COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026566-15**

Domingas Sequeira	Employee
High Point Treatment Center	Employer
Massachusetts Healthcare S.I.G.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Harpin and Calliotte)

The case was heard by Administrative Judge McManus.

APPEARANCES
Daniel S. Hendrie, Esq., for the employee
Linda C. Scarano, Esq., for the self-insurer

FABRICANT, J. The self-insurer appeals from the judge's decision wherein the employee was awarded ongoing § 35 partial incapacity benefits, medical benefits and a legal fee with costs. After review, we vacate the judge's decision in part, and recommit the case for findings, supported by the evidence, on the date the employee's incapacity began, and the extent of that incapacity during the "gap period" prior to the impartial examination.[1]

Domingas Sequeira, the employee, was, at the time of the judge's decision, a fifty-seven year old woman who relocated to the United States approximately twenty-five years ago. She received a GED in 1997, speaks three languages in addition to English, and is a certified Portuguese medical interpreter. Prior to working for the employer, she also worked as a nursing assistant. (Dec. 4.)

[1] As the original hearing judge is no longer with the Department, we refer the case to the Senior Judge for reassignment.

The employee has worked for High Point Treatment Centers since 2001, and at the time of the March 16, 2015,[2] work injury, she worked at the House Harbor Family Shelter as a supervisor and house manager. The house accommodated sixteen families, and the employee's duties included managing the house, hiring and training employees, coordinating employee schedules and overseeing the overall safety of the house. She also interacted with house clients, responded to complaints and problems, and often facilitated the medical, educational, and sustenance needs of the clients. The position was forty hours per week, although she frequently worked additional hours. (Dec. 4.)

On March 16, 2015, the employee fell on black ice in the employer's parking lot. She struck her head, back, and right hand. She reported the event and continued to work for the remainder of the day. The next day, she sought medical treatment at St. Luke's Hospital. (Dec. 5.) Thereafter, she treated with various medical professionals and received a regimen of physical therapy and injections, while continuing to work full time until September 29, 2015. On that date, "[s]he states that she had an anxiety attack[3] leaving her doctor's office and reported to the hospital when seen that she had chest pain and was vomiting. The employee alleges that she also reported back pain to the ER staff at that time." (Dec. 5.) From November 15, 2015, through approximately April 24, 2016, she worked a light-duty, part-time schedule of four hours per day at $18.00 per hour.[4] (Dec. 5, 6.) The employee alleges a myriad of ailments, including the inability to sit for more than thirty minutes, occasional inability to stand or walk, difficulty sleeping, and the inability to conduct day-to-day functions such as cooking, shopping or cleaning. (Dec. 6.)

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[2] We note that although the judge erroneously referred to the date of injury as March 6, 2015, rather than the actual date of March 16, 2015, at least twice in her decision, (see Dec. 5, 11), she properly referred to the March 16, 2015 date throughout the remainder of her decision. We view this as simply a harmless scrivener's error.

[3] The employee did not claim a psychological injury. (Dec. 2, n.2.)

[4] The employee was hospitalized in February 2016 with a diagnosis of possible stroke. She returned to work for four hours per day on a five-day work schedule. (Dec. 6.)

On April 4, 2016, the employee's claim was the subject of a § 10A conference. The administrative judge ordered the self-insurer to pay § 35 benefits at a rate of $335.34 per week from the date claimed, October 26, 2015, and continuing. Both parties appealed,[5] and the matter was scheduled for a hearing de novo before the same administrative judge. (Dec. 2.) Pursuant to § 11A, the employee was examined by Dr. Scott Harris, and the employee's request to submit additional medical evidence was allowed.[6] (Dec. 3.)

Dr. Harris examined the employee on June 22, 2016, and diagnosed a lumbosacral sprain and contusion causally related to the work injury of March 16, 2015. Waddell findings, indicating symptom magnification, were noted. Dr. Harris opined that the employee could return to her previous level of work, at least four hours per day, with a five pound lifting restriction and no climbing of ladders. (Dec. 8.) At deposition, the doctor's opinions remained essentially the same.[7] Although he felt it was more likely than not that the employee had pre-existing degenerative disc disease, it was not symptomatic and not the cause of her current pain. (Dec. 9.) He further found it hard to say if this was a combination injury, and concluded it was more likely than not that the employee's work related injury was the cause of her continued pain. (Dec. 10.)

The employee submitted a number of medical records, some dating back to March 2015, and the self-insurer submitted two reports from Dr. Steven Sewall. (Dec. 1-2.) The judge, in her decision, recited the reports of Dr. Mushtaque A. Chachar and Dr. Sewall,

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[5] See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file).

[6] The judge stated in her decision that she found the § 11A report adequate and the medical issues not complex. (Dec. 3.) She then noted that employee counsel filed a Motion to Open the Medical Evidence, which she initially denied. After further review and argument, she allowed the motion on January 31, 2017. Id.; see Rizzo, supra. The judge did not state the grounds for allowance, but the employee's supplemental motion alleged inadequacy. The self-insurer did not object following the allowance of the employee's motion.

[7] During his deposition, the § 11A examiner clarified the medical opinion stated in his earlier report, and opined that the employee was at a medical end result. (Stat. Ex. B, 18-20, 25, 30.)

but specifically refused to adopt those medical opinions. (Dec. 12.) She did not mention or adopt any of the other additional medical submissions.

The judge adopted the medical opinions of Dr. Harris, the § 11A impartial physician, as to causal relationship, restrictions and physical limitations, as well as the reasonableness and necessity of the employee's medical treatment. She determined the employee suffered an industrial accident on March 16, 2015 and that she was partially disabled as of September 29, 2015, and continuing. (Dec. 11.) The judge found "no credible evidence to prevent or negate" the impartial examiner's opinion of June 22, 2016, "from extending back to the September 29, 2015 date." (Dec. 12.) Additionally, the judge adopted the impartial physician's opinion as to pre-existing degenerative conditions, and determined that § 1(7A) was not applicable to this case. (Dec. 12-13.) The judge credited the employee's testimony that she suffered an industrial accident, and that she has had symptoms and complaints of pain following it. However, the judge did not find the employee's pain and disability rose to the level complained of. (Dec. 7.)

Ultimately, the judge awarded § 35 benefits at a rate of $335.34, based upon an average weekly wage of $745.20 and an earning capacity of $210.00, from September 29, 2015, and continuing, as well as medical benefits, a legal fee, and expenses. The self-insurer was credited for payments already made. (Dec. 14-15.)

The self-insurer now raises three issues on appeal, and we address each in turn. First, the self-insurer contends that the medical evidence does not support the judge's findings on extent of disability and the date incapacity commenced, and concludes that "the order for benefits during the 'gap period' of September 29, 2015 to June 22, 2016, must be reversed." (Self-insurer br. 1, 9-12.) The heart of this argument is the self-insurer's assertion that it was improper for the judge to determine that no credible evidence prevented an extension of the impartial examiner's June 22, 2016, opinion on disability back to September 29, 2015, the ordered commencement date for disability payments. (Self-insurer br. 9.) The self-insurer correctly notes that the impartial examiner did not offer an opinion on the commencement of the employee's disability and, in fact, found she had minimal objective findings and restrictions, none of which

would have prevented her from performing the job she worked up to April 24, 2016.[8] (Self-insurer br. 9; Stat. Ex. A; Stat. Ex. B.) Moreover, the only relevance to the September 29, 2015, date utilized by the judge was that the employee stated she had an anxiety attack leaving her doctor's office. (Tr. 75-80.) The judge adopted no medical evidence causally relating that anxiety attack to the March 16, 2015, injury, nor any evidence indicating the employee could not work full-time as of the date she left work in September 2015. Although the judge stated that the "Employee alleges that she also reported back pain to the ER staff at that time," (Dec. 5), the judge neither credited nor discredited that statement, and cited no medical evidence to support or contradict it.

The self-insurer correctly cites Whalen v. Ryder Integrated Logistics, 23 Mass. Workers' Comp. Rep. 309 (2009), to illustrate that the judge erred in finding that "there is no credible medical evidence that would prevent or negate Dr. Harris's opinions from extending back to the September 29, 2015 date." (Dec. 12.) This finding is a clear example of shifting the burden of proof from the employee, who has the burden of proving causally related disability and incapacity during the gap period, Sponatski's

[8] Certainly, there are situations in which a medical opinion can support "the inference that the employee's medical status from the commencement of [the period in dispute] until the impartial examination . . . was essentially unchanged." Cugini v. Town of Braintree School Dep't., 17 Mass. Workers' Comp. Rep. 363, 366 (2003). See Maraia v. M.B.T.A., 25 Mass. Workers' Comp. Rep. 401, 402-403 (2011)("When a doctor opines a year after failed surgery that employee is *still* permanently and totally disabled, and his disability *remains causally related to the industrial injury,* an inference that total disability existed throughout that year is reasonable"); and Carmody v. North Shore Medical Center, 33 Mass. Workers' Comp. Rep. ___ (April 17, 2019)(judge could reasonably infer from § 11A opinion that employee "continues to experience low back pain which radiates to her leg," and continued to have lifting restrictions and had reached a medical end result, that employee's disability existed from the date she left work through the date of the § 11A exam). Here, Dr. Harris was asked to opine regarding the extent of the employee's disability specifically *as of the date of his examination in June 2016*. (Stat. Ex. B, Dep. 17, 19.) He was not asked to opine regarding the extent of her disability on the day she left work, September 29, 2015, or the date from which the judge found she claimed benefits, October 26, 2015. See Crandall v. Elad General Contractors, 16 Mass. Workers' Comp. Rep. 51, 54 (2002)(where doctor testified to employee's work capacity as of the date he examined him, his opinion fails to address extent of disability prior to date of examination). Moreover, the judge did not adopt any other medical evidence which might have supported a finding the employee's causally related partial incapacity began when she left work in September of 2015, following an anxiety attack.

Case, 220 Mass. 526, 527-528 (1915)(claimant has burden to sustain every element of his claim), to the self-insurer, to essentially prove that the employee was not disabled due to her work injury during that period. Whalen, supra, at 311. Where the burden-shifting "was a key piece of the judge's reasoning and was not in the nature of a harmless semantic slip," the decision must be vacated and recommitted for further findings on extent of incapacity from the date claimed by the employee, through the date of the impartial examination, June 22, 2016. [9] Id.

Next, the self-insurer argues that the judge failed to conduct a proper vocational analysis insofar as she failed to take into account the employee's certification as a Portuguese medical interpreter, or Dr. Harris's opinion she could work at a computer as long as she could sit or stand as needed. (Self-insurer br. 1, 12.) We disagree with respect to the period after the date of the impartial examination. The judge found the employee partially disabled based on Dr. Harris's opinion that the employee could return to her prior supervisory position, with restrictions that included working four hours to start and no lifting or carrying over five pounds, as well as the employee's testimony regarding her chronic back and leg complaints. (Dec. 13.) Neither party submitted expert vocational testimony. Accordingly, the judge found the employee could work four hours per day earning the minimum wage of $11.00 per hour. (Dec. 14.) Had the judge ordered a higher earning capacity than minimum wage, as the self-insurer argues she should have, there would not have been a "factual source," as required by the court in Dalbec's Case, 69 Mass. App. Ct. 306, 316 (2007). See Spencer v. JG MacLellan Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 150 (2016). The judge did "not make findings regarding her return to her prior position as I do not have credible evidence as to what the actual duties and requirements of that position were." (Dec. 14.) The self-insurer states that the evidence is to the contrary, (Self-insurer br. 13), but fails to state

[9] Although the judge ordered § 35 benefits beginning September 29, 2015, (Dec. 15), she found that the employee's claim was for §§ 34 or 35 benefits beginning October 26, 2015. (Dec. 2, and n.2.) On recommittal, the new judge should clarify this inconsistency, keeping in mind she may not expand the parameters of the dispute. MacEachern v. Trace Construction Co., 21 Mass. Workers' Comp. Rep. 31, 37 (2007).

what that evidence is. It is the judge's prerogative to decide what evidence is credible, and we will not disturb this finding. Lettich's Case, 402 Mass. 389, 394 (1988). In addition, there was no evidence that the job the employee was performing from November 15, 2015 until April 24, 2016, was made available to her. See G. L. c. 152, § 35D(2) and (3). Therefore, we affirm the judge's decision with respect to the employee's minimum wage earning capacity for four hours per day, five days per week from the date of Dr. Harris's examination, June 22, 2016, forward. Because the judge must make a new determination on extent of incapacity for the period from the date of claim until the date of the impartial, we vacate the judge's award for that closed period, and recommit the case for further findings.

Finally, the self-insurer argues the judge erred in the calculation of the earning capacity and compensation rate. (Self-insurer br. 1, 13.) We agree. The math in this case literally does not add up. An earning capacity of $11.00 per hour, four hours per day was assigned to the employee. While that should add up to $220.00 per week, the judge instead determined the weekly earning capacity to be $210.00. (Dec. 14.) This is further complicated by the judge's finding that § 35 benefits be paid at a rate of $335.34 per week based on an average weekly wage of $745.20, which is the maximum § 35 rate. An award of $335.34 in § 35 benefits would require an assigned earning capacity of $186.30. Based on the assigned $210.00 weekly earning capacity, the correct § 35 calculation should have been $321.12. However, because the correct earning capacity is $220.00 per week, the § 35 compensation rate is $315.12. Therefore, we order the self-insurer to pay § 35 benefits in the amount of $315.12 from June 22, 2016, and continuing. We vacate the § 35 award from September 29, 2015 until June 22, 2016.

Accordingly, we recommit the case for further findings on the extent of the employee's causally related incapacity, supported by the evidence, from the date claimed (see supra, note 9), until June 22, 2016. The decision is affirmed in all other respects. Because the administrative judge is no longer with the department, the case is forwarded to the senior judge for reassignment to a new judge. That judge should hear the

employee's testimony and may consider the transcript of the prior hearing, including the deposition and medical evidence.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: May 17, 2019