COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 02545494, 04094494, 00057295, 04094594, 02545294 02500794**
Donald Messinger (deceased)	Employee
Beverly Messinger	Claimant
Bethlehem Steel Corp.	Employer/Self-insurer
Thompson & Lichtner Co., Inc.	Employer
Liberty Mutual Insurance Co.	Insurer
Teledyne Components, Inc.	Employer
Transportation/CNA Insurance Co.	Insurer
Argonaut Midwest Insurance Co.	Insurer
Workers' Compensation Trust Fund	Insurer
General Dynamics Corp.	Employer
CIGNA Companies	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy & Smith)

APPEARANCES
John K. Ford, Esq., for the employee & claimant
Scott E. Richardson, Esq., for Bethlehem Steel at hearing
Clyde B. Kelton, Esq., for Liberty Mutual
Paul M. Scannell, Esq., for Transportation at hearing
Michael J. Grace, Esq., for CIGNA at hearing
Pamela Smith, Esq., for Argonaut at hearing
Paul R. Ingraham, Esq., for Workers' Comp. Trust Fund at hearing

WILSON, J. The claimant appeals the decision of an administrative judge, who awarded widow's benefits pursuant to §§ 31, 32 and 51A, but denied her late husband's claim for § 34 weekly benefits during the seventeen month period between his diagnosis of malignant mesothelioma related to asbestos exposure at work and his death. The judge denied the § 34 claim because she found that the employee was already totally incapacitated from a non-work-related condition at the time of the diagnosis of malignant

mesothelioma and, therefore, did not suffer a diminished earning capacity from the effects of the work-related disease. For the reasons set forth below, we conclude that the judge should revisit her finding that the employee was totally incapacitated prior to his diagnosis with cancer, and we recommit the case to the administrative judge for further findings on the extent of the employee's incapacity just prior to his mesothelioma diagnosis.

Donald Messinger was a certified radiographer, who held several jobs that exposed him to asbestos between 1956 and 1988 (Dec. 7 - 9). In 1963, he underwent a kidney transplant for a condition unrelated to his work, after which he generally enjoyed good health and an unrestricted lifestyle until his kidneys began to fail in 1990. (Dec. 10.) He terminated all employment in 1992, when he began kidney dialysis three times a week in four-hour sessions. (Dec. 10.) His last position was strictly an office job. (Dec. 10.)

Two years later, in 1994, the employee became breathless while working in his garden. He was taken to Brigham and Women's Hospital where, on May 24, 1994, he was diagnosed with malignant mesothelioma. (Dec. 11, 23.) He was subsequently removed from the kidney transplant list because the cancer made him a poor candidate for such a surgery. (Dec. 11.) On October 26, 1995, he died at the age of sixty-one of pulmonary failure, which resulted from the malignant mesotheliomia. (Dec. 7, 11, 24.)

Before his death, the employee had filed claims against a number of insurers for § 34 weekly benefits from the approximate date of his diagnosis with malignant mesothelioma. (Dec. 2.) His claims were not accepted and a § 10A conference was held on January 4, 1995, after which an administrative judge denied the claims. He filed an appeal giving rise to a hearing de novo. After Mr. Messinger's death, the employee's attorney moved to join a claim for § 31 benefits for his widow, Beverly Messinger. (Dec. 5.) The hearing proceeded on the employee's claim for a closed period of § 34 benefits from May 26, 1994 to October 26, 1995, and the widow's claim for continuing § 31 benefits from October 26, 1995, as well as claims under §§ 13, 30, 32, 33, 51A and 35C. (Dec. 2.)

Dr. Richard Zimon examined the employee pursuant to § 11A and filed a report dated June 7, 1995. Additional medical evidence was admitted to cover the gap period between the date of the employee's diagnosis with mesothelioma and the date of the impartial examination and to address the issue of causal relationship between the employee's asbestos exposure and his death. (Dec. 5, 12.)

The judge found that the employee's death was caused by pulmonary failure that resulted from malignant mesothelioma caused by his exposure to asbestos. (Dec. 24-25.) She found the employee's last harmful exposure to asbestos to have been between 1973 and 1976 when he was employed by Thompson and Lichtner, which was insured by Liberty Mutual. (Dec. 25.) She ordered Liberty Mutual to pay benefits to Mrs. Messinger pursuant to §§ 31, 32, and 51A for the period subsequent to her husband's death, as well as burial expenses under § 33, and denied and dismissed the claims against the other insurers, except the Trust Fund, which was responsible pursuant to § 65(2)(b)[1] for reimbursements of payments made under § 35C.[2] (Dec. 31.) None of the parties appeals these findings.

It is the judge's denial of the employee's § 34 claim from May 24, 1994 to October 26, 1995 that drives the claimant's appeal. The judge based her findings on the medical testimony of Dr. Zimon, the impartial examiner, who saw the employee on June 5, 1995, and Dr. Baker, the insurer's examining physician, who saw the employee on November 16, 1994, and then performed a record review after the employee died. (Dec. 17, 20.)

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[1] General Laws 152, § 65, provides in relevant part:

> (2) There is hereby established a trust fund in the state treasury, known as the Workers' Compensation Trust Fund, the proceeds of which shall be used to pay or reimburse the following compensation: . . . (b) reimbursement of adjustments to weekly compensation pursuant to section thirty-five C; . . .

[2] General Laws 152, § 35C, provides in relevant part:

> When there is a difference of five years or more between the date of injury and the initial date on which the injured worker or his survivor first became eligible for benefits under section thirty-one, thirty-four, thirty-four A, or section thirty-five, the applicable benefits shall be those in effect on the first date of eligibility for benefits.

Dr. Zimon opined that the employee was completely and permanently disabled for work at the time of the June 5, 1995 exam. Dr. Zimon could not provide an opinion as to the employee's physical disability prior to the examination, but opined that the major cause of his disability when he examined him was shortness of breath and fatigue attributable to the malignant mesothelioma. (Dec. 15.)

Dr. Baker opined that at the time he examined Mr. Messinger on November 16, 1994, he was totally and permanently disabled as a result of both the renal failure and the malignant mesothelioma, but that the malignant mesothelioma alone was permanently disabling him. Prior to the mesothelioma diagnosis, according to Dr. Baker, the employee was totally disabled because of the renal failure, and any disability attributable to the mesothelioma dated from the diagnosis in May 1994. (Dec. 24.)

Adopting Dr. Baker's opinion regarding the extent of physical disability between the May 24, 1994 mesothelioma diagnosis and the June 5, 1995 impartial examination, the judge concluded that the employee was totally incapacitated by the non-work-related kidney disease at the time of his diagnosis of malignant mesothelioma. For this reason and because he had not earned a weekly wage for about two years, the judge found that the employee was not entitled to weekly § 34 benefits. (Dec. 24.)

Mrs. Messinger contends that the judge's finding that the employee was already totally incapacitated from the renal disease when he was diagnosed with mesothelioma in May of 1994 was erroneous, as her uncontradicted testimony established that, once her husband became adjusted to the dialysis, his activities picked up and he was about to move on with his life until he encountered problems with breathlessness related to mesothelioma. The claimant also points out that Dr. Zimon's testimony supports this conclusion. See infra, note 3. Consequently, she argues, the employee had an earning capacity just prior to his diagnosis with malignant mesothelioma, and became totally incapacitated only after his diagnosis with cancer.

"If the hearing judge's decision is to be affirmed in its present form we should be able to look at [the] subsidiary findings of fact and clearly understand the logic behind the judge's ultimate conclusion. [A] general finding [regarding extent of incapacity]

must emerge clearly from the matrix of [the] subsidiary findings." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). A decision cannot stand where subsidiary findings are lacking, imprecise, or internally inconsistent. See Fahy v. Prestige Stations, Inc./Atlantic Richfield, 9 Mass. Workers' Comp. Rep. 87, 91 (1995).

In the case at hand, the judge found that the employee was totally incapacitated due to renal failure prior to his diagnosis with malignant mesothelioma. (Dec. 24.) But, the judge also credited the widow's testimony. (Dec. 29.) That testimony, although somewhat ambiguous regarding the employee's condition during the period after the employee left work but before he was diagnosed with mesothelioma, would appear to be particularly relevant, as neither Dr. Baker nor Dr. Zimon saw the employee before he was diagnosed with cancer. Based on Mrs. Messinger's testimony, the judge found that "[a]lthough dialysis caused fatigue, the Decedent/Employee was able to recover within a day of each session[,]"(Dec. 10), and that "[w]ith time and treatment, including taking medications, he improved." (Dec. 10.) These subsidiary findings are not entirely consistent with the judge's conclusion that the employee was totally incapacitated prior to his diagnosis with mesothelioma.[3] Moreover, there is no indication in the judge's ultimate findings that she factored this credited testimony into her determination that the employee was totally incapacitated from working prior to his diagnosis with mesothelioma. Cf. Greci v. Visiting Nurses Association, 12 Mass. Workers' Comp. Rep. 462, 465 (1998) (findings of incapacity may be based on an employee's testimony and the judge's observation of the employee in conjunction with expert medical testimony). On recommittal the judge should make it clear that she has considered and weighed all relevant credited lay and medical testimony, and should harmonize her subsidiary findings with her ultimate conclusions.

[3] The claimant argues that Dr. Zimon's expert testimony supports her testimony that the employee started to pick up and was fine between treatments. (Dec. 11, 1995 Tr. 44, 55) Dr. Zimon testified that, though people on renal dialysis do not feel great, it is seldom that they cannot do something. (Dr. Zimon Dep. 59.) The judge stated that the doctor was inferring that the employee may have been capable of some level of meaningful activity, perhaps even work activity. (Dec. 16.) However, there is no indication what probative value the judge assigned to this testimony.

Accordingly, we vacate the judge's denial of the employee's § 34 claim and recommit this case for further findings on whether the employee was totally incapacitated due to renal failure prior to his May 24, 1996 diagnosis with mesothelioma, consistent with this decision.[4]

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: October 8, 1999

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William A. McCarthy
Administrative Law Judge

Smith, J. dissenting. I approach this workers' compensation case mindful that G.L. c. 152, § 11C limits the scope of the reviewing board's authority. It is the exclusive function of the administrative judge to consider and weigh the evidence. Any contention that the judge ought to have made contrary findings is unavailing so long as there is any evidentiary support for the findings adopted. There is occasion to reverse the findings and decision of the judge only when they are wholly lacking in evidentiary support or are tainted by errors of law. We should sustain the general finding of the judge if possible. See Demetre's Case, 322 Mass. 95, 98 (1947). The majority regards the findings as

[4] The average weekly wages issue discussed sua sponte by our dissenting colleague was neither appealed nor briefed by either party, although Letteney v. Hercules Powder Co., 10 Mass. Workers' Comp. Rep. 574 (1996), aff'd., 429 Mass. 280 (1999), was filed a month before the administrative judge's decision in the instant case. Absent a challenge by one of the parties, the administrative judge's decision on average weekly wages became the law of the case, see Harberger v. Carver, 297 Mass. 435, 440 (1937), and we therefore do not address it or enlarge the narrow scope of our recommittal. See Saugus v. Refuse Energy Systems Co., 388 Mass. 822, 830-831 (1983) (failure to take a cross-appeal precludes a party from obtaining a judgment more favorable to it than that entered below).

leaving much to be desired. Yet if we disregard those statements which are challenged as not being clear-cut findings of fact, the other findings are adequate to enable us to determine whether correct rules of law have been applied. Therefore recommittal is inappropriate. Id., at 96-97.

The judge's decision contained the following: The employee was having kidney dialysis. The dialysis caused fatigue. (Dec. 10.) People on dialysis do not feel great. (Dec. 16.) The employee had not worked since he started dialysis and was on a list for a kidney transplant until the mesothelioma diagnosis disqualified him for that procedure. (Dec. 16, 18.) The end stage renal disease and dialysis limited the employee's ability to work. (Dec. 22.) The judge adopted the opinion of Dr. Baker that the renal disease independently rendered the employee medically unable to perform any work. (Dec. 22, 24.)

Whether a medical condition is totally incapacitating is usually a question of fact. In the present case it cannot be said that the finding is legally unsupportable as wholly without evidence upon which it can rest. The judge's factual conclusion that the employee was totally incapacitated by the renal condition reflects rational decision making within the particular requirements of the workers' compensation act, G.L. c. 152. See Scheffler's Case, 419 Mass. 251, 258 (1994). Consequently I would affirm that factual conclusion.[5]

When, on recommittal, the judge makes further factual findings about the extent of incapacity prior to the employee's death, she must then draw legal conclusions about the extent of benefit entitlement, applying the statutory formulas set forth in §§ 34 and 35.[6] These formulas use the average weekly wage in the benefit calculation. I therefore note that, after the judge filed her decision, the Supreme Judicial Court issued Letteney's Case,

[5] The widow does not contend that the judge committed legal error in concluding that such total incapacity barred an award of § 34 benefits.

[6] Under G.L. c. 152, § 31, a widow is entitled to workers' compensation benefits based upon two-thirds of the average weekly wages of the decedent.

429 Mass. 280, 286 (1999), which discusses how to determine the average weekly wage for a latent injury such as the one presented here.[7]

Section 35C provides that "the applicable benefits shall be those in effect on the first date of eligibility for benefits." The quoted phrase is interpreted by our regulation. 452 Code Mass. Regs. § 3.02(1) provides: "For purposes of M.G.L. c. 152, § 35C, applicable benefits on the first date of eligibility for benefits shall be based on the employee's average weekly wage as of such first date of eligibility for benefits, or, if the employee is not employed on that date, it shall be based on the employee's average weekly wage as of the employee's last date of employment." However, Letteney's Case further delineates the method of benefit calculation. Wages from self-employment, out-of-state employment and other excluded employment, not within the Commonwealth's workers' compensation system, are not to be used in the calculating the employee's average weekly wage. 429 Mass. at 286.

Since the case is being recommitted, in my opinion, it is appropriate for the judge to make further findings to bring her new decision in compliance with the law as announced by the Supreme Judicial Court in Letteney's Case. In my view, the recommittal also keeps open to the widow the opportunity to argue what the proper legal conclusion should be from the judge's new incapacity findings.[8]

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Suzanne E.K. Smith
Administrative Law Judge

Filed: October 8, 1999

[7] The judge's decision does not evidence awareness of the holding in Letteney v. Hercules Powder Co., 10 Mass. Workers' Comp. Rep. 575 (1996), which excluded earnings from self-employment from the average weekly wage calculation. Closing arguments in this case had been submitted to the judge in March 1996, three months prior to the reviewing board's Letteney decision.

[8] The §§ 34 and 35 temporary incapacity claims run from May 24, 1994, the date when the cancer was detected, until the employee's death on October 26, 1995. During that time period, the employee was less than sixty-five years old. Thus G.L. c. 152, § 35E's presumption of non-entitlement does not apply.