COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 008711-01**

Katherine E. Martin	Employee
Sunbridge Care and Rehab. for Hadley	Employer
American Casualty of Reading, PA	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Horan and Fabricant)

APPEARANCES
Donald W Blakesley, Esq., for the employee
John F. Burke, Jr., Esq., for the insurer

COSTIGAN, J. The insurer appeals from an administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits. We agree that the judge's failure to list the insurer's vocational expert as a witness, or in any way reference her testimony, requires recommittal. However, we disagree that the judge erred by not requiring the employee to prove she had performed an unsuccessful job search as a condition of entitlement to § 34A benefits.

Katherine Martin, fifty years old at the time of hearing, injured her back in 2001 while performing her job as a certified nursing assistant. As a result, she had two major back surgeries, the last one on August 24, 2004. For a few months, she progressed well, but on April 20, 2005, she awoke with back pain so intense that she could not stand. At the time of hearing, she continued to have pain and numbness into her left leg and pain in her back which limited her ability to sit, stand, walk and drive. (Dec. 2.)

Pursuant to a prior hearing decision filed on February 6, 2003, the insurer paid the employee § 34 benefits for the maximum statutory period of one-hundred

and fifty-six weeks.[1] The employee filed a claim for § 34A permanent and total incapacity benefits and, following a § 10A conference, the administrative judge awarded the employee § 35 partial incapacity benefits. Both parties appealed to a de novo hearing, at which the only issues were the employee's disability and the extent thereof. (Dec. 1, 2.)

Dr. Steven Silver, the § 11A physician, opined in his report of May 9, 2005 that the employee has a "moderate to marked partial" disability. (Dec. 3; Stat. Ex. 1.) He further opined the employee could sit or stand for no more than two hours at a time, or four hours total in a day, and that she could lift no more than twenty pounds. Dr. Silver noted the employee exhibited a painful limp and he detected paravertebral muscle spasms upon bending. He opined the employee's prognosis for improvement was poor. (Dec. 3.)

The judge credited the employee's testimony regarding her pain, finding it corroborated by the impartial physician's observations. He concluded the restrictions identified by the § 11A examiner left the employee with "little ability to find any work in the open labor market," as "just getting through the normal activities of daily living will stretch the limits of her physical capacity." (Dec. 3.) The judge ordered the insurer to pay the employee § 34A permanent and total incapacity benefits from and after August 1, 2004. (Dec. 4.)

The insurer first argues that the case must be recommitted for the judge to consider the testimony of its vocational expert, Maria Provini-Salas, who was not listed as a witness and whose testimony was not mentioned in the decision. We agree that it is impossible to determine from the judge's decision whether he, in fact, considered the vocational expert's testimony. We have consistently held:

> "It is fundamental that a judge weigh and consider the evidence he has admitted." Warnke v. New England Insulation Co., 11 Mass. Workers' Comp. Rep. 678, 680 (1997). Where a judge neither lists a witness at the beginning of the decision nor acknowledges that witness's testimony within

[1] We take judicial notice of the documents in the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)

> the decision, we are unable to determine whether he has actually considered that witness's testimony, thereby assuring an adequate foundation for his conclusions. Lockheart v. Wakefield Eng'g, 16 Mass. Workers' Comp. Rep. 302, 304 (2002); Keefe v. M.B.T.A., 15 Mass. Workers' Comp. Rep. 129, 133-134 (2001); Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep. 280, 282-283 (1999).

Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 366 (2005). The requirement that a judge consider admitted testimony applies to all witnesses, including vocational experts. Coelho v. National Cleaning Contractor, 12 Mass. Workers' Comp. Rep. 518, 521-522 (1998)(sufficient for judge to consider vocational expert's testimony, which he may reject as unconvincing, even if unrebutted); Schmidt v. Nauset Marine, Inc., 17 Mass. Workers' Comp. Rep. 326, 329 (2003)(same). Of course, a vocational expert's opinion does not stand on the same footing as testimony by a medical expert, in that a judge does not lose his expertise on earning capacity, even in the presence of expert vocational testimony. Coelho, supra at 522, citing Petition of Dept. of Pub. Welfare to Dispense with Consent to Adoption, 376 Mass. 252, 269 (1978), and Charrier v. Charrier, 416 Mass. 105, 112 (1993). Thus, a judge need not adopt a vocational expert's testimony, nor specify his reasons for rejecting that testimony, nor discuss the expert's opinion in his subsidiary findings. Sylva's Case, 46 Mass. App. Ct. 679, 681 (1999).

That said, however, "we should be able to look at [the] 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). We must be able to tell on what evidence the judge relied in reaching his decision, and that, in fact, he considered admitted vocational testimony. See Jenney v. Waltham-Weston Hosp. & Med. Ctr., 15 Mass. Workers' Comp. Rep. 54, 58 (2001)(where judge seemed to rely on vocational expert's testimony, but did not specifically adopt her opinion, case recommitted for judge to specify on what evidence he relied); Coelho, supra; Schmidt, supra. We cannot do so where, as

here, the judge has failed even to list the vocational expert as a witness. Cf. Faieta v. Boston Globe Newspaper Co., 18 Mass. Workers' Comp. Rep. 1, 11 (2003) (where judge's decision listed vocational witness, no requirement that judge specifically discuss or make findings on his testimony).

Here, the task of determining what evidence the judge considered and relied on is more onerous because he concluded the employee has "little ability to find any work in the open labor market," (Dec. 3), but he performed no vocational analysis. Cf. Sylva's Case, supra at 681(though judge did not mention vocational expert's opinion in his subsidiary findings, those findings demonstrate he took into account employee's age, transferable vocational skills, education, and lack of motivation to seek other jobs, in reaching determination on earning capacity). On recommittal, the judge, at a minimum, must list the vocational expert as a witness, and indicate with greater specificity how he reached his conclusion the employee is unable to perform any "remunerative work of a substantial and not merely trifling character," taking into consideration her age, experience, training and capabilities. Frennier's Case, 318 Mass. 635, 639 (1945). Although the judge must consider the vocational expert's testimony, he has discretion to determine whether that testimony is helpful in reaching his decision.[2]

The insurer's second argument is that "the failure of the employee to look

[2] The fact that the judge listed the vocational expert's labor market survey reports as exhibits does not clearly indicate he considered her actual testimony, where he neither listed Ms. Provini-Salas as a witness nor mentioned her testimony. Cf. Casello v. Executive Glass. Co., 21 Mass. Workers' Comp. Rep. ___ (October 23, 2007)(no recommittal necessary where a) decision identified vocational expert as witness and labor market survey report as exhibit; and b) review of transcript revealed surveillance videotape evidence was considered along with investigative reports listed as exhibits in decision); Armstrong v. Commercial Air Technology, 16 Mass. Workers' Comp. Rep. 100, 101 (2002)(where vocational testimony was introduced as a *written* report, and judge listed report as exhibit, no need for him to discuss it); and Andrews v. Southern Berkshire Janitorial Srvc., 16 Mass. Workers' Comp. Rep. 439, 443 (2002)(where judge listed labor market survey and curriculum vitae of vocational expert as exhibits, fact that he did not discuss vocational testimony does not necessarily lead to inference he did not consider it).

for work dooms her Section 34A claim." (Ins. br. 8.) The insurer acknowledges this board has retreated from a hard and fast requirement, based on Ballard's Case, 13 Mass. App. Ct. 1068 (1982), that the employee must demonstrate she has looked for work to support a claim for §§ 34 or 34A benefits.[3] It argues, however, that where expert vocational testimony indicates available jobs within the employee's medical restrictions, the employee must show she has made an effort to find suitable employment. We disagree.

Our recent decisions have clarified it is not part of the employee's burden of proof in §§ 34 and 34A claims to produce evidence of a search for work. In Giannakopoulos v. Boston College, 18 Mass. Workers' Comp. Rep. 241, 244-245 (2004), we held:

> While evidence of attempts to secure employment *can be pertinent* in particular cases, where an employee's medical limitations and transferable skills suggest the appropriateness of that inquiry (see McCann's Case, [286 Mass. 541, 544 (1934)]), we decline to implement a prerequisite to receipt of total incapacity benefits that the act does not. See LaFlam's Case, 355 Mass. 409, 411 (1969); Svedberg v. Roy & Gagnon Plumbing & Heating Co., 4 Mass. Workers' Comp. Rep. 160 (1990)(no outright duty of employee to seek work to prevail on claim for permanent and total incapacitiy benefits).

(Emphasis added).[4] See also, Sicaras v. Westfield State College, 19 Mass. Workers' Comp. Rep. 69, 73-74 (2005).

Most recently, in Ellison v. NPS Energy Srvcs., 20 Mass. Workers' Comp. Rep. 345 (2006), we stated, "[w]hile we believe the law does not require an injured worker to seek work, what is clear is that a judge *may* make findings relative to a worker's affirmative effort to do so." Id. at 348. (Emphasis added).

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[3] In Ballard's Case, supra, the court cited McCann's Case, supra at 544, which stated: "It was the duty of the employee to try to get other work."

[4] In so holding, we overruled our prior decision in White v. Town of Lanesboro, 13 Mass. Workers' Comp. Rep. 343 (1999), concluding White applied an overly broad interpretation of Ballard's Case, supra.

We interpreted Ballard's Case, supra, as requiring evidence of a job search only when an employee claims entitlement to total disability benefits based on the allegation that no one will hire him. Id. Finding support in the court's holding in Mulcahey's Case, 26 Mass. App. Ct. 1 (1988), we rejected any interpretation that the Ballard court imposed on employees a "general obligation to seek work as a prerequisite for §§ 34 or 34A eligibility." Ellison, supra at 348. This employee did not advance her § 34A claim on the premise that no one will hire her, and therefore she was not, as the insurer argues, required to produce evidence she had looked for work. Accordingly, we reject the insurer's argument that the employee's claim for § 34A permanent and total incapacity benefits must fail, as a matter of law, because she did not produce evidence of an unsuccessful job search.

We recommit this case for further findings consistent with this opinion.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **January 18, 2008**