COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 002944-13**

Elesabeth Brandao	Employee
Judge Rotenberg Education Center	Employer
AIM Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Harpin and Long)

The case was heard by Administrative Judge Herlihy.

APPEARANCES
Robert L. Noa, Esq., for the employee
Donald E. Wallace, Esq., for the insurer

FABRICANT, J. Both parties appeal from a decision awarding the employee weekly §§ 34 and 35 benefits. The insurer argues that the average weekly wage adopted by the judge was improper, and the judge's calculation of the employee's earning capacity was not based on the evidence. The employee argues the case should be recommitted so the judge can address medical benefits pursuant to §§ 13 and 30, specifically with regard to aqua therapy treatment. For the reasons that follow, we affirm the decision, in part, on the amount of the average weekly wage, and recommit only for further findings of fact regarding the employee's earning capacity.

The employee, twenty-seven years old at the time of the hearing, worked as a mental health assistant. She injured her back on the evening of January 29, 2013, when she slipped on black ice on the employer's premises. The employee was taken to Quincy Hospital early the next morning where she received some medications. She treated initially with her primary care nurse practitioner, and later consulted with an orthopedic surgeon. She had conservative treatment for the next two years, including physical therapy, injections and diagnostic testing. (Dec. 4.) She returned to modified work with the employer from February 14, 2013, until April 13, 2013, (Dec. 4-5), and also did some

part-time bartending during that period. (Tr. 56.) Additionally, the employee worked as a nanny earning $15.00/hour for two to three days a week from late summer or early fall of 2013,[1] until January 2014, when she was no longer needed. (Tr. 49-53.)

An impartial medical examination was conducted by Dr. James Nairus on April 14, 2014, pursuant to G. L. c. 152 § 11A. (Ex. 4.) The judge credited the opinion of Dr. Nairus that the employee had a lumbar spine strain with small central disc protrusion at the L5-S1 level, and that the industrial injury was the major contributing cause of her disability and need for treatment for her back. (Dec. 5.) Dr. Nairus also opined that the employee could work a 40-hour work week, subject to restrictions and limitations of no lifting or carrying any objects greater than 30 pounds, and no repetitive bending or stooping. (Dec. 5.)

The judge found the employee partially disabled with an earning capacity of "$300 a week ($15.00 hour for 20 hours)." (Dec. 6.) The judge further stated: "I choose not to disrupt the [§ 19] agreement between the parties from January 29, 2013 until September 14, 2013."[2] (Dec. 6.) The judge also adopted the opinion of Dr. Nairus that the "employee is at maximum medical improvement and no further conservative treatment is warranted specifically narcotic medication." (Dec. 7.)

At hearing, the employee's average weekly wage was not claimed as an issue in dispute by either the employee or the insurer. The aforementioned § 19 agreement

[1] According to the hearing decision, the employee began work as a nanny and bartender sometime after April 13, 2013. However, this is not consistent with the employee's testimony that she worked as a part-time bartender while working modified duty for the employer *until* April 13, 2013, and that the nanny job did not begin until late summer or early fall of 2013. (Tr. 49, 53.)

[2] At hearing, in order to establish what benefits had been paid, the insurer's attorney referred to a Section 19 agreement approved on August 8, 2013. That agreement provided for §34 benefits to be paid, without prejudice, from January 30, 2013, through February 1, 2013, at weekly rate of $306.35. The maximum rate of § 35 benefits ($229.76) was to be paid from February 2, 2013 through February 13, 2013, and from April 14, 2013, through August 29, 2013.

references an average weekly wage of $510.58,[3] as does the joint conference memorandum. However, the conference order assigns an average weekly wage of $541.58. The employee's hearing memorandum also states the figure was $541.58, while the insurer's hearing memorandum indicates the average weekly wage should be $510.58. Ultimately, the judge's recitation of stipulations on the record, agreed to by both parties, places the average weekly wage at $541.58. (Tr. 4, 6-8.)

The insurer argues the average weekly wage, upon which the judge based her order of weekly benefits, is incorrect. In support of this argument, the insurer points out that the without prejudice § 19 agreement was based on an average weekly wage of $510.58. Regardless, the record is clear that at the outset of the hearing, the judge specifically asked the parties whether they agreed to a stipulation of $541.58, and they both responded affirmatively. (Tr. 4, 6-8.) Furthermore, neither party presented additional evidence in support of a different amount. Therefore, we affirm the judge's average weekly wage finding of $541.58.

The insurer next argues the judge did not properly determine the claimant's earning capacity. We agree. "A judge's decision must 'adequate[ly] reveal the basis for [its] ultimate finding." Lavalley v. Republic Parking, 29 Mass. Workers' Comp. Rep. 21, 22 (2015) citing Eady's Case, 72 Mass. App. Ct. 724, 726 (2008). The judge's finding that the employee's § 35 rate was the maximum partial benefit (which equates to an earning capacity of no more than $135.40) is inconsistent with the employee's own testimony that she, in fact, earned approximately $300 per week from approximately late summer or early fall of 2013 to January 2014. (Dec. 8; Tr. 49, 53.)[4]

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

[4] The judge ruled that she would not disrupt the agreement between the parties from January 29, 2013 until September 4, 2013. However, "an agreement to pay compensation" is similar to an unappealed conference order since there are no findings of fact or judicial decision on the merits. Sicaras v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69 (2005). For this reason the judge should make findings of fact addressing the time period covered by the § 19 agreement since it was part of the employee's claim.

Further, while the evidence supports the finding that the employee is able to work with restrictions, the judge does not provide any analysis or explanation as to why the employee is not capable of working on a full-time basis. Pasquale v. Benchmark Assisted Living, 29 Mass. Workers' Comp. Rep. 25, 29 (2015). "A monetary figure cannot emerge from thin air and survive judicial review as a mystery." Dalbec's Case, 69 Mass.App.Ct. 306, 317 (2007). Therefore, we recommit the case for further findings of fact in regard to the employee's earning capacity.

Finally, the employee argues that the judge should have ordered the insurer to pay for aqua therapy. (Employee br. 13.) We disagree. The employee has the burden of proving each and every element of his claim. Sponatski's Case, 220 Mass. 526 (1915). Here, the employee never made a specific claim for aqua therapy. Moreover, the insurer never denied a claim for aqua therapy, and thus, the judge never addressed it as it was never claimed as an issue in dispute. "Where a claim is not before the judge, it is error for [her] to address it." Gleason v. Toxicon Corp., 22 Mass Workers' Comp. Rep. 39, 41 (2008), citing Medley v. E. F. Hausermann Co., 14 Mass. Workers' Comp. Rep. 327 (2000).

"Fundamental requirements of due process entitle parties to a hearing at which they have an opportunity to present evidence, to examine their own witnesses, to cross-examine witnesses of other parties, *to know what evidence is presented against them and to have an opportunity to rebut it*, as well as to develop a record for meaningful appellate review." Anderson v. Lucent Techs., 21 Mass. Workers' Comp. Rep. 93, 95-96 (2007)(emphasis in original), citing Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 386 (2001), citing Haley's Case, 356 Mass. 667 (1972). Since the insurer had no reason to think any evidence regarding aqua therapy was being considered, there would be no reason to submit evidence on the issue.[5]

[5] This does not necessarily preclude the employee from bringing such a claim in the future. The impartial physician testified that under certain circumstances, it might be reasonable to try some conservative treatment, including aqua therapy. (Dep. p. 22.) General Laws c. 152, §16, states, in relevant part:

Accordingly, we recommit the case for further findings of fact regarding the employee's earning capacity, and affirm all other aspects of the judge's decision.

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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Martin J. Long
Administrative Law Judge

Filed: June 8, 2017

"…in any case…[where] the employee is entitled to compensation, no subsequent finding…discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final…and such employee…may have further hearings as to whether his incapacity…is or was the result of the injury for which he received compensation…."