

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 044493-02

Marco Perez
Work Inc.
Arrow Mutual Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Costigan)

APPEARANCES
Maryanne R. Masefield, Esq., for the employee
John A. Morrissey, Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision in which an administrative judge awarded the employee various closed periods of total and partial incapacity benefits, followed by ongoing § 34 benefits. Because the judge assigned earning capacities without proper subsidiary findings and improperly relied upon an extraneous medical report to award ongoing §34 benefits, we recommit the case for further findings of fact.

The employee injured his right ankle at work on October 30, 2002. He returned to modified duty five days later, and worked on and off for the next several weeks until he stopped working after the week of November 30, 2002. (Dec. 46-47.) The employee returned to part-time work at a different employer in July 2003, and worked with intermittent periods of total incapacity due to three surgeries. He did not return to work after his third surgery. (Dec. 48, 52-54.)

At the § 11A medical examination of the employee on January 4, 2005, the impartial physician diagnosed a right ankle sprain with ligamentous injury, causally related to the 2002 work injury. He opined that the three subsequent surgeries were reasonable and necessary treatment for the injury. The doctor considered the employee capable of sedentary work. As the doctor did not comment on the extent of disability prior to his examination of the employee, the judge allowed additional medical evidence

for that so-called “gap” period of disputed incapacity. (Dec. 48-49.) To address the arguments presented on appeal, we need not recount those medical opinions. (Dec. 49-51.)

The judge concluded that the employee was partially incapacitated due to his work-related ankle injury, with varying earning capacities for ten different closed periods from October 31, 2002 until July 14, 2004, with a causally related ongoing total incapacity thereafter. (Dec. 52-54.) The judge based his conclusions on the credible testimony of the employee and the medical opinions of his treating physician, Dr. Christopher Locke. (Dec. 52.)

The insurer argues that the judge erred by simply assigning the employee earning capacities that reflected his actual weekly earnings, without subsidiary findings to support the various amounts.¹ We agree. Actual earnings are but one factor in assessing earning capacity under § 35D² and may establish the floor – not the ceiling – for the assignment of that figure. While it is certainly conceivable that there are vocational and/or medical reasons for the weekly fluctuations in the employee’s earning capacity as found by the judge, none appear in the decision. Recommittal for subsidiary findings of fact to address this deficiency is appropriate. The decision before us simply does not fulfill the legal requirements of G. L. c. 152, § 11B, namely, “a brief statement of the grounds for each .

¹ Although this is not made clear in the decision, the employee does not dispute that the judge did, in fact, simply award § 35 benefits parallel to actual earnings in each such period of incapacity.

² General Laws c. 152, § 35D, provides, in pertinent part:

For the purposes of sections thirty-four, thirty-four A and thirty-five, the weekly wage the employee is capable of earning, if any, after the injury, shall be the *greatest* of the following: --

(1) The actual earnings of the employee during each week.

. . .

(4) The earnings that the employee is capable of earning.

(Emphasis added.)

. . decision” on each issue in controversy. See Scheffler’s Case, 419 Mass. 251, 258 (1994)(decisions must have “adequate evidentiary support and disclos[e] reasoned decision making within the particular requirements governing a workers’ compensation dispute”).

The judge also erred in the handling of the so-called “gap” medical evidence in this case. Additional medical evidence was allowed to address disability during the period prior to the 2005 § 11A medical examination. However, the judge left the impartial report as the exclusive prima facie medical evidence for the continuing disability; the § 11A medical evidence was *not* determined to be inadequate for the disputed period of disability ongoing from the date of the examination. Nonetheless, the judge adopted the medical opinion of Christopher Locke, M.D., the employee’s treating doctor, to support his award of *all* benefits, including the ongoing order of § 34. This was error. “ ‘Gap’ medicals, when allowed for that reason of providing evidence in the retrospective pre-examination period, may not then be used for other medical issues in the case, such as *present* disability [] – as in this case . . .” Mims v. M.B.T.A., 18 Mass. Workers’ Comp. Rep. 96, 100 (2004)(emphasis in original). See also Gulino v. General Elec. Co., 15 Mass. Workers’ comp. Rep. 378, 379-380 (2001)(same); Behre v. General Elec. Co., 17 Mass. Workers’ Comp. Rep. 273, 277 (2003)(same). Because the “gap” medicals could not be used to address present disability, the award of ongoing § 34 benefits from the date of the impartial examination in 2005 is without support in the medical evidence. The judge must revisit this period of incapacity on recommittal and make further findings of fact, based on the impartial medical evidence.

Accordingly, we recommit the case for further findings of fact consistent with this opinion.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

Marco Perez
Board No. 044493-02

William A. McCarthy
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Filed: **May 5, 2006**