COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 006024-18**

John McLaughlin	Employee
Boston University	Employer
Boston University	Self-Insurer

REVIEWING BOARD DECISION
(Judges Fabiszewski, Fabricant and Koziol)

The case was heard by Administrative Judge Ricciardone

APPEARANCES
Seth J. Elin, Esq., for the employee at hearing and on appeal
Diane J. Bonafede, Esq. for the self-insurer at hearing and on appeal

FABISZEWSKI, J. The employee appeals from the administrative judge's decision awarding him § 34 temporary total incapacity benefits for a closed period, followed by two closed periods of § 35 temporary partial incapacity benefits, plus ongoing § 35 temporary partial incapacity benefits and § 30 medical benefits. On appeal, the employee raises six issues, five of which we summarily affirm. The final issue raised by the employee is whether the evidence supports the administrative judge's decision that the employee is partially incapacitated and has a minimum-wage earning capacity. Because the hearing decision does not contain sufficient findings for us to determine whether the administrative judge applied the correct rules of law, we recommit the case for further findings on the issues of the employee's incapacity and subsequent earning capacity. See, Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

On January 25, 2018, the employee was employed by Boston University as a truck driver when he injured his back while lifting a printer. (Dec. 7.) Pursuant to a § 10A conference held on the employee's claim for benefits, he was awarded § 34 temporary total incapacity benefits from July 15, 2018, to date and continuing. (Dec. 3.) The self-insurer filed a timely appeal. (Dec. 3-4.) Pursuant to § 11A(2), the employee was

examined by Dr. Lawrence Geuss on May 14, 2019. (Dec. 5.) Prior to hearing, the employee's claim for § 34A permanent and total incapacity benefits was joined. (Dec. 4.) The employee also made a motion to submit additional medical evidence based on the inadequacy of the impartial report, as well as complexity of the medical issues. (Dec. 4.) Although the administrative judge found the impartial report adequate, she allowed the submission of additional medical evidence on the basis of complexity, and also for the "gap period."[1] (Dec. 5.) A hearing was held on January 19, 2021, February 5, 2021, and February 24, 2021. (Dec. 4.) On April 9, 2021, the administrative judge issued her decision awarding a closed period of § 34 benefits from July 15, 2018 to May 13, 2019, plus two closed periods and one ongoing period of § 35 benefits based on a minimum-wage earning capacity.[2]

The employee testified that he was still experiencing sharp pain across the bottom of his back as well as pain that radiated down his leg and behind his knee. (Dec. 7.) A few times a week, he was able to drive to complete errands. (Dec. 7.) He was able to sit for 15-20 minutes but then must move or the pain would shoot down to his foot. (Dec. 8.) He did not do any yard work or chores, and lifting a gallon of milk caused pain. (Dec. 8.) He described his pain on a scale of 1-10 as ranging from a 5-6 on a good day to

[1] Although not raised as a claim of error in this case, we have repeatedly held that a "gap period" cannot exist in the absence of a corresponding inadequacy in the impartial report. An impartial report is, by definition, inadequate if additional medical evidence is allowed to address a "gap" in the report pertaining to any period of time. Hinanay v. DMHNS 1 North Shore Area – Danvers, 35 Mass. Workers' Comp. Rep. __ (July 30, 2021), citing Spencer v. JG MacLellan Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 149-150 (2016).

[2] The judge ordered the self-insurer to pay the employee the following weekly compensation benefits: 1) § 34 benefits for the period July 15, 2018 to May 13, 2019 at the rate of $988.39 per week, based on an average weekly wage of $1,647.31; 2) § 35 benefits for the period May 14, 2019 to December 31, 2019 at the rate of $700.39 per week, based on the employee's average weekly wage and a minimum-wage earning capacity of $480.00 per week; 3) § 35 benefits for the period January 1, 2020 to December 31, 2020 at a rate of $682.39 per week, based on the employee's average weekly wage and a minimum-wage earning capacity of $510.00; and 4) § 35 benefits for the period January 1, 2021 to date and continuing at the rate of $664.39 per week, based on the employee's average weekly wage and a minimum-wage earning capacity of $540.00 per week. (Dec. 18-19).

an 8 on a bad day. (Dec. 7.) To relieve the pain, he walked, lay down or took a hot shower. (Dec. 7.) He took a medication similar to aspirin and also occasionally took a muscle relaxer at night. (Dec 7.) He further testified that he was unable to concentrate because he was always thinking of his back and trying to move in ways that did not cause the pain to flare. (Tr. I, 40.)[3] The administrative judge expressly found the employee testified credibly regarding his level of pain. (Dec. 16.)

In her decision finding that the employee was partially incapacitated, the administrative judge adopted parts of the opinions of several doctors who had examined or treated the employee, including the impartial examiner, Dr. Geuss, who examined the employee on May 14, 2019. Dr. Geuss opined that the employee was capable of performing moderate duty work with lifting upward of 20 to 30 pounds. (Dec. 14.) The judge also adopted part of the opinion of Dr. Murray Goodman, who examined the employee on behalf of the self-insurer on multiple occasions. (Dec. 3, 12.) At the time of his June 27, 2018 and November 26, 2018 evaluations, Dr. Goodman opined that the employee had a sedentary work capacity, with a 5-pound lifting restriction, no bending and the ability to get up for 5 to 10 minutes every hour. (Dec. 13.) Additionally, the administrative judge also adopted part of the opinion of Dr. Simon Faynzilberg, who treated the employee in 2018 and 2019. (Dec. 14.) Dr. Faynzilberg examined the employee on April 13, 2018, and opined that the employee had very limited lifting ability and disabling pain. (Dec. 13.) Dr. Faynzilberg treated the employee with a series of epidural injections in 2018 and noted, in January 2019, that the employee had "very substantial improvement" post injection. (Dec. 14.) The judge adopted the opinion of the self-insurer's vocational expert, Sue Chase, that based on "the medical records that she reviewed and the physical capacities provided", the employee "is capable of performing work that falls within the light work category, as well as select positions within the medium work category." (Dec. 15.)

[3] The transcript of the hearing held on January 19, 2021, is referenced as "Tr. I".

An administrative judge has a duty to "address the issues in a case in a manner enabling this board to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz, supra, at 47. In circumstances where the record is insufficient to allow for appellate review, the case must be recommitted for further findings of fact and rulings of law necessary for the board to complete its review. Id. A medical evaluation of physical impairment is merely one component in determining an employee's loss of earning capacity. Scheffler's Case, 419 Mass 251, 256 (1994). Other factors such as the employee's "[e]ducation, training, age and experience", coupled with economic factors and attitudes of employers and insurance companies also impact an injured employee's ability to obtain and retain a job. Id. While an administrative judge must ground her findings of incapacity and earning capacity on an accurate assessment of physical limitations, earning capacity can also be impacted by an employee's complaints of pain. Greci v. Visiting Nurses Association, 12 Mass. Workers' Comp. Rep. 462, 465 (1998). As the Supreme Judicial Court noted in Scheffler, supra at 256, quoting L. Locke, Workman's Comp. §321, at 375-376 (2d ed. 1981): "The goal of disability adjudication is to make a realistic appraisal of the medical effect of a physical injury on the individual claimant and award compensation for the resulting impairment of earning capacity, discounting the effect of all other factors. . . ." Id. at 256, quoting L. Locke, Workman's Comp. §321, at 375-376 (2d ed. 1981).

Here, the administrative judge adopted the opinion of several doctors, indicating that the employee had some work capacity, and Ms. Chase, who relied only on the restrictions she found in the medical opinions. Yet, the judge simultaneously credited, without qualification, the employee's testimony regarding his complaints of pain. Specifically, the employee testified that he was able to sit for no more than 20 minutes and that he must walk, lie down or take a hot shower to relieve the pain. He also testified that lifting a gallon of milk caused pain. He noted that he was unable to concentrate because he was always thinking of his back and trying to move in ways that did not exacerbate his back pain. The employee's credited testimony alone contradicts Dr. Goodman's adopted medical opinion that the employee "should be allowed to be up for 5

to 10 minutes every hour."[4] (Dec. 13.) Additionally, much of the medical evidence adopted by the administrative judge is from treatment and evaluations that occurred in 2018 and 2019, which is at least two years prior to the employee's testimony regarding his pain. While the employee certainly could have been in worse pain in 2018 and 2019 than he was at the time of the hearing, his credited testimony regarding his current pain must be considered in the judge's analysis. Without more detailed analysis, the employee's testimony appears inconsistent with the earning capacity assigned by the administrative judge. It is unclear what type of remunerative work the employee could perform if he cannot concentrate and cannot sit for more than 20 minutes, especially where two of the things which help relieve his pain – lying down and taking a hot shower – are generally not activities common to employment. The adopted vocational opinion of Sue Chase was based on the medical opinions regarding disability and did not consider the employee's pain. Without resolving the apparent inconsistencies and providing further findings explaining how the employee's complaints of pain coupled with his physical limitations enable him to sustain a full-time minimum-wage earning capacity, we are unable to determine with reasonable certainty whether the correct rules of law have been applied to the facts in this case.

Accordingly, we affirm the decision with respect to the other issues raised and recommit the case for further findings consistent with this decision on the issues of the employee's incapacity and subsequent earning capacity. See, Svonkin v. Falcon Hotel Corp., 20 Mass. Workers' Comp. Rep. 133, 138-139 (2006).

So ordered.

Karen S. Fabiszewski

Karen S. Fabiszewski
Administrative Law Judge

[4] Dr. Goodman provided only one 5-10 minute break in an hour, whereas the employee's credited testimony that he could sit for up to 20 minutes would result in at least two such breaks each hour. (Dec. 8, 13.)

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***March 25, 2022***