COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 015902-05

Jerrold R. Sicotte	Employee
Land Air Express of Vermont	Employer
Acadia Insurance Company	Insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and Fabricant)
The case was heard by Administrative Judge Chivers.

APPEARANCES

Jonathan Harris, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on appeal
Sheila S. Cunningham, Esq., for the insurer

HORAN, J. The employee appeals from a decision denying his claim for weekly incapacity and medical benefits stemming from an inguinal hernia. The employee contends the judge's finding of no specific work incident was arbitrary and capricious because the employee's testimony was to the contrary. We agree, vacate the decision, and recommit the case.

The employee has suffered from a pre-existing inguinal hernia since 2002, for which he underwent three surgical repairs, the most recent in June 2004. (Tr. 13-15, 24.) He returned to work as a truck driver in August 2004, and was able to do his regular work, albeit in pain. (Dec. 2-3.) The employee testified that in April or May 2005, he lifted "some kind of crate or a box" while unloading his truck at work and felt a "searing, shooting pain" in his groin, different than the pain he had experienced since his August 2004 return to work. (Tr. 24-27.) He reported the injury to his supervisor. (Dec. 3.) Although the employee continued to work in pain for the next couple of weeks, he began missing days, and last worked on May 25, 2005. (Tr. 26-27.)

Despite the employee's account of the incident at work, the judge found: "[The employee] actually testifies he does not think there was a specific injury in 2005, just a severe intensification of the pain at the time of the lifting." (Dec. 3.) The judge then concluded:

The problem for [the employee] is that he does not identify any particular incident or episode in April or May of 2005, that leads to this present disability. He admits that there was increased swelling and pain leading up to his going out of work in May of 2005, and further states that there was no particular incident that brought on the searing pain he felt [at] that time.

(Dec. 4.) On that basis, the judge concluded the employee most likely had suffered a recurrence of his prior hernia injury, and not a compensable aggravation or new injury. (Dec. 4.)

The employee argues that the finding regarding the non-occurrence of an injury at work in April or May 2005 is arbitrary and capricious. We agree. The employee's inability to specify the date notwithstanding, there is no way to harmonize his testimony with the judge's finding that the employee failed to "identify any particular incident" at work. (Dec. 4.) Therefore, we must vacate the decision and recommit the case. See Pike v. Mass. Dep't of Mental Retardation, 21 Mass. Workers' Comp. Rep. 193, 195 (2007)(findings unsupported by evidence are arbitrary and capricious, not harmless when bearing on central issue in dispute); Cibene v. Brentwood Realty Trust, 8 Mass. Workers' Comp. Rep. 172, 173 (1994)(same).

Accordingly, we vacate the decision and recommit the case for further findings, including findings addressing the insurer's § 1(7A) defense. See Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005).

So ordered.

_____

Mark D. Horan
Administrative Law Judge

_____

Patricia A. Costigan
Administrative Law Judge

_____

Bernard W. Fabricant
Administrative Law Judge

Filed: **August 19, 2009**