

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

**BOARD NOS. 036058-09
023913-09**

Karen Craig

Employee

Bombay Duck
Paramount Insurance

Employer
Insurer

Concord Teacakes
Mass Retail Merchants (SIG)

Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Harpin)

The case was heard by Administrative Judge Solomon.

APPEARANCES

Gerald T. MacCurtain, Esq., for the employee
John R. Hitt, Esq., for Paramount Insurance at hearing and on appeal
Peter M. McElroy, Esq., for Paramount Insurance on appeal
Richard N. Curtin, Esq., for Mass. Retail Merchants (SIG) at hearing
Paul M. Moretti, Esq., for Mass. Retail Merchants (SIG) on appeal

FABRICANT, J. The employee and one insurer, Mass. Retail Merchants (SIG) (hereinafter, "SIG"), appeal from an administrative judge's decision awarding ongoing § 35 benefits from the date of the recurrence of a prior work-related injury. As we find no merit in SIG's arguments on appeal that the judge misconstrued medical evidence or misapplied the successive insurer rule, we summarily affirm on those issues. We do, however, agree with SIG that the judge's finding of partial incapacity is supported by the evidence. We thus affirm the decision, and address the employee's argument that the subsidiary findings of fact compel an award of total disability benefits.

On August 26, 2009, the employee was 49 years old, and concurrently employed at Bombay Duck as a kitchen manager, and at Concord Teacakes as a baker. (Dec. 5.) While working at Concord Teacakes on that date, the employee sustained an injury to her right dominant shoulder and neck after lifting three fifty pound bags of flour. (Dec. 5.)

A September 15, 2009 MRI of the shoulder revealed a probable anterior labral tear, (Employee Ex. 11), and a March 10, 2010 cervical MRI revealed a C6-7 moderate right lateral disc protrusion with compromise of the nerve root and moderate stenosis. (Employee Ex. 10.) While cortisone shots to her shoulder provided little relief, her pain symptoms improved dramatically subsequent to a cervical spine epidural steroid injection followed by physical therapy. (Dec. 5.) By December 2009, the treating neurosurgeon, Dr Arthur Lee, cleared the employee to return to work without restrictions. (Employee Ex. 9.)

In December 2009, less than four months after her initial injury, the employee returned to work for Bombay Duck as part of the kitchen staff, where her job was to fill twelve-ounce containers with spinach dip. (Dec. 6.) On average, she was required to fill approximately 500 containers per day. (Id.) Prior to her return to work, Dr. Paul Re, an orthopedist, treated the employee's right shoulder, and assigned a fifty pound lifting restriction, but placed no restrictions on repetitive motion. (Paramount Ins. Ex. 1.) The judge credited testimony from a co-owner of Bombay Duck that the employer was aware of the lifting restriction and that the employee was provided with assistance when requested. (Dec. 6.) Further, the judge found that there were no rules limiting the number of breaks any employee could take, as long as the work was completed. (Dec. 6.)

Following her return to work for Bombay Duck, the judge found the employee experienced the identical pain and symptoms which she had previously experienced after the initial injury at Concord Teacakes. (Dec. 7; Tr. II, 49.) Her last day of employment was January 25, 2010. (Dec. 7.)

On November 5, 2010, the employee was examined by Dr. William Walsh, the § 11A impartial physician. Dr. Walsh concluded in his report that the employee “is temporarily partially impaired.” (Impartial Examiner Ex. 1.) The report also contains the following observation regarding work capacity: “Based on the physical examination and natural history of her condition, she is capable of only sedentary duties at this time.” (Id., 2.) Dr. Walsh’s September 6, 2011 deposition testimony unequivocally confirms his opinion regarding her capacity for employment:

- Q. And I assume that she was experiencing severe pain or bouts of pain as a result of this condition, would you still say that she would be able to engage in gainful employment?
- A. Sedentary employment?
- Q. Yes.
- A. Yes.
- Q. Even in pain?
- A. Sure.

(Dep. 18.)

Adopting Dr. Walsh’s findings, the judge found the claimant capable of performing sedentary work, with a restriction from lifting her right arm above shoulder level. (Dec. 8.) The judge’s finding of a minimum wage earning capacity is based upon the employee’s sedentary work capacity, coupled with her past experience in customer service, a qualifying sedentary position. (Dec. 8, Tr. II, 62.)

On appeal, the employee argues the judge’s adoption of the statement of her treating physician, Dr. Lee, that the employee’s pain had “returned to the same baseline of a 10/10,” (Dec. 7), is inconsistent with a finding of partial disability.

There is no inconsistency. The judge adopted Dr. Lee’s findings only for the purpose of resolving whether the employee’s present symptoms were causally related to her work at Bombay Duck or her earlier injury at Concord Teacakes.

The judge found that the employee's activities upon her return to work at Bombay Duck did not constitute a new injury.

Considering Dr. Lee's opinions, I do not find that the reemergence of the employee's pain symptoms were due to a new injury or aggravation. There is no indication of a worsening of the employee's underlying neck or shoulder condition as a result of the employee's work activities at Bombay Duck. I therefore conclude that the employee, while working at Bombay Duck, suffered a recurrence of her prior work-related injury and that she is presently disabled as a result of her injury at Concord Teacakes.

(Dec. 9).

The determination of injury must not be confused with earning capacity. For that issue, the judge relied on the opinion of Dr. Walsh, who felt the employee had the capacity for sedentary work, even with severe pain. Clarici's Case, 340 Mass. 495, 497 (1960)(judge is free to accept portions of medical testimony deemed credible); William's Case, 70 Mass. App. Ct. 1115, n. 3 (2011) (Memorandum and Order Pursuant to Rule 1:28). The judge then identified a sedentary position in the employee's experience and work history, that of a customer service representative, to find her capable of minimum wage earnings. (Dec. 9). " '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.' " Scheffler's Case, 419 Mass. 251, 256 (1994), quoting from L. Locke, *Workmen's Comp.* § 321 at 375-376 (2d. ed. 1981)(emphasis supplied). Here, the judge clearly articulated the rationale for her findings on earning capacity, which were supported by the evidence. There is no error.

The decision is affirmed. Pursuant to G.L. c. 152, § 13A(6), we order the insurer to pay employee's counsel an attorney's fee of \$1,563.91.

So ordered.

Karen Craig
Board Nos. 023913-09 & 036058-09

Bernard W. Fabricant
Administrative Law Judge

William C. Harpin
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed: **August 8, 2013**