COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 075947-89**

Donna Thompson	Employee
Sturdy Memorial Hospital	Employer
Sturdy Memorial Hospital	Self-insurer

REVIEWING BOARD DECISION
(Judges Maze-Rothstein, Levine and Carroll)

APPEARANCES
James S. Aven, Esq., for the employee
Linda C. Scarano, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

MAZE-ROTHSTEIN, J. The self-insurer appeals from a third decision following a second recommittal by the reviewing board. Because this decision is likewise flawed, we recommit the case once again.

The facts of this accepted October 27, 1989 industrial injury are set out in Thompson v. Sturdy Memorial Hosp., 10 Mass. Workers' Comp. Rep. 133 (1996), and need not be repeated here. Further, when the self-insurer appealed the second decision on its 1993 complaint to discontinue, the reviewing board again recommitted the case. That second recommittal directed the judge to make further findings on certain specifics, particularly a job offer as an admissions registrar that the self-insurer claimed to be dispositive of the employee's earning capacity:

> We therefore reverse the finding that the job offer did not meet the requirements of c. 152, § 35D(3). We affirm the finding that the night shift is unsuitable and not within the employee's ability to perform and recommit the case for further findings on the other shifts offered with the appropriate analysis under Scheffler [419 Mass. 251, 256 (1994)], and § 35D and on the issue of continuing medical disability and causal relationship. Since even more time has passed since the 1993 formulation of the record relied on for Decision II, in the interest of justice, the parties should be permitted

> to present evidence updating the employee's medical and vocational condition, if it has changed.

Thompson v. Sturdy Memorial Hosp., 11 Mass. Workers' Comp. Rep. 663, 668 (1997)["Thompson II"].

On the second recommittal, the judge took further testimony from the employee, and from an employer witness relative to the facts surrounding the job offer. He recited testimony of the employer witness. That witness stated that if the employee would attempt to return to work, all accommodations necessary would be made to assist her in carrying out her duties as an admissions registrar on the day shift. (Dec. 6-7, dated August 6, 1998 [hereinafter Dec. III].) The job had a current pay scale of $9.50 per hour (Dec. III, 12), as compared with the $8.56 per hour the job paid according to the first decision. (Dec. 7, dated February 17, 1994 [hereinafter Dec. I].)

The parties also updated their medical evidence, as allowed by Thompson II. (Dec. III, 1-2.) The judge found the opinions of the employee's treating physician, as expressed in his July 10, 1998 deposition, to be persuasive. Since he first started treating the employee soon after her injury on October 27, 1989, through his most recent examination, on March 30, 1998, the doctor found radiating back pain, numbness and related muscle spasm, tightness and a reduced range of motion. (Dec. III, 8-9.) He related the employee's condition to her industrial injury. He noted there had been a degree of improvement after the employee's 1990 surgery without change thereafter. The doctor limited the employee's physical capacity for work to approximately three hours a day. He proscribed lifting beyond five pounds, and limited sitting or standing to approximately thirty minutes. (Dec. III, 9.)

The judge relied on the doctor's most recent opinion to conclude that the employee was physically capable of some employment activity. The judge determined that the employee could work for periods up to three hours per day, five days per week, with lifting, bending, stooping, sitting and standing accommodations. (Dec. II, 11.) He also found that the employer's job offer was bona fide if such accommodations were made, and that the employee's education, experience and training would allow her to

perform that light duty job on a restricted basis. (Dec. III, 12.) The judge concluded that the employee could work during the daytime shift at the offered job up to fifteen hours per week at the hourly rate of $9.50, which raised the employee's earning capacity from the $125.00 per week assigned in the earlier decisions to $142.50 per week. (Dec. III, 12-13.) See Thompson II, supra.

Of the many arguments that the self-insurer asserts on appeal, two compel yet another recommital. First, Thompson II directed the judge to further address the job offer of 1993, along with the issues of continuing medical disability and causal relationship. That direction did not refer only to the employee's present and ongoing status, but clearly contemplated the entire period of incapacity disputed by the self-insurer commencing with the 1993 complaint to discontinue. See Cubellis v. Mozzarella House, 9 Mass. Workers' Comp. Rep. 354 (1995). No final determination on the self-insurer's job offer has ever been made. The third decision on appeal did indeed assign the employee an increased earning capacity above that in the second decision, to reflect the bona fide job offer, with accommodations combined with the adopted medical evidence. However, the judge only assigned that slightly higher earning capacity ($ 142.50 weekly versus the prior $ 125.00 weekly earning capacity) as of the treating doctor's deposition on July 10, 1998. (Dec. III, 13.) See Sanchez v. City of Boston, 11 Mass. Workers' Comp. Rep. 235 (1997). Consequently, the order left unaddressed an approximate five year period from the date of the self-insurer's filing of its request for discontinuance until the 1998 deposition using the corrected earning capacity formulation. General Laws c. 152, §11B, requires the administrative judge to address all of the issues in controversy. The failure to render a decision which adequately addressed the full disputed period of incapacity makes necessary this third recommittal.[1] Pelletier v. Bristol County, 8 Mass. Workers' Comp. Rep. 294 (1994).

Second, the judge ordered the self-insurer to pay another attorney's fee under

[1] We estimate that on the existing decision the error results in a relatively minimal overpayment to the employee, ranging between $250.00 and $1,250.00, (depending on when the new hourly

§ 13A, which was in addition to the fee awarded in his first decision in 1994. The judge gave no rationale to support the award that, in effect, enhanced the hearing fee under § 13A(5). The decision on appeal was due to a second recommittal to correct errors in the first and second decisions. The judge should have made findings in support of his increased fee. See G.L. c. 152, § 13A(5) ("An administrative judge may increase or decrease such fee based on the complexity of the dispute or the effort expended by the attorney.") In the absence of such findings, we must reverse it. On recommittal, and in the event the employee "prevails" within the meaning of the statute and the interpretive regulation, 452 Code Mass. Regs. § 1.19(4), the new judge hearing the case may determine how to handle the § 13A(5) fee for this protracted proceeding that required renewing and updating evidence.

Accordingly, we reverse the decision, including the award of an attorney's fee, and recommit the case for further proceedings. As the judge who tried the case is no longer with the department, we transfer the case to the senior judge for reassignment and a hearing de novo.

Susan Maze-Rothstein
Administrative Law Judge

Frederick E. Levine
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Filed:December 14, 1999

rate could be found to have taken effect). Nonetheless, the self-insurer's argument has merit, and it is entitled to a decision untainted by error of law.