

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO.: 044295-04

Marie Cangemi
Cumberland Farms
Insurance Co. of State of Pennsylvania

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, McCarthy and Horan)

APPEARANCES

Donald W. Blakesley, Esq., for the employee
John F. Burke, Jr., Esq., for the insurer

FABRICANT, J. The insurer appeals from a decision in which the administrative judge awarded the employee ongoing partial incapacity benefits for an accepted work injury to her back. The insurer argues, among other issues, that the judge committed prejudicial error in finding that a discogram was recommended when, in fact, it had already been performed at the time of the issuance of the decision. While we agree that the finding is incorrect, we consider the error harmless for the reasons that follow.

The employee injured her back in a motor vehicle accident while working on October 3, 2004. She continued to work lighter duty until December 7, 2004, when she was terminated for reasons unrelated to her injury. She filed this claim for § 34 total incapacity benefits. Based on his examination of the employee, the impartial physician opined that she suffered from cervical and lumbar strains causally related to her work injury, and that she should not lift more than twenty-five to thirty pounds as a result. (Dec. 1-2.) The judge concluded that the employee was partially incapacitated, and assigned a weekly earning capacity of \$400.00, reflecting her inability to lift heavier items. (Dec. 2-3.)

On appeal, the insurer argues the judge's finding that "[a] further discogram is now recommended," (Dec. 2), is arbitrary and capricious, because the procedure had been performed by the time the decision was filed. As there is no dispute that this finding is erroneous, we therefore need only assess the extent of any prejudice it may have caused.

The insurer acknowledges that when the impartial physician was confronted with the results of the discogram at his deposition, he did not change his opinions regarding the employee's twenty-five to thirty pound lifting restriction, or her unfitness for surgery. (Dep. 8-9; Ins. Brief, 8-9) Moreover, the judge relied on the impartial physician's heavy lifting restrictions in assigning an earning capacity, contrary to the employee's claim of total incapacity. We therefore see no reason to recommit the case for the judge to reassess the impartial physician's unchanged opinions, articulated after the discogram was performed.

The decision is affirmed.¹ Pursuant to § 13A(6), employee's counsel is awarded a fee of \$1,458.01.

So ordered.

Bernard W. Fabricant
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

Filed : June 6, 2008

¹ We summarily affirm the decision as to the insurer's other arguments on appeal.