COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 701367-82**

John Saccone	Employee
Department of Public Health	Employer
Massachusetts PERAC/Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
Ann M. McNamara, Esq., for the employee
Marian C. Grimes, Esq., for the insurer

WILSON, J. The insurer appeals the decision of an administrative judge, who awarded § 34A benefits, reasonable and necessary medical treatment for the diagnosed condition pursuant to §§ 13 and 30, attorney's fees and costs, and authorized the insurer to credit itself for payments made prior to the date of the decision. After a review of the record, we recommit the case to the administrative judge for further findings.

John Saccone, who was fifty-eight years old at the time of the hearing, attended Massasoit Community College for one year after receiving his high school diploma. He has thirteen years of experience with the Massachusetts Department of Public Health as a nursing home inspector, holding the title of Senior Civil Engineer/Life Safety Code Unit. (Dec. 4.)

On August 6, 1981, during an inspection of a nursing home in Brockton, the employee lost his balance while standing on a ledge. He stumbled and, although he managed to catch himself and avert a fall, he felt a "ripping" in his lower back. (Dec. 4.) The employee continued to work for the next six months despite the resulting pain and stiffness, for which he was treated by his family

physician. Ultimately, in March of 1982, the employee was unable to carry out the physical requirements of his employment. (Dec. 4-5.)

The insurer accepted initial liability for the employee's claim. Following a hearing before an administrative judge in February 1988, the employee was awarded permanent and total incapacity benefits under § 34A. (Dec. 5-6.) On August 21, 1995, the insurer filed a complaint to discontinue payment of § 34A benefits. A conference was held before another administrative judge and modification or discontinuance was denied. The insurer then appealed to a hearing de novo. (Dec. 2.)

Pursuant to G. L. c. 152, § 11A, the employee was examined by Dr. Thomas Antkowiak, whose report and deposition were admitted into evidence. (Dec. 1, 3, 5.) The administrative judge found that the examiner's report was adequate but determined that the medical issues were complex. (Dec. 2.) Consequently, he allowed the admission of additional evidence consisting of the reports and deposition testimony of Dr. Brian Awbrey. (Dec. 2, 3, 6.)

Although only the extent of incapacity was at issue in this discontinuance case, the administrative judge found that on August 6, 1981, the employee suffered an injury that arose out of and in the course of his employment. (Dec. 5, 9.) He then observed that the case was accepted in 1982 and that in May 1988, a previous administrative judge had ordered permanent and total incapacity benefits under § 34A. (Dec. 5.) The administrative judge rejected the impartial examiner's medical opinion that the employee could do sedentary work and adopted the medical opinion of Dr. Brian Awbrey, who concluded in his report and deposition testimony that the employee was permanently and totally medically disabled. (Dec. 6.)[1] Crediting the employee's testimony regarding his physical limitations, restrictions and pain, and stating that he must consider the employee's age, education, background, training, work experience, mental ability, and other

[1] The judge inexplicably rejected the opinion of Dr. Aufranc, whose reports were not entered into evidence and whose deposition was waived by the insurer. (Dec. 2, 3.)

capabilities, the administrative judge concluded that the employee remained permanently and totally incapacitated and was entitled to § 34A benefits. (Dec. 7, 8, 9.)

On appeal the insurer advances several arguments, two of which are dispositive. The insurer contends generally that the judge failed to make specific and definite subsidiary findings regarding the medical evidence and the extent of the employee's incapacity. In conjunction with this argument, the insurer points out that the judge failed to resolve the discrepancies between the employee's testimony and the history he gave Dr. Awbrey concerning his physical limitations. We agree.

The judge credited the testimony of the employee regarding his physical limitations, restrictions and complaints of pain, (Dec. 7), and adopted the opinion of Dr. Awbrey that the employee was totally and permanently incapacitated. (Dec. 6.) The employee's account to Dr. Awbrey was that he had trouble sitting for more than five minutes or walking more than half a block. (Dr. Awbrey Dep. 8-9.) Based on the employee's statements and his examination of the employee, Dr. Awbrey testified that the employee was limited to walking one-half block, was unable to lift, stoop, or bend, and could sit for very short periods of time, with pain. (Dr. Awbrey Dep. 13.)

In marked contrast, the employee testified at hearing that he was unable to drive or sit for more than twenty to twenty-five minutes, (Tr. 26), and could walk a mile and a half or sometimes two miles. (Tr. 27.) He further testified that he gardened on a regular basis for up to one-half hour at a time, (Tr. 34, 43), mowed his lawn on occasion, (Tr. 41), shoveled snow, (Tr. 42), bent to rake grass into his pick-up truck, (Tr. 44), and could lift up to twenty-five pounds if necessary, and ten to twenty pounds on a sustained basis. (Tr. 28). Because "the history upon which the medical expert relies is crucial to his opinion[,]" see Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 682 (1995), quoting Scali v. Mara Products, Inc., 6 Mass. Workers' Comp. Rep. 78, 80 (1992), on

recommittal the judge should make specific findings regarding the employee's testimony about his physical activities and abilities. He must then determine whether Dr. Awbrey's opinion is sufficiently grounded in the evidence and assign the medical opinion its appropriate weight in determining the extent of the employee's limitations and physical disability. Patient, supra at 682.

Additionally, the insurer contends that the administrative judge failed to consider the testimony of two investigators for the Commonwealth or list the videotape presented at hearing as an exhibit. Although the omission of witnesses and an exhibit from the lists typically set forth at the beginning of a decision strays from the preferred practice, it is not *ipso facto* conclusive that the administrative judge failed to consider the evidence when reaching his ultimate conclusions. But in this case, these omissions are accompanied by a lack of discussion or recognition of this evidence within the text of the decision. As a result we must recommit the case. On recommittal the judge should, at a minimum, identify all the witnesses and exhibits, and make such additional findings as will clarify the degree to which the evidence was relied upon. See Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 680 (1997).

The insurer next argues that the administrative judge erred in rejecting the opinion of the impartial examiner on the basis that Dr. Antkowiak had improperly disregarded the previous judge's findings on causal relationship. As we read the decision, however, the judge was merely explaining that he could not adopt those parts of Dr. Antkowiak's report that addressed previously adjudicated issues.

As a final matter, the insurer asserts that the judge's findings on physical disability and the vocational factors lack the requisite specificity and analysis to support his ultimate conclusion on extent of incapacity. We have stated before that we are hard pressed to accomplish our review when there is only token reference to earning capacity assessment. Peters v. City of Salem Cemetery Department, 11 Mass. Workers' Comp. Rep. 55, 58 (1997). "If the hearing judge's decision is to be affirmed in its present form we should be able to look at these

subsidiary findings of fact and clearly understand the logic behind the judge's ultimate conclusion." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). In other words, the decision should briefly analyze how the medical and vocational elements in combination form a foundation that supports the ultimate conclusion on extent of incapacity. As this case must be recommitted for further findings on both the medical and lay testimony, the judge should make specific findings on and analyze the physical disability and vocational factors in combination in order to justify the conclusion on earning capacity. See Russell v. Micron Engineering, 12 Mass. Workers' Comp. Rep. 183, 184-185 (1998).

The decision is recommitted to the administrative judge for further findings consistent with this opinion.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: September 17, 1999

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William A. McCarthy
Administrative Law Judge

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Suzanne E. K. Smith
Administrative Law Judge