COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 054232-96 056323-98**

Mary Shade Miranda	Employee
Olympus Healthcare Group, Inc.	Employer
Life Care Center of West Bridgewater	Employer
Wausau Insurance Company	Insurer
Insurance Company of the State of Pennsylvania	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Maze-Rothstein and McCarthy)

APPEARANCES
Ronald W. Stoia, Esq., for the employee
Gerald Pugsley, Esq., for Wausau Insurance Co. at hearing
Dennis M. Maher, Esq., for Wausau Insurance Co. on appeal
Joseph M. Spinale, Esq., for Insurance Co. of the State of PA

COSTIGAN, J. The employee and the second insurer in this successive insurer case cross-appeal from an administrative judge's decision awarding a closed period of § 34 total incapacity benefits and ongoing § 35 partial incapacity benefits for a 1998 aggravation injury. The employee claims she remains totally incapacitated and entitled to § 34 benefits. We agree that the administrative judge's subsidiary findings of fact on the extent of incapacity and the assigned earning capacity are lacking, and recommit the case as a result. The second insurer argues that the judge erred in finding a new injury for which it was liable. We disagree, and summarily affirm the decision with respect to that liability issue.

The employee, who was forty-eight years old at the time of the hearing, was educated through high school and two years of nursing school. She had worked as a licensed practical nurse (LPN) at Olympus Healthcare for ten years prior to September 25, 1996, when she injured her low back trying to move a patient. Wausau, the first insurer in this case, paid compensation benefits for the injury. In March 1998, the employee began light duty work as an LPN with a new employer, Life Care Center of

West Bridgewater. (Dec. 3.) On April 14, 1998, the employee's claim against Wausau was resolved by a § 48 lump sum settlement agreement. (Dec. 2-3.) On July 14, 1998, the employee underwent a lumbar discectomy; she required further surgical repair of a defect in the dura some ten days later. (Dec. 5.)

On November 21, 1998, having returned to light duty work at Life Care, the employee was walking a patient from the shower with another nurse, when the patient fell. Even though she let go immediately, while the other nurse tended to the patient, the employee felt a "searing hot feeling" in her low back. The employee continued to work on light duty until December, but was released from her job, as the employer needed a nurse who could work full duty. The employee has not worked since that time, claiming ongoing severe back pain. (Dec. 3.)

The employee claimed medical benefits against Wausau, the insurer covering the 1996 injury,[1] and ongoing § 34 and medical benefits against the Insurance Company of the State of PA, the insurer covering the 1998 incident. At separate conferences, the administrative judge ordered that Wausau pay medical benefits up to the date of the 1998 alleged injury, but she denied the employee's claim against the second insurer. Both the employee and Wausau appealed to full evidentiary hearings. The two appeals were joined for one de novo hearing. (Dec. 2.)

The employee underwent a § 11A impartial medical examination on June 22, 2000. (Dec. 3.) The impartial physician diagnosed the employee with "chronic low back pain and left leg pain following the excision of a herniated lumbar disc." (Dec. 6; Statutory Ex. 1, 5-6.) He opined that the November 1998 incident "aggravated her underlying condition but did not result in a significant new injury." (Dec. 6; Statutory Ex. 1, 6.) The impartial physician restricted the employee from returning to regular full time work as a nurse, but opined that she was capable of performing sedentary or light

[1] The employee's April 1998 lump sum settlement with Wausau precluded a claim for weekly incapacity benefits, but because liability for the 1996 injury had been established, her rights to future medical benefits remained open. See G. L. c. 152, § 48(2).

duty work without repetitive bending, stooping, squatting, twisting or lifting. (Dec. 6-7; Statutory Ex. 1, 6.) No party moved for additional medical evidence. (Dec. 7.)

The judge adopted the opinion of the impartial physician as to aggravation, and concluded that a new injury under the Act had occurred on November 21, 1998. See Rock's Case, 323 Mass. 428, 429 (1948) (any contribution of second industrial injury to disability, even to the slightest extent, triggers liability on the part of the insurer on the risk at that time). (Dec. 7-8.) The judge ordered the second insurer to pay the employee weekly § 34 temporary total incapacity benefits of $316.80 from December 1, 1998 through June 21, 2000. From and after June 22, 2000, the date of the § 11A impartial medical examination, the insurer was ordered to pay weekly § 35 partial incapacity benefits of $136.80, based on the employee's $528.00 pre-injury average weekly wage and an assigned earning capacity of $300.00. (Dec. 3, 9.) The judge also ordered the second insurer to pay "ongoing and outstanding reasonable and necessary medical expenses for the diagnosed condition" under §§ 13 and 30. The judge denied and dismissed the employee's claim against Wausau.[2] (Dec. 9.)

The employee's appeal challenges the judge's assignment of a $300.00 earning capacity as of the June 22, 2000 date of the impartial examination. That challenge has merit, at least because the judge failed to make sufficent subsidiary findings of fact to explain the assignment and amount of the earning capacity, and to allow us " 'to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found.' " Lockheart v. Wakefield Eng'g, 16 Mass. Workers' Comp. Rep. 302, 304 (2002), quoting Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993); G. L. c. 152, §§ 11B, 11C.

Given the judge's finding that the employee was totally incapacitated on June 21, 2000, we note first that there is no evidence of a *change* in the employee's physical

[2] Although technically incorrect in light of Wausau's appeal of the conference order against it, we take the judge's decision to mean that the medical benefits for treatment prior to November 21, 1998 -- which the judge, at conference, had ordered Wausau to pay -- remained unaffected by the hearing decision. The employee's claim against Wausau at hearing was for medical benefits from and after November 21, 1998. (Tr. 5.)

condition on the date of the § 11A exam -- particularly no medical evidence -- for the simple reason that there is *no* medical evidence addressing the extent of the employee's disability prior to that date.[3] Moreover, it is clear that the impartial physician's opinion as to the employee's capacity for work spoke only to her condition on June 22, 2000:

> *Based on today's exam*, it is my opinion that the patient *is* not suitable for return to regular full time duty as a nurse, but *would be* capable of performing sedentary or light duty work with no repetitive bending, stooping, squatting, twisting, lifting or heavy lifting.

(Statutory Ex. 1, 6; emphasis added.) Against the backdrop of that expert opinion as to medical disability, the administrative judge stated that "[s]ince the parties have not offered evidence on the issue of earning capacity, I must rely on my knowledge and eleven years' experience as an Administrative Judge in making that determination." (Dec. 9.) "[T]aking into account the employee's age, education and experience," the judge concluded that the employee was able to earn $300.00 per week from and after June 22, 2000. (Id.)

While it is true that " 'in the absence of testimony as to the earning capacity of the employee, the members of the board are entitled to use their own judgment and knowledge in determining that question,' " Mulcahey's Case, 26 Mass. App. Ct. 1, 3

[3] It is axiomatic that the employee bore the burden of proving every element of her claim, including incapacity. Valdes v. Tewksbury Hosp., 16 Mass. Workers' Comp. Rep. 196, 198 (2002), citing Ginley's Case, 244 Mass. 346, 347-348 (1923). Moreover, the issues of causation and medical disability presented by her claims against successive insurers required expert medical opinion. See Josi's Case, 324 Mass. 415 (1949); Goodsell v. Nashoba Painters, Inc., 16 Mass. Workers' Comp. Rep. 104, 107 (2002). There were no § 11A motions for additional medical evidence to address the period of claimed total disability prior to the impartial doctor's examination date opinion. See George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22 (1996) (propriety of § 11A(2) motion allowance where gap in medical evidence). Nor did the administrative judge, on her own initiative, authorize the submission of additional medical testimony, as permitted by § 11A(2). Thus, the absence of medical evidence as to the total incapacity claimed would otherwise require us to vacate the judge's award of § 34 benefits from December 1, 1998 through June 21, 2000. The second insurer, however, has not argued that the award was erroneous as to the *extent* of incapacity, only that it was not liable to pay the award. Therefore, we do not review that award, notwithstanding the judge's finding -- in direct contradiction to her award -- of "no medical evidence to support the employee's claim for total disability benefits from *April 1, 1999 and continuing.*" (Dec. 9; emphasis added.)

(1988), quoting O'Reilly's Case, 265 Mass. 456, 458 (1929), the judge's findings must be sufficiently specific so that we can discern the logic for her conclusions. Scholl v. Fixture Perfect, 14 Mass. Workers' Comp. Rep. 484, 488 (2000); Rackliffe v. Sedgwick James, 12 Mass. Workers' Comp. Rep. 327, 331 (1998). "It is not enough that the judge merely incant the vocational factors enunciated in Frennier's Case, 318 Mass. 635, 639 (1945), and Scheffler's Case, 419 Mass. 251, 256 (1994). The judge must make findings addressing these factors." Griffin v. State Lottery Comm'n, 14 Mass. Workers' Comp. Rep. 347, 349 (2000). See Ballard's Case, 13 Mass. App. Ct. 1068 (1982); Vantsouris v. New England Baptist Hosp., 15 Mass. Workers' Comp. Rep. 238, 242 (2001) (judge must explain her findings and reasoning in assigning earning capacity with sufficient specificity to ensure proper appellate review). The judge's findings here do not suffice.

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

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **March 11, 2003**