COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 056618-96 057001-96**

Matthew D. Bahr	Employee
New England Patriots Football Club, Inc.	Employer
Travelers Insurance Company	Insurer
Liberty Mutual Insurance Company	Insurer

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

APPEARANCES
Brian C. Cloherty, Esq., for the employee
James Garretson, Esq., for Travelers Insurance Company
Dennis Maher, Esq., for Liberty Mutual Insurance Company

MAZE-ROTHSTEIN, J. The employee appeals a decision determining that he was entitled to only G. L. c. 152, § 30, reasonable and necessary medical benefits. He claims error in the failure to award G. L. c. 152, § 35, partial incapacity benefits and § 14(1) penalties. We agreed reverse and recommit the case for further findings. G. L. c. 152, § 11C.

Matthew Bahr, age forty-three at hearing, is married and the father of three minor children. (Dec. 3.) He was drafted by the National Football League in 1979 while a student at Pennsylvania State University. He played eight years with the Cleveland Browns, one year with the Pittsburgh Steelers and two years with the New York Giants prior to becoming a place kicker for the employer, the New England Patriots. He played for three additional years until let go on August 20, 1996. (Dec. 3, 5.)

Mr. Bahr sustained a number of orthopedic and head injuries while a professional football player. In 1990 and 1993 he suffered concussions, low back hyperextensions, rib and hand fractures as well as a right thigh tear. In 1991, he had right recurrent sprains of

both ankles and rotator cuff and shoulder injuries. (Dec. 3.) While with the Patriots, Mr. Bahr was hit numerous times in the head leading progressively to headaches, dizziness, concentration deficits, and an inability to tolerate light. His football career ended on August 20, 1996, with a termination for unsatisfactory performance. (Dec. 4, 5.)[1] He tried out unsuccessfully with the Philadelphia Eagles. Ultimately, Mr. Bahr was forced to spend a good deal of his time in treatment for his constant dizziness, chronic headaches, intolerance to light and diminution of concentration and memory. (Dec. 5.)

The employee filed his claim for benefits and the matter was conferenced before an administrative judge. The judge issued orders denying benefits. The employee sought a hearing de novo. Id.

A § 11A physician with a specialty in behavioral neurology examined the employee on April 9, 1999. He diagnosed a migraine disorder and elements of depression. (Dec. 7.)[2] At deposition, the doctor further clarified his diagnosis explaining that post-concussive syndrome is a disorder where, after a blow to the head, the patient has persistent problems with some combination of headaches and diminished concentration and memory. These were the very complaints that the employee had. The medical examiner was of the opinion that specific incidents with the employer aggravated these conditions and clearly contributed to his current complaints. (Dec. 7, 8.) The judge adopted the § 11A physician's diagnosis but rejected his opinion as to extent of medical disability. The judge found that the employee's orthopedic injuries to his ankle and back,

[1] On July 28, 1996, the employee was asked to sign a form summarizing his medical condition and assuming the risk of continued playing. (Dec. 4, 5.) Then, on August 20, 1996, the employer gave notice of termination stating that his NFL Player Contract for the 1996 season was terminated because, in the judgement of the club, his skill or performance had been unsatisfactory as compared with that of other players competing for positions on the club's roster. (Dec. 5.)

[2] The parties were permitted to submit additional medical evidence to address the employee's orthopedic injuries, since the § 11A examiner was a neurologist. (Dec. 2.) See G. L. c. 152, § 11A(2).

and the likelihood of worsening his neurological symptoms, do not hamper his employability except as to professional football. (Dec. 10.)

The judge awarded only § 30 medical benefits, indicating that she had insufficient information to determine whether the employee's earning capacity is less than his average weekly wage. (Dec. 10.) She also found that "under the circumstances of this case, including the written report of the impartial medical examiner, I do not think the insurer defended the claim without reasonable grounds." (Dec. 10, 11.)

The employee raises two issues on appeal. First, he asserts that the judge erred in failing to determine an earning capacity. (Employee br. 9-11.) Next, the employee argues that the conclusory denial of the employee's claim for § 14(1)[3] penalties and costs was legally deficient. (Employee br. 11-14.) We agree recommittal for further findings.

The judge provided the following rationale for her inability to establish an earning capacity for the emplyee: There was "insufficient information to determine that the employee's earning capacity is less than his average weekly wage and that he has shown himself capable of being employed in broadcasting and as a motivational speaker, has obvious education and skills, which, with the cachet of a former professional football player, are likely to give him a substantial earning capacity." Yet the employee's uncontroverted testimony throws into question how much he actually reaped from these

[3] General Laws c. 152, § 14(1), as amended by St. 1991, c. 398, §§ 36 to 38, reads in pertinent part:

> If any administrative judge or administrative law judge determines that any proceedings have been brought, prosecuted, or defended by an insurer without reasonable grounds:
> (a) the whole cost of the proceedings shall be assessed upon the insurer; and
> (b) if a subsequent order requires that additional compensation be paid, a penalty of double back benefits of such amount shall be paid by the insurer to the employee, and such penalty shall not be included in any formula utilized to establish premium rates for workers' compensation insurance.
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> If an administrative judge or administrative law judge determines that any proceedings have been brought or defended by an employer or counsel without reasonable grounds, the whole cost of the proceedings shall be assessed against the employee or counsel, whomever is responsible.

valuable sounding skills on the open job market.[4] Given the evidence of actual earnings we cannot discern the basis for the judge to, in effect, assign Mr. Bahr an earning capacity equal to his stipulated, (Tr. 4), pre-injury wages of $ 5,000.00 per week by denying his claim for weekly partial incapacity benefits.

Section 35D(1) through (4), as amended by St. 1991, c. 398, § 66, itself provides the methodology to calculate post-injury earning capacity, directing judges to use the greatest of the amount of an employee's actual earnings, § 35D(1), or the amount the employee is capable of earning with a reasonable use of all his faculties, mental and physical, § 35D(4).[5] See G. L. c. 152, § 35D; France v. Door Eng'g Co. & Servs. Unlimited, 12 Mass. Workers' Comp. Rep. 142, 145-146 (1998). An accurate §35D(4) analysis requires specific findings, based on the evidence submitted, as to the actual amount the employee is capable of earning post-injury. See Kelley v. General Elec. Co., 12 Mass. Workers' Comp. Rep. 476 (1998). The decision before us for review lacks sufficient findings to show that the employee is able to earn $5,000 per week since his termination from employment.

The employee's second argument is that the judge erred in not making any findings on the issue of the employee's claim for § 14(1) costs and penalty. The

[4] The employee attested that he has been employed by CBS as a radio broadcaster doing post game analysis for the Steelers, beginning in 1997 and continued with it at the time of hearing, up to and including the 1999 season. (Tr. 31.) He worked Sundays for eight hours and a couple of hours during the week earning $150.00 a week for the season. Id. The employee further testified that he had signed a contract with Health South Corp. to make public appearances and was hopeful to earn $75,000 annually, if they called him to make ten appearances. However, as of the date of hearing, no such calls had come and no such appearances had been made. (Tr. 61.) The employee also testified that since his termination from the Patriots he has been sporadically employed as a coach for the Jets earning $1,000 or $2,000, and that he was not able to return to any engineering work, although educated in this area, due to his loss of concentration as a result of the injuries. (Tr. 34.)

[5] General Laws c. 152, § 35D(2), and (3), are not pertinent to this case. Subsection (2) addresses the earnings that the employee is capable of earning in the job the employee held at the time of injury, provided, however, that such job has been made available to the employee and he is capable of performing it. G. L. c. 152, § 35D(2). Subsection (3) speaks to any "particular suitable job" also offered by the employer. G. L. c. 152, § 35D(3). The record contains no evidence as to any such offer from the employer.

employee contends that despite the admission of substantial evidence at hearing, the judge neither cited the underlying facts regarding the second insurer, Liberty's conduct in denying the employee's claim nor gave any explanation for her conclusion. (Employee br. 11.) We agree.

Where the findings of the judge are such that we are unable to determine if correct principles of law have been applied, recommittal is appropriate. Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 21 (1999); Antoine v. Pryotector, 7 Mass. Workers' Comp. Rep. 337, 341 (1993). Additionally, § 14(1) establishes a "reasonable grounds" standard for defense of a proceeding. In Gonsalves v. IGS Store Fixtures, Inc., 13 Mass. Workers' Comp. Rep. 21 (1999), we held that reasonable grounds should be read with a view toward its traditional meaning, with a cautious and prudent person standard applied to the offending party's actions or inactions. We framed the question as, " 'would the facts available to the [offending party] at the moment . . . warrant a [person] of reasonable caution in the belief that the action taken was appropriate?' " Id. at 24 quoting, Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

Here, the judge makes the following conclusory statement: "under the circumstances of this case, including the written report of the impartial medical examiner, I do not think the insurer defended the claim without reasonable grounds." (Dec. 11.) This statement is silent as to how and why the cautious and prudent person standard has been met, thereby, frustrating proper appellate review. Ballard's Case, 13 Mass. App. Ct. 1068, 1069 (1982)(findings should be set forth with such clarity as to enable reviewing body to determine correct principles of law have been applied to facts).[6]

Accordingly, we reverse the decision and recommit the case for findings consistent herewith.

So ordered.

[6] At a minimum, the judge on recommittal must explain her oblique reference to the "circumstances of the case" and what it is about the § 11A report that prompted her to deny the § 14(1) penalty. (Dec. 11.)

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Susan Maze-Rothstein
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: June 14, 2002

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Sara Holmes Wilson
Administrative Law Judge