COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 011069-01**

Joseph J. Rezendes	Employee
City of New Bedford Water Dept.	Employer
City of New Bedford	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Horan)

APPEARANCES
Matthew F. King, Esq., for the employee
Robert C. Menzel, Esq., for the self-insurer at hearing
John A. Markey, Jr., Esq., for the self-insurer on appeal

COSTIGAN, J. The employee appeals from a decision in which an administrative judge concluded that although he had suffered an industrial injury resulting in ongoing partial disability, he was entitled to only a closed period of total incapacity benefits. The employee contends that because the medical evidence the judge adopted supported a finding of continuing disability, she erred by failing to award ongoing partial incapacity benefits.

It is well-established that medical disability and incapacity are not equivalent terms. Casagrande v. Massachusetts Gen. Hosp., 12 Mass. Workers' Comp. Rep. 137, 139 (1998). Because the judge's disability and incapacity findings are confusing, and sometimes inconsistent, we are uncertain of the view she took of the evidence, and cannot "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). Therefore, we recommit the case for further findings consistent with this opinion.

Mr. Rezendes had worked for the City of New Bedford Water Department for nineteen years. For the last twelve years of his employment, he worked as a pipe fitter, a job that entailed very heavy labor, and as a working foreman. (Dec.

4; Tr. 13.) On March 27, 2001, when he was sixty-one years old, he injured his right major shoulder while replacing lead pipe with copper pipe, which required using his arms and hands forcefully to punch holes into packed soil. But for one brief attempt at what was supposed to be light duty, the employee was unable to return to work due to constant pain in his shoulder. (Dec. 4.) He opted to retire from the city, and moved to Florida in September 2001.

In June 2002, the employee began treating in Florida with Dr. William Stolzer, who opined that although the employee's range of motion in his right shoulder was good, he had limited ability to lift overhead. He noted a fair amount of degenerative arthritis and impingement. (Dec. 9.)

In September 2002, the employee became employed at Wal-Mart where, at the time of the hearing, he was working twenty-six (Dec. 10) or twenty-eight (Dec. 5) to thirty-two hours per week, mixing paint for customers, at an hourly wage of $8.00. (Dec. 4-5.) The employee, however, claimed § 34 total incapacity benefits from the date of his injury only to August 12, 2001, when his treating physician, Dr. Gilbert Shapiro, released him to return to his regular work. The employee claimed ongoing § 35 partial incapacity benefits from and after August 13, 2001.[1] (Dec. 2.)

Pursuant to § 11A, the employee underwent an impartial medical examination by Dr. James E. McLennon on April 13, 2005. The doctor opined that the employee suffered from work-related degenerative changes in his right shoulder, resulting in a 25% loss of use of the shoulder with regard to his ability to lift overhead. The doctor considered that the employee could "carry on in his current capacity in Florida." The impartial physician also concluded that the employee could not return to his heavy pipefitting job. (Dec. 7-8; Statutory Ex.

[1] Dr. Shapiro's office notes and reports for the period from May 14, 2001 to August 9, 2001 were offered into evidence by both the employee and the self-insurer. (Ex. 4[5]; Ex. 5[5].) Those exhibits reflect, and the judge so found, that the employee was released to return to his usual occupation as of August **9**, 2001. (Dec. 9.)

A.) The judge allowed additional medical evidence to address the claimed period of disability, the so-called "gap period," from the March 27, 2001 date of injury to the date of the impartial medical examination more than four years later. (Dec. 3.)

For the initial nineteen weeks of the gap period, the judge adopted the medical opinions of one of the employee's treating physicians, Dr. Shapiro, that the employee was totally disabled from March 27, 2001 through August 9, 2001. She wrote:

> With regard to the Gap Period, that of the date of injury through the date of the Impartial exam, I find credible and adopt the medical opinions of the treating doctors Shapiro and Stolzer. Dr. Gilbert Shapiro's reports establish the reporting of an industrial injury as claimed, and the resulting shoulder diagnosis. I also credit Dr. Shapiro's expert opinions on disability, which indicate the employee was disabled from the March 27, 2001 incident up through August 9, 2001, when he released the employee to regular duty. As a result, and given the Employee's continued complaints of pain and discomfort following August 9, 2001, I find that he was partially disabled following this and until his examination by the Impartial on April 13, 2005.

(Dec. 10.) The judge awarded § 34 benefits accordingly, and this award is unchallenged. However, the employee does allege error in the judge's handling of his claimed incapacity after August 9, 2001. The judge found:

> With regard to the period of time from August 9, 2001 to the Employee's date of employment with his current employer, Wal-Mart, there has also *been no credible evidence that the Employee was incapacitated from seeking this or other similar employment*, prior to when he applied for work with Wal-Mart. While recognizing the Employee was hired at [an] hourly wage of $7.50, which has since increased to approximately $8.00 per hour, clearly less than his prior weekly wage of $633.51 [sic], I am not convinced that the Employee was incapacitated as a result of his right shoulder injury, following his release to work by his then treating doctor. Further, given the employee's ability to communicate effectively, the knowledge he has gained through his lengthy experience <u>in his position with this employer in a supervisory role</u>, *I do not find that this Employee is presently incapacitated, and that he has not been so, since his release to return to full duty as of August 9, 2001, by Dr. Shapiro.*

(Dec. 11-12; August 31, 2005 amendment to decision underlined; emphasis added.)

Although the judge acknowledged that Dr. Shapiro released the employee to "full duty" and "his regular duty," i.e., his physically demanding job of pipefitter and working foreman, as of August 9, 2001, she relied on the employee's "continued complaints of pain and discomfort following August 9, 2001" to "find that he was partially disabled following this and until his examination by the Impartial on April 13, 2005." (Dec. 10.)[2] Moreover, in her vocational assessment, the judge concluded that the employee's job at Wal-Mart evidenced an ability to hold employment within his physical restrictions:

> After his release to full duty by a treating doctor, he elected to retire and move to a warmer climate. While I credit his testimony that his inability to

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[2] Such credibility determinations are the sole province of the hearing judge and, generally, will not be disturbed. Lagos v. Mary A. Jennings, Inc., 14 Mass. Workers' Comp. Rep. 21, 26 (2000), citing Lettich's Case, 403 Mass. 389, 394 (1988). Here, however, the record reflects that the employee's right shoulder complaints, which the judge credited and relied upon, had been reported to Dr. Shapiro, ("the patient states that he still has complaints in that it is painful at night and some pain at the extremes of motion"), who nevertheless released the employee to "return to his usual occupation." (Ex. 4[5]; Ex. 5[5])

> Whether on causal relationship or medical disability, a judge cannot substitute her own lay opinion for that of the [adopted] physician where the doctor had the same facts before him as did the judge, when he rendered his final opinion. . . . Lastly, we note there is no authority for the proposition that a judge may add the vocational factors under Scheffler's Case, 419 Mass. 251, 256 (1994), to an expert medical opinion of *no* medical disability to reach the conclusion that some loss of earning capacity exists. . . . Some measure of disability is a *sine qua non* of loss of earning capacity, just as some measure of vocational deficit based on that disability is also necessary for an award of compensation benefits.

Taylor v. USF Logistics, Inc., 17 Mass. Workers' Comp. Rep. 182, 185-186 (2003). The self-insurer, however, has not appealed this aspect of the judge's decision, probably because, notwithstanding her finding of partial medical disability, the judge did not award any incapacity benefits. Thus, we deem the issue waived. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), citing Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 674 (2000) and Albert v. Municipal Court of City of Boston, 388 Mass. 491, 493-494 (1983).

> perform his prior work played a role in that decision, I find that upon seeking employment in Florida, he was able to obtain this in a manner that accommodates his complaints. He has and is clearly evidencing the ability to work in this modified position, up to 32 hours a week and I have not heard any evidence that would convince me that the Employee is unable to work *in this position* on a full time basis.

(Dec. 11; emphasis added.) Thus, even though the judge found the employee partially *medically* disabled throughout the approximately four years at issue in his claim for benefits, it appears she considered that he had been able to sustain full-time *lighter duty* employment that would pay him at least $683.51 per week since August 9, 2001. (Dec. 13; emphasis added.) The reasoning behind that conclusion is not adequately explained by the judge's subsidiary findings.

Based solely on her adoption of Dr. Shapiro's opinion that the employee was physically able to perform his regular, full duty work as of August 9, 2001, the judge properly could have found the employee regained the ability to earn his pre-injury average weekly wage of $683.51 from that date forward, at least to the date of the § 11A impartial examination. She did not do so. Instead, she used credibility and vocational assessments to find the employee had an ongoing partial medical disability which did not, however, result in any incapacity. Even though the employee's actual part-time earnings at Wal-Mart -- $208 or $224 to $256 per week (Dec. 5, 10) -- were significantly less than his average weekly wage of $683.51, and even though a full-time, forty-hour per week schedule at Wal-Mart would pay him only $320, the judge determined the employee was not incapacitated from earning $683.51. She based this conclusion on the employee's ability to communicate effectively, and the knowledge he gained through his lengthy experience in a supervisory role with the employer.

We cannot discern how the employee's supervisory skills and ability to communicate would support the judge's conclusion that he could earn $17.09 per hour for a forty hour week. That is the rate of pay which the employee would

need to earn in order to match his pre-injury average weekly wage of $683.51. Although the determination of earning capacity is not limited to actual wages an injured employee may be receiving, G. L. c. 152, § 35D,[3] the judge's critical finding is that the employee is medically restricted to the modified type of work he performs at Wal-Mart, but that he is able to work full-time. Thus, the employee's argument -- that the assigned earning capacity is far in excess of what he actually makes, or could make, at Wal-Mart -- has merit. We cannot follow how the judge reasoned from her subsidiary findings of fact to her general finding of an earning capacity equal to what the employee made before he was injured. See Antoine v. Pyrotector, 7 Mass. Workers' Comp. Rep. 337, 341 (1993). Without an ability to return to his pipe fitter job, we think the employee is entitled to more detailed findings on his vocational profile and earning capacity. Accordingly, the case is recommitted for further findings of fact consistent with this opinion.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **February 16, 2007**

[3] General Laws c. 152, § 35D, provides in pertinent part:

> For purposes of sections thirty-four, thirty four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the greatest of the following:
>
> (1) The actual earnings of the employee during each week.
>
> . . .
>
> (4) The earnings that the employee is capable of earning.