COMMONWEALTH OF
COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 047176-89**

Jane Jenney	Employee
Waltham-Weston Hospital & Medical Center	Employer
Waltham-Weston Hospital & Medical Center	Self-insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine & Wilson)

APPEARANCES
Bernard T. Loughran, Jr., Esq., for the employee
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

CARROLL, J. This case is before us for the second time. In Jenney v. Waltham-Weston Hosp. Medical Ctr., 10 Mass. Workers' Comp. Rep. 687 (1996), we recommitted the case to the hearing judge to state with specificity the facts on which he relied in reaching his conclusion on earning capacity. Id. at 689. A different administrative judge subsequently issued a decision finding the employee totally incapacitated, incapable of earning any wages. Because this latest determination is flawed, we once again recommit the case for further findings.

Jane Jenney was sixty-five years old at the time of the hearing in this matter. A registered nurse, she fell at work on August 18, 1989. Her arms were outstretched and she landed on her hands and knees. Early diagnoses were left wrist fracture, right wrist sprain, contusions of both knees and a left ankle sprain.[1] The self-insurer paid § 34 benefits from the date of injury until February 1990 when the employee returned to part-time limited duty work. Ms. Jenney continued working on this basis until September 1990 when she again went out of work and the self-insurer resumed payment of § 34

[1] Later diagnoses included rotator cuff injury (Jenney, supra at 687, citing Dec. I. 7, 9; Dec. II. 7) and chronic cervical sprain with probable pre-existing cervical spondylosis, chronic tendonitis, sprains to both wrists and low back pain. (Dec. II. 7.)

benefits. (Dec. 5, 6, 11.)

The self-insurer filed a complaint for modification or discontinuance of benefits. Following a § 10A conference, an administrative judge allowed the complaint, ordering the self-insurer to pay §35 temporary partial incapacity benefits with an assigned earning capacity of $600.[2] The self-insurer appealed the order. Following a full evidentiary hearing, the judge issued a decision wherein he increased the employee's earning capacity to $965.24, retroactive to April 22, 1992. The employee appealed that decision and the reviewing board recommitted the matter, directing the judge to specifically set out the facts on which he relied in reaching his earning capacity conclusion. Thereafter, the matter was assigned to a different administrative judge.[3] (Dec. 4.)

The new administrative judge conducted a hearing de novo, and stated in his decision that the earlier decision and transcript of the proceeding related to that earlier hearing were "incorporated by reference in [the] proceedings [of the recommittal hearing]." (Dec. 5.) He further stated that he found, "and adopt[ed] in part, the opinion of [the employee's treating physician] Dr. Molloy, that the Employee is totally disabled." The employee was deemed to be incapacitated from performing meaningful work. The judge denied the self-insurer's complaint to modify or discontinue benefits, thereby in effect directing the self-insurer to pay § 34 benefits. (Dec. 12, 14). The self-insurer appeals.

The self-insurer argues that the award of total incapacity benefits was arbitrary and capricious. In support of its argument, the self-insurer points to the well established principle that medical questions which are beyond the realm of lay knowledge must be decided on the basis of expert medical testimony. Triangle Dress, Inc. v. Bay State Service, Inc. 356 Mass. 440, 441 (1969); Josi's Case, 324 Mass. 415, 417-418 (1949). Here, the administrative judge found the employee totally incapacitated since April 22,

---

[2] Because the employee's average weekly wage was $1,287.98, her § 35 compensation rate remained the same as her § 34 compensation rate. (Dec. 4.)

[3] At the time of recommital, the administrative judge who issued the first decision no longer served in the department.

1992, based on the opinion of Dr. Molloy. (Dec. 12.) However, Dr. Molloy first saw the employee more than six years later, on February 6, 1998. More importantly, he rendered no opinion as to her incapacity, if any, prior to that first encounter. While other medical evidence relevant to the employee's incapacity prior to February 6, 1998 was admitted into evidence, the judge did not adopt it. (Dec. 2-3, 7.) Thus, any finding of incapacity prior to February 6, 1998 is not grounded in the evidence as found by the judge.

The finding of total incapacity is further flawed. As a general rule, a judge may not award benefits beyond those claimed by the parties. Burgos v. Superior Abatement, Inc., 14 Mass. Workers' Comp. Rep. 183, 185 (2000); Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997). However, a claim may be deemed amended where the parties try it by consent. Debrosky v. Oxford Manor Nursing Home, 11 Mass. Workers' Comp. Rep. 243 (1997). Thus, where the medical or vocational evidence so supports, an expanded award of benefits may be allowable. Whitaker v. Agar Supply Co., Inc., 14 Mass. Workers' Comp. Rep. ___ (November 17, 2000). Here, the matter came to hearing pursuant to the self-insurer's complaint to modify or discontinue the employee's § 34 benefits The employee would not agree to such modification or discontinuance and testified that she was unable to perform any work. (Tr. 2, p. 51.) The self-insurer's complaint to modify was allowed at conference, and the employee's weekly benefits were reduced to § 35 partial incapacity benefits with an assigned earning capacity. The employee did not appeal the conference order, and on her hearing claims sheet she only listed § 35. (Employee exh. 1, submitted at first hearing.) In addition, in her "Proposed Findings of Fact" submitted to the judge on January 28, 2000, the employee proposed the following findings:

> With respect to disability, I adopt the numerous medical opinions presented by the Employee . . . which indicate a significant partial disability as of the dates of those exams and treatment.
> On the basis of the Employee's work from February to September, 1990, her education and past work experience and the Employee's testimony that she was capable of part-time, light duty work earning $300 per week . . . (in September, 1990), I find that the Employee had an earning capacity of $300 as of the date of the Conference on the Self-Insurer's Request to Modify

> Benefits, August 13, 1992 to February 6, 1998, the date of Dr. Molloy's first examination of the Employee.

Thus, the employee seemingly concedes that, from August 13, 1992 to February 6, 1998, her incapacity was partial, lending further credence to the self-insurer's argument that the award of § 34 benefits, at least from August 13, 1992 to February 6, 1998 was error. On recommittal, the judge should determine the parameters of the dispute.

The self-insurer also argues that the judge's finding of total incapacity is contrary to the principle of issue preclusion. We do not agree. The case was before the judge for a hearing de novo. While the second administrative judge recognized the decision of the first administrative judge, (Dec. 5), he did not adopt and was not bound by the findings contained therein.

Next, the self-insurer argues that the issue of residual incapacity is not fully addressed by the judge in that he failed to make any findings on the employee's educational background or capabilities. In the "Additional Subsidiary Findings" section of the decision, the judge summarized the testimony and the opinion of two vocational experts as to the employee's educational background and capabilities. (Dec. 9-11.) In his conclusions, the judge found the employee not able to perform the jobs researched by the self-insurer's vocational expert based on her age, education, training, work history, incapacity and approximate nine year absence from the work force. (Dec. 12-13.) The judge seems to rely on the employee's vocational expert, although he does not specifically adopt her opinion. Instead, the judge states that he found the employee's vocational expert to be truthful and that he gave her testimony its appropriate probative value. (Dec. 10.)

Section 11B of the Act requires a judge to set forth the issues in controversy, the decision on each issue and a brief statement of the grounds for each decision. Here, we cannot be certain what evidence the judge relied on in reaching his conclusion relative to the employee's residual capacity. On recommittal, the judge must specifically state what evidence he relies on. Recitals of testimony do not constitute findings of fact. Sherman v. Van-Pak, 6 Mass. Workers' Comp. Rep. 60, 62 (1992).

The self-insurer also argues that the judge rejected the testimony of its vocational expert without explanation. The judge is not required to explain. See Sylva's Case, 46 Mass. App. Ct. 679, 680-681 (1999) (no error that the administrative judge failed to mention vocational expert's evaluation); Coelho v. Nat'l. Cleaning Contr., 12 Mass. Workers' Comp. Rep. 518, 521-522 (1998) (judge does not have to explain reasons for rejecting vocational expert's testimony).

Lastly, the self-insurer argues that, pursuant to § 35E[4], the employee was not entitled to either § 34 or § 35 benefits upon reaching the age of sixty-five. The self-insurer failed to raise this issue at the second hearing despite the fact that the employee was sixty-five at that time. An issue not raised below cannot be raised for the first time on appeal. Phillips' Case, 278 Mass. 194, 196 (1932).

We recommit the case for further findings consistent with this opinion. On recommital, the judge should reconsider what the parameters of the dispute were. Further, in his discretion, the administrative judge may allow joinder of the § 35E issue. The order of weekly compensation under § 35 given in the first hearing decision shall remain in place from April 22, 1992, pending resolution of the earning capacity issue.

So ordered.

Martine Carroll
Administrative Law Judge

Sara Holmes Wilson
Administrative Law Judge

[4] Section 35E states, in part: "Any employee who is at least sixty-five years of age and has been out of the labor force for a period of at least two years and is eligible for old age benefits pursuant to the federal social security act . . . shall not be entitled to benefits under sections thirty-four or thirty-five unless such employee can establish that but for the injury, he or she would have remained active in the labor market."

Frederick E. Levine
Administrative Law Judge

Filed: February 12, 2001
MC/jdm