COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 02751097 07317890**
Diane Marble	Employee
Milton Hospital	Employer
Boston Whaler, Inc.	Employer
Massachusetts Healthcare SIG	Insurer
Arrow Mutual Liability Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Levine and Carroll)

APPEARANCES
John J. O'Day, Jr., Esq., for the employee
James W. Stone, Esq., for Mass. Healthcare SIG
John T. Underhill, Esq., for Arrow Mutual Liability

WILSON, J. Massachusetts Healthcare SIG appeals an award of § 34 weekly temporary total incapacity benefits, contending that the judge based a key credibility determination on a finding which has no evidentiary basis, and that the judge failed to make adequate subsidiary findings in support of his award of § 34 benefits. We agree with the latter argument and recommit the case for further findings on extent of incapacity. The decision is otherwise summarily affirmed.

Diane Marble, who was thirty-nine years old at the time of hearing, had worked as a veterinarian's assistant and as the office manager of a trucking company before going to work as an associate buyer for Boston Whaler (insured by Arrow Mutual Insurance Company). (Dec. 4.) On December 22, 1990, she suffered her first industrial injury to her neck and low back while performing inventory for Boston Whaler, a task requiring that she lift pallets and boat parts weighing fifty to seventy pounds. (Dec. 7.) Ms. Marble had neck surgery in 1992 for relief of pressure on the right C5 nerve root, and in 1994, she had a C4-C5 anterior discectomy. Following the second surgery, she had physical therapy and pool therapy, which significantly improved her condition. (Dec. 8.) Arrow

Mutual accepted liability and paid workers' compensation benefits until the case was settled by lump sum agreement on January 25, 1995. Pursuant to a rehabilitation plan approved by the Department's Office of Education and Vocational Rehabilitation, the employee completed a two-year associate's degree program as a clinical laboratory technician at Massasoit Community College. In January 1997, as part of her training, she became involved in a clinical program at Milton Hospital.[1] (Dec. 4-6, 9.) After Ms. Marble passed a pre-employment physical clearing her for employment without restriction in March 1997, the hospital hired her on a permanent basis.[2] (Dec. 5; Tr. 17.)

On July 1, 2 and 3, 1997, Ms. Marble worked in the urinalysis laboratory of Milton Hospital. Her duties included using the microscope to analyze samples. During the first day, she began experiencing severe neck pain and, as a result, on July 1 she stopped working at her concurrent part-time employment as a phlebotomist for the Harvard Health Plan. The pain increased over the next few days at work and, on July 4, while she was at home, it became even more severe. On July 6, Ms. Marble sought treatment at the Good Samaritan Hospital. She returned to work wearing a collar on July 8, and attempted to use the microscope. Because of her complaints of pain, however, she was limited to light duty not involving the microscope. (Dec. 6, 9.) She worked until July 10, 1997. (Dec. 9; Tr. 25.)

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[1] The judge found that Ms. Marble participated in clinical rotations at various hospitals as part of her training. (Dec. 5.) Elsewhere he found that she participated in a multitude of job-training positions at Milton Hospital during the first six months of 1997. (Dec. 9.) The testimony of both Ms. Marble and Ms. Iodice supports the latter finding. (Tr. 17-18, 60, 71.)

[2] The judge found that she became a full-time laboratory technician in July of 1997, (Dec. 9), but the employee's testimony was that she was hired by the hospital in March 1997, and began working 40 hours per week then. (Tr. 17-19.) Ms. Marble testified that she began an orientation program rotating through the lab upon being hired in March, and on July 1, 1997, she began work doing urine sediments. (Tr. 19-21.) Brenda Iodice, who testified that she was supervisor of the microbiology urinalysis laboratory, further testified that Ms. Marble first worked in her laboratory as a student in January 1997, and returned June 30, 1997 as an employee being trained to fill an evening position. (Tr. 59-61.)

Prior to the onset of these problems in July 1997, Ms. Marble had not treated for neck or back problems for approximately three years, though she did have periodic pain. (Dec. 5, 8-9.) After leaving work at Milton Hospital on July 10, 1997, she underwent physical therapy without improvement and, then, on December 2 and December 4, 1997, she had a C5-6, C6-7 anterior fusion with plating. (Dec. 9-11.)

Ms. Marble filed a claim for compensation and medical benefits against Massachusetts Healthcare SIG, Milton Hospital's insurer, and a claim for medical benefits alone against Arrow Mutual, the insurer of Boston Whaler. Both claims were denied at conference, and the employee appealed to a hearing de novo. (Dec. 2.)

Dr. Michael DiTullio, Jr. examined the employee pursuant to § 11A on two occasions, April 29, 1998 and April 7, 1999. (Dec. 7, 10.) His reports were deemed adequate and his deposition was taken. (Dec. 3.) Dr. DiTullio opined that the employee suffered a C4-5 disc herniation, as well as a progression of a C5-6 and C6-7 degenerative disc disease, causally related to her work injury of December 22, 1990 at Boston Whaler. Dr. DiTullio also opined that the degenerative disc disease was further aggravated by the employee's second work injury in July 1997. (Dec. 11; 4/29/98 Imp. Rep. 11; 4/7/99 Imp. Rep. 12.) His opinion was based on radiological studies and the history given him by the employee, which was that her duties during the first week of July 1997 involved sitting and looking through a microscope for up to eight hours at a time. (Dec. 9.) Dr DiTullio concluded that Ms. Marble had reached a medical end result, and that she should permanently avoid activities which would involve prolonged postural fixation, excessive spinal loading, repetitive bending, lifting of objects over five pounds, or repeated use of her upper extremities above the level of her shoulders. (Dec. 10.) The judge adopted the impartial physician's opinion that the employee had a preexisting condition caused by a compensable injury in 1990, which was aggravated by the July 1, 1997 injury at Milton

Hospital, and ordered Massachusetts Healthcare SIG, as the insurer of Milton Hospital, to pay § 34 benefits from July 1, 1997 to June 30, 2000.[3] (Dec. 11, 13.)

Massachusetts Healthcare SIG contends that the judge did not make sufficient subsidiary findings to support his award of total incapacity. We agree.

The judge stated the applicable law:

> "In deciding the issue of incapacity an employee's physical limitations constitutes [sic] only one factor to be considered by the judge." Scheffler v. Sentury [sic] Insurance, 7 Mass. Workers' Comp. Rep. 219, 223 (1993). I must also consider the employee's age, education, background, training, work experience, mental ability, and other capabilities. See Frennier's Case, 218 [sic] Mass. 635 (1945). I also consider the employee's subjective complaints of pain, which I have credited. See Anderson vs. Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65, 66-67 (1990).

The judge stopped there, however, without accomplishing the task he set out by explaining how he applied the law. "It is not enough that the judge merely incant the vocational factors enunciated in Frennier's Case, 318 Mass. 635, 639 (1945), and Scheffler's Case, 419 Mass. 251, 256 (1994). The judge must make findings addressing these factors." Griffin v. State Lottery Comm'n, 14 Mass. Workers' Comp. Rep. 347, 349 (2000), citing Faille v. U.S. Concrete, 11 Mass. Workers' Comp. Rep. 473, 477-478 (1997). Here, the judge credited the employee's complaints of pain, (Dec. 12), and recounted the impartial physician's opinion that the employee had a "guarded prognosis" and should "permanently avoid activities which would involve prolonged postural fixation, excessive spinal loading, repetitive bending, lifting of objects over five pounds, or repeated use of her upper extremities above the level of her shoulders." (Dec. 10.) But, he made no findings regarding how Ms. Marble's education (associate's degree), prior work experience (associate buyer, veterinarian's assistant, phlebotomist and office manager), relatively young age (thirty-nine), and other relevant factors, together with the physical limitations, influenced his appraisal of the effect of the injury on her earning

[3] Apparently, the employee made no claim for § 35 weekly benefits. (Dec. 2.) The judge stated that he did not have a current medical report indicating whether Ms. Marble had improved, so he

capacity and the decision to award her temporary total incapacity benefits. The judge's conclusion that the employee was totally incapacitated for work "must emerge clearly from the matrix of his subsidiary findings." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). As we cannot tell on what factors the judge based his award of § 34 benefits and, thus, whether the judge applied the law correctly, id., citing Zucchi's Case, 310 Mass. 130, 133 (1941), we find it appropriate to recommit the case for further subsidiary findings on the limited issue of extent of incapacity.

As the administrative judge no longer serves in the department, the case is forwarded to the senior judge for reassignment to another judge. Because the judge must make credibility findings on the issue of extent of incapacity, there must be a hearing de novo on that issue.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: May 3, 2002

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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could not make a further determination on the extent of her incapacity. (Dec. 13.)