COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 013634-96**

Eleni Vantsouris	Employee
New England Baptist Hospital	Employer
Care Group, Inc.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, Maze-Rothstein and McCarthy)

APPEARANCES
Peter Georgiou, Esq., for the employee at hearing and on brief
Richard Curtin, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on brief

WILSON, J. Both parties appeal the decision of an administrative judge in which the employee was awarded weekly benefits for temporary, partial incapacity under G.L c. 152, § 35. After a review of the evidentiary record, we recommit the decision to the administrative judge for further findings.

At the time of the judge's decision, the employee, Eleni Vantsouris, was a married, fifty-one year old mother of two adult children. She attained the sixth grade level in her native Greece. In 1973, she immigrated to the United States and commenced employment as a housekeeper. Approximately one year later, she became employed at New England Baptist Hospital as a seamstress. In addition to sewing towels and sheets, she was required to retrieve, lift and fold fabrics. (Dec. 4.)

On April 2, 1996, while in the course of her employment, the employee fell down five stairs and fractured her left leg. The employee was treated at the hospital where she was employed and her leg was placed in a cast. She was out of work for six weeks, but returned thereafter in a second cast. When that cast was removed, she continued to work despite ankle pain. She treated with Dr. Elly Trepman for the pain. Dr. Trepman administered injections to her ankle on three

occasions from January 1998 through September 1998, but the employee experienced only slight relief. Despite negative findings after an EMG, MRI and CAT scan, the ankle pain became so severe that the employee was unable to continue her job duties by January 12, 1999. She has not worked since that date. (Dec. 4.)

Although the insurer has stipulated to liability for an industrial injury, it resisted the employee's claim for further weekly benefits for total incapacity from the January 12, 1999 date. The employee's claim for further § 34 benefits was heard at conference and, on May 14, 1999, the judge awarded § 35 benefits from January 18, 1999 and continuing. Both parties appealed to a hearing de novo, where the insurer defended on grounds of incapacity and causal relationship. (Dec. 2-3.)

Pursuant to G. L. c. 152, § 11A, the employee was examined by Dr. James V. Bono, whose medical report and deposition testimony were admitted into evidence. (Dec. 1-3.) The employee moved for additional medical evidence. Although the administrative judge found that the medical issues involved were not complex, she found that the report was inadequate as to the "gap period" from the date of injury up to the July 13, 1999 date of the impartial examination. The parties were therefore permitted to offer additional medical evidence for the time period of January 12, 1999 through July 13, 1999. The employee submitted office notes of several treating physicians in addition to various diagnostic test results. (Dec. 1, 2, 3.) No additional medical evidence was submitted on behalf of the insurer. (Dec. 3.)

Dr. Bono opined that the employee suffers from chronic left foot and ankle pain following the right[1] distal tibial fracture sustained at work on April 2, 1996. Considering the absence of objective findings on examination and the negative diagnostic testing, he found neither evidence of reflex sympathetic dystrophy

[1] We assume that Dr. Bono's reference to the "right" fracture was scrivener's error, (Impartial examiner exhibit), as the employee's testimony and other medical experts focus solely on the left ankle.

(RSD) nor objective or neurological grounds for the employee's disability. On a final note, the impartial examiner opined that, based on the employee's subjective complaints, the employee was capable of sedentary work that allowed her to elevate her leg. (Dec. 5.)

The office notes of Dr. Irene Goranitis, one of the employee's treating physicians, reflected that the employee had continuing symptoms of chronic left ankle pain. Dr. Goranitis found the employee medically disabled from employment as a seamstress and causally related that disability to the employee's work incident. The medical notes of Dr. Elly Trepman, another treating physician, reflect the employee's left foot and ankle pain. Dr. Trepman consistently opined that it was necessary for the employee to limit standing and walking. (Dec. 5.)

The administrative judge adopted the medical opinions of Dr. Bono, Dr. Goranitis and Dr. Trepman, and found that the employee is capable of sedentary work that would both allow the employee to elevate her leg and require limited standing and walking. (Dec. 6.) Relying on these medical opinions, the judge determined that the employee's incapacity was partial and causally related to her employment. She ordered the insurer to pay § 35 benefits based on an earning capacity of $210 per week; benefits pursuant to §§ 13 and 30 for the diagnosed condition; and attorney's fees to the employee's counsel. (Dec. 6.) We have the case on cross appeals.

The employee raises two issues: 1) the judge failed to apply the principles set forth in Scheffler's Case, 419 Mass. 251 (1994); and 2) the judge's subsidiary findings fail to support an assignment of an earning capacity. (Employee's brief, 3, 4.) In its cross-appeal, the insurer raises three issues: 1) the decision of the administrative judge is wholly without evidentiary support; 2) the judge failed to address all the medical issues before her; and 3) the judge did not adequately address the issue of residual capacity. (Insurer's brief, 11, 15, 17.) We address two of these somewhat overlapping issues that have merit.

The insurer contends that the decision must be reversed as there is no medical opinion on causal relationship for the period subsequent to the § 11A

examination. The record reveals that in his report, Dr. Bono opined that if symptoms of RSD were confirmed by testing, the condition would be chronologically related to the work injury. (Impartial Examiner Ex.)[2] But he later retracted his conditional diagnosis of RSD during his deposition, as RSD was not confirmed by what he assumed were lumbar sympathetic blocks or by a three stage bone scan. (Dep. of § 11A examiner, 18-19, 31-33.) He then equivocated, saying that if the injections done were not lumbar sympathetic blocks, RSD is still viable as only such testing could confirm or rule out RSD. (Dep. of § 11A examiner, 36.) As the judge found that the diagnostic testing was negative, and the parties do not dispute the finding, the foundation for the original, conditional causal relationship opinion collapsed.

One gossamer thread of causal relationship remains, however. During the deposition, the employee presented numerous questions to the impartial physician based on a hypothetical set of facts. (Dep. of § 11A examiner, 39-41.) The insurer objected to the hypothetical itself, as well as to each related inquiry. (Dep. of § 11A examiner, 39-41.) The administrative judge sustained these objections through page forty (40) of the deposition. (Dec. 7.) A last question was posed by the employee and objected to by the insurer.[3] (Dep. of § 11A Examiner, 41.) The judge omitted a ruling on the insurer's objection. (Dec. 7.) As the ruling on the

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[2] A statement of mere temporal relationship between symptoms and a work incident is legally insufficient, without more, as a basis for a causal relationship opinion. Rotman v. National R.R. Passenger Corp., 41 Mass. App. Ct. 317, 318-319 (1996); Koonce v. Bay State Bus Corp., 14 Mass. Workers' Comp. Rep. 238, 240 (2000).

[3] The pertinent question, objection and answer read as follows:

> Q. Okay. But again, that wasn't my question. My question was that if my hypothetical question is true in fact, if you were to believe that, then the restrictions that you would place on her ability to engage in physical activities would be related to 4/12/96, the day of the injury?
>
> Mr. O'Reilly: Same objection.
>
> A. Yes.

(Dep. of § 11A examiner, 41.)

insurer's objection is pivotal to the employee's sustaining her burden of proof on causal relationship, the case must be recommitted for that ruling.

If the administrative judge sustains the objection, the insurer is correct that the medical evidence does not establish causal relationship beyond the date of the impartial examination. Accordingly, the administrative judge's decision awarding § 35 benefits could not stand. On the other hand, in the event the objection is overruled, the employee would have presented sufficient medical evidence as to causal relationship. This leads us to the second issue at hand.

In a notable departure from typical adversarial advocacy, both parties complain in perfect harmony that the Frennier analysis necessary to assess the employee's degree of incapacity comes up short. See Frennier's Case, 318 Mass. 635, 639 (1945). We agree. The judge relies in large part on the medical opinions in finding an ability to perform sedentary employment. (Dec. 5-6.) The determination of incapacity for work, however, entails more than a medical evaluation of the employee's physical impairment, coupled with merely a rote recitation of the Frennier considerations of education, training and experience. See Scheffler's Case, supra at 256. On recommittal, if the judge finds causal relationship, she must consider the effects of the medical disability together with the vocational factors, and explain her findings and reasoning in her opinion to enable proper appellate review of the ultimate incapacity determination. Carney v. M.B.T.A., 9 Mass. Workers' Comp. Rep. 492,496 (1995).

We recommit the decision to the administrative judge to address the insurer's objection and to make further findings on causal relationship. In the event that the objection is overruled, further findings on and analysis of the vocational factors are necessary to properly address incapacity.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: June 15, 2001