the insurer asserts the judge erred in making her underlying disability determination, as well as her incapacity determination and awarding the employee § 34 benefits. We affirm in part. However, we also vacate the order of § 34 benefits from April 10, 2017, and continuing, and recommit for further findings of fact pursuant to G. L. c. 152, § 35D(4), regarding the employee's incapacity during that time frame.

The employee is a fifty-five year old registered nurse who worked for the employer at Salem Hospital providing direct patient care as a floor nurse. On December 28, 2016, the employee injured her lower back while positioning a patient. Upon doing so, she experienced immediate excruciating low back pain radiating to her right leg, causing her to seek medical treatment at the Employer's emergency room at the end of her shift. "The employee never recovered sufficiently to return to her regular job as a direct care floor nurse." (Dec. 4.) However, "[f]ollowing a brief period of

convalescence, she returned to modified work in a clerical capacity at reduced hours, where she suffered an increase of symptoms necessitating more time out of work."[1] (Dec. 4.)

The employee filed a claim seeking payment of § 34 temporary total incapacity from the date of injury, December 28, 2016, through March 6, 2017, when she returned to modified work, followed by ongoing § 34 benefits from the date she had to leave her modified duty work, April 10, 2017, to date and continuing. Alternatively, she sought § 35 partial incapacity benefits from December 28, 2016, and continuing. The claim was the subject of a § 10A conference and, by order filed August 11, 2017, the insurer was required to pay the employee § 34 benefits at a rate of $937.69 per week based on an average weekly wage of $1,622.82, from December 28, 2016 through March 6, 2017, and from April 10, 2017, and continuing. Rizzo, supra. The judge also ordered the insurer to pay the employee partial incapacity benefits "based on actual wages" earned from March 7, 2017, through April 9, 2017. Id. The insurer filed a timely appeal,[2] and the employee was examined by an impartial medical examiner, Dr. David C. Morley, on January 18, 2018. The judge found Dr. Morley's report to be adequate and allowed the parties to take his deposition, but neither party chose to do so. (Dec. 3.) Accordingly, Dr. Morley's report was the only medical report in evidence. (Dec. 3.)

In her findings regarding the medical evidence pertaining to the employee's physical capacity, the judge adopted Dr. Morley's opinions:

- That the Employee continues to experience low back pain which radiates to her leg.
- That the Employee can take over the counter medications to control her pain.
- That she can lift up to 20 pounds occasionally using proper spinal mechanics.
- That she has reached maximum medical improvement.

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[1] The board file shows that the employee worked three days per week for four hours per day in that modified duty job. (Form 106, Insurer's Notification of Termination or Modification of Weekly Compensation During Payment Without Prejudice Period); Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3(2002)(judicial notice taken of board file).

[2] The judge's decision states the employee appealed from the conference order, (Dec. 2), but the employee did not appeal from that order. Rizzo, supra.

(Dec. 5-6.)

At the hearing the employee testified extensively about her symptoms and her attempts to find gainful employment, which she indicated began in earnest in June of 2017, when she began to feel better. (Dec. 5, 7; Tr. 22-27.) The employee's testimony revealed she applied for numerous nursing jobs in a variety of settings and with a variety of potential employers. From this testimony the judge made the following findings:

> Through hearing she attained limited recovery and continues to experience significant limitations that prevent her from returning to her regular work and pre-injury active lifestyle. . . . The Employee's work as a floor nurse is physically demanding and necessitates direct care of patients. She credibly testified that prior to this industrial injury, she had no physical limitations, back injuries, work restrictions, nor need for any pain/anti-inflammatory medications. Improvement of symptoms has been marginal at best. She is now attempting to cope with persistent residual pain and restricted capability to lift, climb stairs, walk, drive, and sit. Her repeated good faith attempts at finding employment with the Employer in any capacity within her physical restrictions yielded no response other than sparse assurances that she will be contacted in the near future. Likewise, her search to work for outside employers, because of her physical condition and limitations garnered no employment.

(Dec. 4-5.) The judge concluded,

> I adopt the medical opinion of Dr. Morley and the credible testimony furnished by the Employee in finding that she has been and remains totally disabled from earning a wage through this hearing. The Employee's persistent attempts to find non-temporary work through her Employer in a modified position and her search elsewhere for employment within her physical restrictions and skill sets is compelling and satisfies me that she is not presently capable of earning a wage.

(Dec. 7.)

On appeal, the insurer takes issue with the judge's disability findings and her earning capacity analysis. First, it asserts the employee failed to show she was entitled to any weekly benefits at any time after April 9, 2017, through the date of Dr. Morley's examination on January 18, 2018, because she failed to submit evidence that she had any disability prior to the date of Dr. Morley's examination. We disagree.

The insurer's argument is based not only on facts not found by the judge, but also specifically ignores the judge's finding that the employee had to leave the modified duty clerical job for the employer on April 9, 2017, because she experienced "an increase of symptoms necessitating more time out of work." (Dec. 4.) Second, the employee was prohibited from submitting additional medical evidence specifically addressing the time period prior to Dr. Morley's § 11A examination because the judge found the impartial medical examiner's report to be adequate. Spencer v. JG MacLellan Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 149 (2016)("The whole idea of admitting 'gap medical evidence' is to address an inadequacy in an impartial medical examiner's report for a given timeframe"). Simply because Dr. Morley examined the employee in January of 2018, it does not necessarily mean the judge erred in relying on his opinions as providing evidence of the extent of the employee's disability from April of 2017, through the date of his examination. Indeed, even nine months after the employee left her modified duty job due to an increase in her symptoms, Dr. Morley determined that she "continues to experience low back pain which radiates to her leg," she continued to have restrictions on lifting up to 20 pounds "occasionally," and that she had reached maximal medical improvement. The judge could reasonably infer from those opinions and the employee's credited testimony that the employee's disability existed throughout the time period spanning from the date her condition required her to leave work, April 10, 2017, through the date of Dr. Morley's examination. Maraia v. M.B.T.A., 25 Mass. Workers' Comp. Rep. 401, 403 (2011).

Next, the insurer argues the judge erred in determining the extent of the employee's incapacity. We disagree with the insurer insofar as it argues the judge erred by failing to find that the employee had the ability to earn her former wage as a nurse by engaging in a light duty nursing job from April 10, 2017, and continuing.

We begin by noting, "it is not part of the employee's burden of proof in § 34 and 34A claims to produce evidence of a search for work." Martin v. Sunbridge Care and Rehab. for Hadley, 22 Mass. Workers' Comp. Rep. 1, 7 (2006). However, "what is clear

is that a judge may make findings relative to a worker's affirmative effort to do so." Ellison v. NPS Energy Services, 20 Mass. Workers' Comp. Rep. 345, 348 (2006). After crediting the employee's testimony regarding her extensive, yet unfruitful, search for a nursing job within her restrictions, the judge reasonably inferred that she was unable to secure such employment through the employer and in the labor market at large.

Nonetheless, the insurer further argues there is no indication that the judge considered the employee's ability to perform other work in the open labor market outside of the nursing field, when she made her determination regarding the employee's incapacity. We agree.

"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: – (4) The earnings that the employee is capable of earning." G. L. c. 152, § 35D(4). Because the judge relied on the employee's testimony, which solely discussed her job search for nursing-related positions in the medical field, in determining the extent of the employee's incapacity, we cannot tell whether the judge considered the employee's ability to earn wages in the open labor market in general.

> A judge's decision must contain conclusions adequately supported by subsidiary findings. See Crawford's Case, 340 Mass. 719, 720-721 (1960). Findings with respect to the extent of continuing incapacity must be sufficiently definite and specific so the reviewing board can properly perform its appellate function. See Ballard's Case,13 Mass. App. Ct. 1068, 1068-1069 (1982); Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). Where essential findings are lacking, imprecise or internally inconsistent, the decision cannot stand. Nelson v. ADAP/RITE AID Auto Place, 10 Mass. Workers' Comp. Rep. 503, 505 (1996).

Howell v. Norton Co., 11 Mass. Workers' Comp. Rep. 161, 164 (1997). Thus, "[i]t is our duty to recommit [the] case for further findings when we cannot determine 'with reasonable certainty whether [the] correct rules of law have been applied to facts that could properly be found.' " Lopez v. Wilson Farms, 25 Mass. Workers' Comp. Rep. 223, 226 n. 1 (2011), quoting Praetz, supra at 47. "Rather than merely incanting that [s]he

considered the 'age, experience, education and physical condition of the employee,' a judge must set out a reasoned analysis of these factors, as well as other circumstances that might affect the employee's ability to make earnings of a substantial and not trifling nature." Kelleher v. United Parcel Service, 10 Mass. Workers' Comp. Rep. 735, 737 (1996), quoting Frennier's Case, 318 Mass. 635, 639 (1949).

Accordingly, we vacate the award of § 34 benefits from April 10, 2017, and continuing, and recommit the matter for the judge to make further findings of fact and to conduct an analysis pursuant to § 35D(4). We reinstate the conference order, pending receipt of the judge's decision on recommittal. See Lafleur v. Department of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: ***April 17, 2019***