COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 01245-96**

Kimberly Bowden	Employee
Roland Kelly, Inc.	Employer
Eastern Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy & Smith)

APPEARANCES
Richard H. Schwartz, Esq., for the employee
Peter Bancroft, Esq., for the insurer at hearing
James E. Rame, Esq., for the insurer on brief

WILSON, J. The insurer appeals from the decision of an administrative judge, who awarded ongoing § 34 weekly benefits for total, temporary incapacity caused by a January 18, 1996 industrial injury to the employee's lower back and coccyx. Because the decision lacks necessary findings, we recommit the case.

Kimberly Bowden was twenty-six years old at the time of hearing. A high school graduate, she completed one year of college toward an associates' degree in the executive secretarial field. In June 1990, she started work as a cashier/receptionist for Roland Kelly, Inc., an automobile dealership. She subsequently advanced to the cellular phone department and later became a warranty administrator. (Dec. 4.) It was while working in this last capacity that the employee suffered the industrial injury.

On January 18, 1996, the employee's heel caught in the threads of a staircase carpet, causing her to fall down five or six steps and land on her buttocks and lower back. The fall was witnessed by several employees. The employee was five months pregnant at the time. Following her accident, the employee worked for a few days until her back pain increased. She also experienced coccyx pain within a week of her fall. (Dec. 5.)

After giving birth in May 1996, she began treating for her pain symptoms with Dr. Mager, a chiropractor. That treatment ended in July 1997, when it was no longer authorized by the insurer because it exceeded the utilization review guidelines. See G.L. c. 152, § 13(3), and 452 C.M.R. § 6.06. She also treated with Dr. Dumas, starting in June 1997, and began a course of aquatic therapy through Dr. Burns. (Dec. 5.)

The insurer paid § 34 weekly benefits for total, temporary incapacity on a without prejudice basis from February 1, 1996 through June 27, 1996. (Insurer brief 1.) Thereafter, the employee filed a claim for additional weekly benefits, which the insurer rejected. Following a § 10A conference, the insurer was ordered to pay a closed period of § 34 weekly benefits and ongoing § 35 weekly benefits. Both parties appealed that order, giving rise to a hearing *de novo*.

Pursuant to § 11A, the employee was examined by Dr. Joel Saperstein on January 13, 1997. Dr. Saperstein diagnosed a back strain with coccydynia causally related to her industrial accident, and opined that she was able to return to work with very mild alterations in her work activity. (Dec. 6-7.) His report was admitted into evidence and accorded prima facie status. Due to a lapse of seven months between the § 11A examination and the start of the hearing, the judge declared the impartial report inadequate as to that period and allowed the parties to introduce additional medical evidence on that issue. Accordingly, the employee submitted the deposition testimony of Dr. Dumas. (Dec. 3.) In his October 20, 1997 deposition, Dr. Dumas concurred with the employee's own testimony at hearing that her pain symptoms had improved since she started treating with him in June 1997, but did not think she was capable of working as a secretary in the June to October 1997 period he had been treating her. (Dec. 7.)

In his decision, the administrative judge made this general finding: "I adopt the opinion of Dr. Dumas that as of October 8, 1997, the employee remained totally disabled from her work as a secretary." (Dec. 8.) He then ordered the insurer to pay weekly benefits under § 34 from June 26, 1996 and continuing. (Dec. 9.)

In its appeal the insurer first asserts that the decision fails to address the employee's medical limitations chronologically from the date of injury forward. General

Laws c. 152, § 11B, requires that the administrative judge set forth the issues in controversy, make a decision on each issue, and give a brief statement of the grounds for each decision. The nature and extent of incapacity during the entire period of the employee's claim were in controversy here. By declaring the § 11A medical report inadequate as to the employee's current medical condition, the judge recognized two distinct periods; the period prior to and including Dr. Saperstein's January 23, 1997 examination and the period after that examination. The judge's general finding on medical disability, however, falls short of addressing both periods. He states only that he adopts the opinion of Dr. Dumas that the employee remained totally disabled from her work as a secretary as of October 8, 1997, and is silent as to the period from June 28, 1996 through the impartial doctor's exam on January 13, 1997. On recommital, the judge should address and make findings on the employee's work related medical limitations chronologically from June 28, 1996, the date when the insurer terminated its voluntary payments without prejudice, and then decide the nature and extent of medical disability for the entire claim period.[1]

The insurer next argues that the decision lacks findings to show how the employee's physical limitations during the period of the claim combine with the non-medical factors to affect her earning incapacity. It is well-established that in deciding an employee's capacity for work, the degree of physical impairment is only one factor to be considered. An administrative judge must also consider the employee's age, education, background and training as well as external economic factors. Scheffler's Case, 419 Mass. 251, 256 (1994). In the instant case the impartial examiner opined that, as of January 13, 1997, the employee was able to return to her work "with very mild alterations in her work activities." He restricted her from prolonged sitting, lifting more than ten pounds and heavy (sic) squatting, and stated that she should be permitted to move about, stretch and get rest periods. (Dec.6; Exhibit 2.) The judge found the § 11A report fully adequate as to the information and opinions contained therein and accorded it *prima facie*

[1] The benefits voluntarily paid from the date of injury, January 18, 1996, through June 27, 1996 are not an issue.

status. (Dec. 3.) The judge then adopted Dr. Dumas's opinion and found the employee totally disabled "from work as a secretary" as of October 8, 1997, and awarded total, temporary incapacity benefits for the entire period claimed. (Dec. 8, 9.) We agree with the insurer's contention that the absence of findings to support the judge's award presents a twofold problem. First, the decision lacks any subsidiary findings to support the general finding of total incapacity for the entire period of the claim. Although partial medical impairment and total incapacity are not necessarily mutually exclusive, see Anderson v. Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65, 67 (1990), an analysis in the form of subsidiary findings that illustrate the effect of the work-related medical disability on the employee's ability to earn wages is necessary for the award to stand. "Conclusions unaccompanied by findings of facts as a basis to support them do not satisfy the requirement to make findings of fact." Hannon v. Gillette, 7 Mass. Workers' Comp. Rep. 287, 291 (1993), citing Judkins Case, 315 Mass. 226 (1943).

Second, the judge's general finding that the employee remained totally "disabled" from work as a secretary implies that the judge reached his conclusion that the employee is totally incapacitated by focusing solely on employee's pre-injury employment, rather than on her earning capacity in the open labor market. See Frennier's Case, 318 Mass. 635, 639 (1945). (Total incapacity is "such as to prevent the employee from engaging in any occupation and performing any work for compensation" that is "of a substantial and not merely trifling character[.]") (emphasis supplied).

On recommital the judge should make specific findings on both the degree of causally related medical impairment and the extent of any earning capacity on the open market for the entire claim period.

We recommit the case to the hearing judge for further findings consistent with this decision.

So ordered.

Sara Holmes Wilson
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: January 25, 1999

Suzanne E.K. Smith
Administrative Law Judge