COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 043056-07**

Edward Ryder	Employee
National Freight, Inc.	Employer
Zurich American Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge Jacques.

APPEARANCES
Steven M. Buckley, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

FABRICANT, J. The employee challenges the administrative judge's decision that he was no longer eligible for payment of weekly benefits for his work injury, as she found no ongoing incapacity. Of the myriad arguments[1] proffered by the employee, we agree that one issue requires recommittal: the judge failed to list or discuss a medical report which the employee submitted for introduction into the record. We also agree the judge's average weekly wage calculation is marred by one small error, which we correct as discussed within.

The employee suffered a work injury to his lower back on February 5, 2007. (Dec. 8.) The insurer accepted liability and paid benefits in compliance with the workers' compensation law of New Jersey, a forum of concurrent jurisdiction. Payments were discontinued on November 16, 2008, (Dec. 6), and the employee subsequently filed the present claim pursuant to G. L. c. 152. (Dec. 5.)

The judge allowed additional medical evidence due to the inadequacy of the § 11A report, and both parties submitted medical evidence, listed as exhibits 17

[1] Except for the issues which we address, we otherwise summarily affirm the decision.

through 24. (Dec. 3, 6.) Unfortunately, a report dated May 29, 2010, authored by the employee's treating physician, Dr. Laurence Schenk, was not so listed, and the judge failed to acknowledge the report in her findings of fact. As this report was the only recent medical evidence which might support the employee's claim of present disability, we cannot deem its absence from the decision harmless, as the insurer proposes. (Ins. br. 10.) See Murphy v. B & M Office Installation, 24 Mass. Workers' Comp. Rep. 217 (2010)(because reference to medical report entirely absent from decision, reviewing board unable to discern whether judge considered the evidence, or did so, but did not adopt it); see also Casagrande v. Massachusetts Gen. Hosp., 12 Mass. Workers' Comp. Rep. 137, 140-141 (1998). Recommittal is therefore appropriate.

The employee also challenges the judge's finding of a $338.06 average weekly wage. The judge relied on a summary of the employee's earnings listed in Exhibit 10 to determine the employee's average weekly wage. (Dec. 16.) The employee contends the shortness of his pre-injury employment with the employer renders it impracticable for the computation of his average weekly wage. We are not persuaded the fifteen week pre-injury period[2] listed in Exhibit 10 is too brief, as a matter of law, for the average weekly wage assessment. Moreover, the employee's contention that several of the weeks included should have been characterized as "time lost" under § 1(1)[3] has no merit. In none of those weeks does the employee's earnings approach the $5.00 cut-off necessary to constitute a time lost exclusion from the average weekly wage calculation. The judge also was not obligated to credit the employee's

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[2] One of the wage entries in Exhibit 10 is for a period occurring *after* the injury, and should therefore not have been included in the judge's calculation. See infra.

[3] General Laws c. 152, § 1(1), states, in pertinent part:

> Weeks in which the employee received less than five dollars in wages shall be considered time lost and shall be excluded in determining the average weekly wages; provided, however, that this exclusion shall not apply to employees whose normal working hours in the service of the employer are less than fifteen hours each week.

testimony that the weekly wages listed in Exhibit 10 were net, as opposed to gross, earnings.[4] Finally, we discern no evidentiary basis for the employee's claim that his work schedule was on an upward trajectory during the course of his fifteen weeks of pre-injury employment. Thus, we need not consider the argument to the effect that, going forward, a higher average weekly wage would have been indicated or appropriate.

Regardless, the exhibit relied upon for the average weekly wage calculation contains some extraneous information which should have been excluded from consideration. Although Exhibit 10 lists earnings for a sixteen-week period, the $107.10 listed for the final week was earned post-injury and must necessarily be excluded from the average weekly wage calculation. Excluding those earnings, we arrive at an average weekly wage increased from the assigned $338.06 to $353.46. With this modification, we otherwise affirm the judge's average weekly wage findings.

Accordingly, we recommit the case for further findings addressing the May 29, 2010 medical report of Dr. Schenk.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

[4] The judge finds that '[b]ased upon the employee's own testimony . . . Exhibit #10 [sic] is an accurate statement of the employee's earnings . . . ." (Dec. 16.) We note, however, the judge did not specifically credit the employee's testimony regarding "net" wages, or other estimated wage figures. (Tr. 37–44). To the contrary, the judge finds that the employee offered no documentary evidence to support his testimony and that "[h]e produced no pay stubs, no mileage logs, no bank records, and . . . [no] tax records . . . ." (Dec. 14.) The judge further found that despite the employee's testimony that Exhibit 10 inaccurately reflected his wages, he nonetheless was able to credibly explain each of its entries. (Dec. 15.) We thus conclude that the judge found the employee's testimony to be consistent with the authenticity of the information contained in Exhibit 10, and not that the employee's testimony was credited in its entirety. Regardless, any proffered designation of the wages identified in Exhibit 10 as "net" as opposed to "gross" wages is irrelevant where the evidence of greater payment amounts is purely speculative. Sponatski's Case, 220 Mass. 526 (1915)(employee has burden of proof for all essential elements of claim).

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Mark D. Horan
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

Filed: **October 31, 2011**