COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

Employee: Ethel Blood
Employer: City of Lynn
Insurer: City of Lynn
Board No.: 01422500

REVIEWING BOARD DECISION

(Judges Maze-Rothstein, Wilson and Costigan)

APPEARANCES

Ronald D. Malloy, Esq., for the employee
Thomas F. Finn, Esq., for the self-insurer

MAZE-ROTHSTEIN, J. The employee challenges the assignment of an earning capacity and award of G. L. c. 152, § 35, partial incapacity weekly indemnity benefits, maintaining that the § 11 decision is not supported by the evidence. She contends that the conclusions reached by the judge as to extent of incapacity are: 1) premised on a mischaracterization of the § 11A medical evidence that was not the examiner's opinion but inadmissible hearsay; 2) not adequately supported by subsidiary findings addressing pivotal testimonial evidence; and 3) lacking adequate analysis under Frennier's Case, 318 Mass. 635 (1945), and Scheffler's Case, 419 Mass. 251, 256 (1994). We summarily affirm the decision in all respects, except we address the issue of hearsay and deem it waived because it was not preserved below and was mooted by the employee's own confirmation of that hearsay.

At the time of hearing, Ethel Blood was seventy-two years old and had worked for the City of Lynn School Department as a teacher's aide for twenty-five years prior to her industrial injury. (Dec. 3.) She worked in non-graded classrooms for teenage special education students. Id.

On April 13, 2000, Ms. Blood tripped over the leg of a desk while walking through the aisle of her assigned classroom. (Dec. 3.) She fell to the floor striking the upper right back of her head on a metal doorjamb. (Dec. 3-4.) The school nurse applied ice and Ms. Blood drove home, a trip which she has difficulty remembering. (Dec. 4.)

The self-insurer voluntarily paid the employee § 34 temporary total incapacity weekly indemnity benefits from April 13, 2000 through June 22, 2000. (Dec. 2.) Shortly thereafter, the employee filed a claim for further compensation and the matter came on for a § 10A conference from which an order for payment of continuing § 34 benefits issued. Id. The self-insurer appealed to a hearing de novo. (Dec. 2.)

Pursuant to § 11A, **[1]**a neurologist examined the employee. In his decision, the judge adopted the § 11A opinion that the employee was capable of working part-time in a non-stressful setting. (Dec. 6.) Additional medical evidence was permitted to address the period of claimed benefits prior to the date of the examination. (Dec. 3.) **[2]** See George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22, 26 (1996)(additional medical evidence may be admitted for the purpose of filling in the "gap period" between the onset of alleged incapacity and the date of the § 11A medical examination). The judge adopted the opinion of the self-insurer's doctor, which he found to be consistent with the § 11A report, that the employee had not reached an end result but, as of October 2000, she could work part-time. (Dec. 6.)

The § 11A physician diagnosed the employee as having resolved post-concussive syndrome, superimposed on the aftermath of pre-existing strokes. (Dec. 4.) Although he opined that at least some of her memory problems were attributable to the prior, small strokes, he nonetheless felt that her symptoms, including her post-traumatic depression and anxiety, were triggered by the head injury. (Dec. 5.) **[3]**As to the employee's incapacity, he postulated that it is very unlikely that she will go back to work teaching full-time. However, he felt she could work on a part-time basis as of the examination date. (Statutory Ex. 3.)

The judge found that the employee sustained a head trauma arising out of and in the course of her employment. Based on the § 11A physician's and self-insurer's doctor's evaluations, the judge found the employee to be partially incapacitated continuing from June 23, 2000. **[4]** (Dec. 6-7.) He assigned an earning capacity premised on her ability to work at 80% capacity in the open labor market, and awarded ongoing

§ 35 partial incapacity benefits. Because the judge determined that the employee was unable to attain 80% of her average weekly wage with the City of Lynn, he found her capable of earning only $250.00 per week in a non-stressful occupation. (Dec. 7.) Among the arguments raised on appeal, the employee submits that the 80% earning capacity assignment is based on hearsay statements made by the employee's son to the § 11A physician. (Employee's Rebuttal Brief, 4.) There are two problems with the employee's hearsay contention. The first is that the record is devoid of any objection to, or motion to strike testimony taken, relative to the employee's son's statements made to the § 11A physician that the employee had recovered 80% of her memory. Generally, objections, issues or claims -- however meritorious -- that have not been raised below, are waived on appeal. Taylor v. Morton Hosp. and Med'l Ctr., Inc., 16 Mass. Workers' Comp. Rep. 30, 34 (2002); Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), citing Wynn & Wynn, P.C., v. Mass. Comm'n Against Discrimination, 431 Mass. 655, 674 (2000). "This rule applies to arguments that could have been raised, but were not raised, before an administrative agency." Green, supra. See also Dudley v. Yellow Freight Sys., Inc., 15 Mass. Workers' Comp. Rep. 204, 207 (2001)(issues not raised below cannot properly be raised for the first time on appeal). The employee's error is underscored by the following colloquy at deposition between employee's attorney and the § 11A examiner:

> Q. Doctor, there is another part of your report and you mentioned it in your deposition today that Ms. Blood suggested that she was about 80% normal. My question about that Doctor is, if Ms. Blood was really having memory problems, concentration problems, the inability to read even books that she used to read because she couldn't remember, and the inability to tell jokes, the inability to play scrabble as well as do crosswords as well Doctor, are you relying on her memory here at about 80% recovery?
> A. I'm relying on her and her son, they both said that.
> Q. You're testifying Doctor that Mr. Ludwig said she was 80% if you are Doctor, I would ask you to point that out to me if you would?

A. All right. In paragraph three her son ---

Q. Which page, Doctor, I'm sorry?

A. Page two.

Q. Thank you.

A. *Her son reports that her memory is not as good as it used to be. He thinks it is about 80% back to normal.*

(Dep. 34-37; emphasis added.)

The appropriate means to have preserved the issue of hearsay would have been to move to strike the doctor's testimony concerning the statements made by the employee's son relative to her 80% memory recovery. Maloney v. Hovley Private Hosp., 279 Mass. 96, 100 (1932)(hearsay admitted without objection may be given any probative value it possesses). We do not reach the issue as the record is silent as to that representational step. In any event, the after the fact objection, offered only now by way of this appeal, as to testimony of the son's utterances, was rendered moot by the employee's own confirmation of that same percentile of memory recovery. (Dep. 34-37.) Furthermore, the underdeveloped opportunity to challenge the medical foundation of the doctor's opinion during the deposition again surfaced in the following redirect examination by the self-insurer of the § 11A physician:

Q. Mr. Ludwig in Ms. Blood's assessment that her memory was 80%, do your findings based on your examination support that she was 80%?

A. I would say that my findings do support that, yes.

Q. Would you say she is higher than 80%?

A. *I didn't do any specific memory testing.*

(Dep. 37; emphasis added.)

Ultimately, as noted above, the judge, who properly considered the Frennier, supra and Scheffler, supra, vocational factors of the employee's age and background skills, assigned a part time earning capacity at far less than 80% of her former average weekly wage to be achieved in the open job market. (Dec. 7.) On this record, we see no error. The decision is affirmed.

So ordered.

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usan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

SMR/lk

Filed: March 25, 2003