COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS | **BOARD NO. 038624-99**

Guilherme Rodrigues — Employee
AM-PM Cleaning Corporation — Employer
Eastern Casualty Insurance Company — Insurer

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

APPEARANCES
Thomas J. Canavan, Esq., for the employee
Kerry G. Nero, Esq., for the insurer on appeal
William Holtz, Esq., for the insurer at hearing

LEVINE, J. The employee appeals from a decision denying his claim for G. L. c. 152, § 34, temporary total incapacity benefits, and awarding § 35 partial incapacity benefits based on a weekly earning capacity of $230.00 and a stipulated average weekly wage of $340.77. (Dec. 4.) Because the decision lacks adequate vocational analysis, we recommit the case for further findings of fact. See G. L. c. 152, § 11C.

Mr. Rodrigues, now forty-four years old, is a native of Cape Verde. He speaks English, but does not read or write it. In Cape Verde, he taught Portuguese in the primary schools. Since coming to this country, the employee worked as a machine operator, warehouse worker and, since 1977, as a maintenance worker. His duties included lifting up to 100 pounds. (Dec. 4.) In January 1999, he suffered a work-related lifting injury to his back. He was out of work two months. Although the employee's doctors recommended that he limit his lifting to forty pounds, there apparently was no light duty work available; and the employee returned to his regular job. Id. On September 23, 1999, he reinjured his back while lifting barrels of trash. (Dec. 4-5.) The insurer accepted liability, and paid § 34 benefits for several months. The insurer reduced the employee to § 35 benefits in December 1999. (Dec. 3, 4). In November 2000, the employee underwent an L4-5 laminectomy and decompression. (Dec. 6.) After the

surgery, and by agreement with the employee, the insurer paid the employee § 34 benefits from November 20, 2000, to March 19, 2001. Beginning on March 20, 2001, the insurer resumed § 35 benefits at the weekly rate of $66.46. (Dec. 2, 3, 4, 6.) The employee filed a claim for § 34 benefits. It was denied at conference, "maintaining the status quo at $66.46 per week." (Dec. 2.) The employee appealed to a de novo hearing. Id.

On June 7, 2001, the impartial physician examined the employee[1] and opined that his work injury was superimposed on an underlying progressive degenerative disc disease, attributing seventy per cent of the employee's condition to that pre-existing condition and thirty per cent to the September 23, 1999 industrial injury. The judge's unchallenged conclusion was that the employee had met his burden of proof that the work injury remained a major cause of his disability. (Dec. 6.) See Siano v. Specialty Bolt and Screw, 16 Mass. Workers' Comp. Rep. 237, 240 (2002)("There may . . . be multiple 'major' causes").

Based on the impartial physician's opinion, the judge found that as of June 6, 2001, the employee had undergone sufficient post-surgery recuperation and rehabilitation to be no longer totally incapacitated. She adopted the impartial physician's opinion that the employee was limited to lifting no more than twenty-five pounds and carrying no more than twenty pounds and was capable of modified work. (Dec. 6-7.) The judge concluded that she could see no reason to decrease the weekly earning capacity of $230.00 as reflected in the § 35 benefits paid by the insurer beginning March 20, 2001, and maintained as a result of the § 10A conference order. (Dec. 7.) The judge did order, however, that the insurer pay § 34 benefits through June 7, 2001, the date of the impartial examination. (Dec. 8.) The employee appeals the order of § 35 benefits beginning June 8, 2001; he argues, and we agree, that the decision lacks the appropriate vocational analysis. See generally G. L. c. 152, § 35D.

As an initial matter, the judge appears to misapprehend the nature of the hearing as

[1] The impartial physician earlier examined the employee on October 19, 2000. (Dec. 5.) That examination is not relevant to this appeal.

a de novo proceeding.[2] Thus, she states, "I see no reason to decrease the $230 earning capacity upon which [the employee's] benefits have been based and see no reason to increase his weekly compensation." (Dec. 7.) However, "[s]ince the hearing is a *de novo* proceeding and not an extension or continuation of the conference, the conference order is not part of the hearing evidence and should not in any way bear on the judge's ultimate disposition of the case." Grande v. T-Equipment Constr. Co., 10 Mass. Workers' Comp. Rep. 379, 381 (1996). It was error for that misapprehension to have influenced the judge in her determination of the extent of the employee's incapacity.

More importantly, we agree with the employee that the judge has not undertaken appropriate vocational analysis to support her assignment of the $230.00 weekly earning capacity. Her statement, quoted in the previous paragraph, is not enough. Nor is her reference to the generic "education, training and work history," (Dec. 7), sufficient. "[W]e are hard pressed to accomplish our review when there is only token reference to earning capacity assessment." Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 283 (1999). The decision early on, (Dec. 4), described the employee's vocational profile, but the decision did not analyze the profile as it bears on the employee's current earning capacity. "[T]he decision should briefly analyze how the medical and vocational elements in combination form a foundation that supports the ultimate conclusion on extent of incapacity." Saccone, supra. On recommittal, "the judge should set forth her analysis of the work-related medical condition and its impact on ability to earn in the context of the employee's education, training, age and experience." Peters v. City of Salem Cemetery Dept., 11 Mass. Workers' Comp. Rep. 55, 58 (1997). See Scheffler's Case, 419 Mass. 251, 256 (1994); Frennier's Case, 318 Mass. 635, 639 (1945). We recognize that "[a] judge has considerable discretion and may use her own judgment in determining the amount of an employee's earning capacity." Beagle v. Crown Serv. Sys., Inc., 10 Mass. Workers' Comp. Rep. 282, 284

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[2] The conference order, which denied the employee's claim for § 34 benefits, continued the employee on the § 35 benefits the insurer had been paying. Those benefits were based on a $230.00 weekly earning capacity.

(1996), citing Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988). "However, those determinations are meaningless unless adequately supported by subsidiary findings that are in turn grounded in the evidence." Id., citing Altshuler v. Colonial Hilton Hotel, 7 Mass. Workers' Comp. Rep. 62, 65 (1993). See Fortier v. Ambulance Sys. of America, 13 Mass. Workers' Comp. Rep. 442, 444 (1999)(vocational analysis inadequate where judge failed to discuss at all how employee's age, training, experience, education and physical limitations affected her ability to work).

With these principles in mind, we recommit the case for further findings on the extent of incapacity.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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