COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF INDUSTRIAL ACCIDENTS

EMPLOYEE: Kimberly Wright
EMPLOYER: Energy Options
BOARD NO.: 03308290
INSURER: Commercial Union Ins. Co
EMPLOYER: Reed & Carnrick
BOARD NO.: 07778891
INSURER: Hartford Underwriters Ins.
EMPLOYER: Block Drug
INSURER: Lumbermens Mutual Casualty Co.
BOARD NO.: 01947794

REVIEWING BOARD DECISION
(Judges McCarthy,Wilson and Smith)
APPEARANCES
Charles R. Casartello, Jr., Esq., for the employee
Kimberly Davis Crear, Esq., for Commercial Union Insurance Co.
Christine M. Gill, Esq., for Hartford Underwriters Insurance Co.
Matthew F. King, Esq., for Lumbermens Mutual Casualty Co.

MCCARTHY, J. On August 13, 1982, while in his mid-twenties, Kimberly Wright sustained a serious low back injury while lifting in the course of his employment as a sales person for Energy Options. He had low back surgery the following month and was out of work for about ten months.

In September 1983, Wright began work as a sales representative for New England Sound and Communications. One year later, he moved to New World Energy and in June 1986, moved again, this time to Reed & Carnrick Pharmaceuticals. In two years he was promoted to national account manager. Prior to a second low back operation in January 1992, Mr. Wright had severe pain in the left leg and the low back and had "trouble getting around. . . . His pain was so severe that he was looking for anything that could offer him relief." (Dec. 10.)

The second surgery produced some improvement. Nevertheless, Wright continued to experience constant leg and back pain. He tried other modalities of treatment including steroid injections, acupuncture, massage and chiropractic treatment. (Dec. 11.) After 1992, Wright curtailed his level of physical activity. He made fewer appointments and retired earlier in the evening. Impatient and frustrated, the employee determined that he could not continue working for Reed & Carnrick as national account manager and left work permanently on March 6, 1994. (Dec. 11.) He has not worked since. His stipulated average weekly wage at that time was $1,504.93. (Dec. 4.)

After leaving work, Wright made a claim in the alternative alleging either, 1) a recurrence of incapacity flowing from the August 13, 1982 injury (and the application of § 35B), or, 2) a new injury on August 28, 1991, or, 3) a new injury on his last day of work (March 6, 1994). Following a §10A conference on the three alternative claims, an administrative judge ordered payment of temporary total incapacity benefits under § 34 to be paid by Commercial Union Insurance Company, the workers' compensation insurer on August 13, 1982. Cross appeals were taken and the case went back to the same judge for a formal evidentiary hearing. The hearing concluded, the judge filed his decision. He found that the recurrence of incapacity related back causally to the August 13, 1982 industrial injury. The judge found as a fact that the employee had a weekly earning capacity of $150.00. He determined that Taylor's Case, 44 Mass. App. Ct. 495 (1998), applied. This reduced Wright's maximum weekly § 35 benefit to seventy-five percent of $565.94 or $424.46. Because his conference order had directed payment of a higher weekly sum under § 34, the judge indicated that Commercial Union could recoup overpayments under the provisions of G.L. c. 152 § 11D(3). The employee appeals.

The issues on appeal cluster around the finding of an earning capacity of $150.00 per week. The employee contends that the administrative judge made errors of law and of fact as he reached this conclusion.

The determination of earning capacity is virtually always a question of fact. It requires a realistic appraisal of the medical effect of a physical injury on an individual by blending vocational factors with expert medical opinions. DiRusso's Case, 11 Mass. Workers' Comp. Rep. 217 (1997). Wright argues that in this process the judge made an incorrect finding of fact which is critical to his determination of earning capacity. (Employee brief 19.) We agree. Mr. Wright testified in great detail regarding the effect of pain on exertional functions such as sitting, standing, walking and lifting. He asserted that he could not spend more than fifteen minutes at a time on his computer and would sit at the computer for a total of ". . . maybe a half hour during the day, broken up." (Tr. II pg. 31)(emphasis added). The judge mischaracterized this testimony when he found as follows:

> The Employee described a "hobby" he has of researching chronic pain and back problems on the computer. He admitted that he sits at a computer about ½ of the day, spread out over the day. He denied being able to sit at the computer more than 15 minutes at a time. He said that sometimes he was on his knees. He said he could not do more because his pain affects his ability to concentrate. I find that this "hobby" manifests ability on the part of the Employee to do work more than trifling in nature. (emphasis added).

(Dec. 18.) This unsupported finding expressly underpins the factual finding that the employee's computer hobby manifests an ability "to do work more than trifling in nature." Id. It compels a reversal of the decision and a recommittal to the hearing judge for reconsideration and a decision anew on the pivotal issue of extent of incapacity. ' "Where crucial and material findings are made without evidentiary support, the error resulting therefrom

is not harmless and renders the ultimate decision both arbitrary and capricious.' " Caira v. Raytheon Corp., 12 Mass. Workers' Comp. Rep. 22, 25 (1998), quoting McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285, 288 (1997).

The employee also argues that an earning capacity of $150.00 per week is per se insubstantial and trivial given the stipulated average weekly wage of $1, 504.93. On the face of it an annual income of less than $8,000.00 seems trivial in comparison to the stipulated annual income of nearly $80,000.00. But the employee cites to no authority for his proposition that the finding of an earning capacity which is less than ten percent of the average weekly wage is trifling and insubstantial as a matter of law. Absent authority in the case law, and in the circumstances of this case, we are loath to intrude on the authority reposed in the administrative judge. See Mulcahey's Case, 26 Mass. App. Ct. 1 (1988).

The last argument advanced on appeal by the employee is that the judge ignored the overwhelming weight of the medical evidence and thus acted arbitrarily. We disagree. As the judge correctly pointed out in his decision, citing Galloway's Case, 354 Mass. 427 (1968); Silveira v. Bull Information Sys., 8 Mass. Workers' Comp. Rep. 136 (1994), he was free to credit the testimony of one medical expert over that of another. (Dec. 13.) Notwithstanding the employee's view of where the great weight of the expert medical opinion resided, the judge acted within the scope of his authority when he chose certain medical opinions over others.

We reverse the incapacity finding and recommit the case for a new decision consistent with this opinion. The judge is free, of course, to permit or request the introduction of further evidence if he determines that justice requires it.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Suzanne E.K. Smith
Administrative Law Judge

FILED: August 19, 1999