COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 04075-01**

Margaret Beverly	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Carroll and Maze-Rothstein)

APPEARANCES

Michael J. Powell, Jr., Esq., for the employee
Mark A. Teehan, Esq., for the self-insurer

MCCARTHY, J. An unusual twist in the self-insurer's appeal of a decision awarding the employee § 35 benefits is the employee's agreement that the case needs to be recommitted to the administrative judge for further findings on how it was that he concluded the employee could earn $227.98 per week. Not wanting to stand in the way of such a meeting of the minds, we add our voice to the consensus for recommittal. However, we also agree with the self-insurer that the decision has other problems that the judge must tackle on recommittal.

The employee, Margaret Beverly, then age fifty-two, had driven a bus for the M.B.T.A. for more than five years when, on February 2, 2001, she collided with another M.B.T.A. bus stopped in front of her. The resulting damage to the bus was significant, with the dashboard, fare box and steering wheel caving in on and trapping her until fire and EMT workers were able to assist her. (Dec. 4.) The employee was taken to New England Medical Center, where she was examined and released. She stayed out of work for a couple of days, and saw her primary care physician, Dr. Herbert Dreyer, about a week after the accident. Dr. Dreyer prescribed pain medication and muscle relaxants and as of February 7, 2001, disabled her from all work as a result of injuries to her neck

sustained in the accident. On February 5, 2001, however, the employee was examined by an M.B.T.A. physician and then talked with her supervisor on February 6, 2001. (Dec. 5.) The employee stated to both that she was ready and able to go back to work. Her supervisor told her that she would have to wait for the results of her post-accident drug and alcohol test and would also need to be interviewed about the accident before she could return to work. On February 7, 2001, the employee was interviewed regarding the accident, and was suspended for thirty days pending discharge. (Dec. 5.)

The employee continued treating with Dr. Dreyer for pains in her knee, arm numbness, difficulty sleeping and nightmares. (Dec. 6.) The self-insurer accepted liability for the accident. (Dec. 2.) The employee claimed § 35 partial incapacity benefits ongoing from February 14, 2001. As a result of the § 10A conference, the judge ordered payment of § 35 benefits using a weekly earning capacity of $227.98. (Dec. 2.) The employee underwent a § 11A medical examination. The § 11A physician was unable to render an opinion on any of the required categories of § 11A(2): diagnosis, causal relationship, extent of disability and medical end result. As a result, the judge declared the impartial report inadequate, and the parties introduced the medical opinions of their own expert physicians. (Dec. 6-7, 9.) Dr. Dreyer, for the employee, opined that the employee suffered from cervical strain with post-traumatic stress reactions with pain in her neck, arm and knee. He restricted the employee from returning to work as a bus driver and causally related her symptoms to the bus accident. (Dec. 7.) The self-insurer's expert physician opined that the employee's medical problems were not causally related to her bus accident and that she could return to her former employment. (Dec. 8.) The self-insurer also introduced testimony from a vocational expert, the employee's supervisor, and the manager of medical services at the M.B.T.A. (Dec. 1, 8.) The judge in his decision awarded the employee ongoing § 35 benefits at the same rate as he ordered following the § 10A conference. (Dec. 10.)

The self-insurer argues that the judge failed to make findings on whose testimony he credited and adopted, which medical opinion he adopted, and how he viewed the inconsistencies that the employee's testimony presented regarding her post-accident

medical status. We agree. Of particular note is how the judge viewed the employee's admissions, made just a few days after the accident, that she was not injured. (Dec. 5.) The judge's findings on those admissions are inconsistent with his conclusion on incapacity, as far as we can tell. "Conclusions unaccompanied by findings of fact as a basis to support them do not satisfy the requirement to make findings of fact." Hannon v. Gillette Co., 7 Mass. Workers' Comp. Rep. 287, 291 (1993); Judkins' Case, 315 Mass. 226 (1943). In addition, the judge needs to clarify his findings on the medical testimony that he relied upon in his incapacity assessment.

> The judge is free to credit the testimony of one medical expert over another, Wright v. Energy Options, 13 Mass. Workers' Comp. Rep. 263, 266 (1999), but we should be able to tell on what medical evidence, if any, he based his award. Allen, [v. Luciano Refrigeration, 15 Mass. Workers' Comp. Rep. 346 (2001)]. His general finding on extent of incapacity "must emerge clearly from the matrix of his subsidiary findings." Crowell [v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993)]. "Where we cannot discern the reasoning that supports the judge's award of compensation benefits, and where the conclusion reached by the judge on the extent of incapacity does not rationally flow from his subsidiary findings of fact on the lay and medical evidence, we must recommit the case." Cipoletta, [v. Metropolitan Dist. Comm'n, 12 Mass. Workers' Comp. Rep. 206, 208 (1998)].

Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 46 (2002). The employee avers that the judge's conclusion can only be read to mean that he credited the testimony – both medical and lay – that supports the award, and discredited that which does not. However, there is a limit to which we will indulge such a conjectural read of a decision, especially in light of the language of § 11 C which invites the reviewing board " … when appropriate [to] recommit a case before it to an administrative judge for further findings of fact."

Moreover, while there is a recounting of the employee's work history in the decision, (Dec. 4), there is no vocational assessment of the employee to support the judge's assignment of the $227.98 weekly earning capacity. "[W]e are hard pressed to accomplish our review when there is only token reference to earning capacity assessment." Saccone v. Department of Pub. Health, 13 Mass. Workers' Comp. Rep.

280, 283 (1999). "[T]he decision should briefly analyze how the medical and vocational elements in combination form a foundation that supports the ultimate conclusion on extent of incapacity." Id. "On remand, the judge should set forth [his] analysis of the work-related medical condition and its impact on ability to earn in the context of the employee's education, training, age and experience." Peters v. City of Salem Cemetery Dept., 11 Mass. Workers' Comp. Rep. 55, 58 (1997). See Scheffler's Case, 419 Mass. 251, 256 (1994); Frennier's Case, 318 Mass. 635, 639 (1945).

Thus, while we agree with the parties that recommittal is appropriate for the judge to perform a vocational analysis pursuant to Scheffler, supra, we think that the judge must also clarify his reasoning as to what testimony he relied on to support his conclusions. Mere recitations of testimony – e.g., that the employee "claims that certain daily activities like opening blinds or rolling over on one side of her arm further aggravate the pain" (Dec. 6) – do not suffice. Evers v. City of Boston, 11 Mass. Workers' Comp. Rep. 636, 638 (1996).

Accordingly, we recommit the case for further findings.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **December 24, 2003**

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge