

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO.: 020254-04

Linda Fontes

Employee

Mercy Care Center

Employer

ACE American Insurance Co.

Insurer

REVIEWING BOARD DECISION

(Judges Horan, Costigan and McCarthy)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Jonathan Harris, Esq., for the employee at hearing

James N. Ellis, Esq., for the employee on appeal

Kimberly Davis Crear, Esq., for the insurer at hearing

Robert A. Riordan, Jr., Esq., for the insurer on appeal

HORAN, J. The employee appeals from a decision¹ awarding her § 35 partial incapacity benefits for a cervical spine injury² suffered in a work-related assault on July 5, 2004. We recommit the case.

The insurer paid § 34 benefits without prejudice from the date of injury until May 13, 2005, when it terminated payments. The employee filed a claim seeking § 34 benefits from May 13, 2005 to date and continuing. (Employee Ex. 1.) The insurer denied the claim. At conference, the employee was permitted to join a claim alleging her industrial accident caused an inguinal hernia injury, requiring surgery. The insurer denied liability for the employee's hernia and raised, *inter alia*, the issues of disability and causation with respect to both the employee's accepted cervical injury, and her unaccepted hernia condition. (Ins. Ex. 1.)

¹ A second "corrected" decision, filed subsequent to the original one. See discussion, infra.

² The employee "underwent cervical fusion and was left with moderate physical restrictions resulting directly from that work injury." (Dec. 5.)

At conference the judge awarded the employee § 35 benefits from May 13, 2006 to date and continuing. Cross-appeals brought the claim to an evidentiary hearing. In a decision filed on December 20, 2007, the judge found that the employee's hernia was unrelated to the assault at work.³ The judge awarded the employee § 35 benefits from May 13, 2005 to date and continuing, based on an earning capacity of \$270 per week, reasoning that:

The continuing restrictions resulting from the cervical surgery will clearly keep Ms. Fontes' [sic] from doing her work as a certified nurses [sic] assistant. However, they are not, in themselves, completely disabling from all work in the open labor market. Looking only at these restrictions, and applying them to Ms. Fontes' education and background, it seems clear she is capable of light duty retail or clerical work of an entry level nature, consistent with a minimum wage earning capacity.

(Dec. 5.) In his decision, the judge also wrote "the conference order is affirmed."⁴ (Dec. 6.) In a "corrected" decision filed on January 30, 2008, the judge changed his decision in one material respect, awarding § 35 benefits from May 13, 2006⁵ to date and continuing, instead of May 13, 2005.

The employee raises one issue on appeal, arguing the "corrected" decision awarding benefits as of May 13, 2006, instead of May 13, 2005, is arbitrary and capricious. We agree, as the decision lacks any subsidiary findings supportive of the date chosen for the commencement of § 35 benefits. See, e.g., Rose v. Home Goods, 21 Mass. Workers' Comp. Rep. 1 (2007). We do not assay an opinion as to whether the May 13, 2006 date has a reasoned foundation in the evidence adduced at hearing. What is clear is that the decision, as it stands, sheds no light on why the

³ The employee does not challenge this finding.

⁴ Given the de novo nature of the hearing, affirmance of the § 10A conference order is improper and inadequate. The hearing decision must contain subsidiary findings of fact, anchored in the evidence offered at hearing, which support the judge's general findings.

⁵ As noted, this was the date the judge used in his conference order.

award of benefits should start on May 13, 2006.⁶ Therefore, recommitment is appropriate. See Joppas v. Rand-Whitney, 9 Mass. Workers' Comp. Rep. 396, 397 (1995)(inadequate incapacity findings, as to extent and duration, hinder appellate review and require recommitment).

Accordingly, we recommit the case for further findings regarding the commencement of § 35 benefits.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: **July 30, 2009**

⁶ We are perplexed why the judge decomposed his original decision, which awarded benefits from the date the insurer had terminated them. (Employee Ex. 1.) Because the judge took the affirmative step of issuing a "corrected" decision, we cannot attribute the date change to a scrivener's error.