COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 042040-02**

Matthew Ormonde	Employee
Choice One Communications	Employer
Federal Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Fabricant and Koziol)

This case was heard by Administrative Judge Heffernan.

APPEARANCES
Michael A. Torrisi, Esq., for the employee
Thomas F. Finn, Esq., for the insurer

COSTIGAN, J. The insurer's appeal challenges the administrative judge's decision on three fronts: 1) it is not supported by adequate subsidiary findings of fact; 2) the award of § 34 total incapacity benefits is not supported by the medical evidence; and 3) the award of ongoing § 35 partial incapacity benefits is not supported by the medical evidence. We are satisfied the judge's subsidiary findings adequately support his denial of the insurer's § 14 fraud complaint against the employee, and we affirm his decision on that issue. We agree, however, that other of the judge's subsidiary findings do not allow us to "determine with reasonable certainty whether correct rules of law have been applied to facts that could properly be found." Ladue v. C & S Wholesale Foods, 21 Mass. Workers' Comp. Rep. 233, 239 (2007), quoting Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). We also agree the judge erred in finding total incapacity based solely on the impartial medical report. Further, we agree the judge erred in adopting the same expert medical opinion to assign different earning capacities. Therefore, we recommit the case for the judge to reconsider the medical evidence and make additional subsidiary findings.

We summarize the pertinent facts and procedural history. The employee, age thirty-eight at the time of the hearing, obtained his GED after leaving school in the ninth grade. (Dec. 4.) At the time of his injury, the employee had worked for Choice One Communications for a year, installing large, heavy telephone equipment. (Dec. 7.) On September 10, 2002, while attempting to lift equipment onto a truck, he injured his back. (Dec. 5.) The insurer accepted liability for the injury, and began paying weekly § 34 total incapacity benefits based on the employee's pre-injury average weekly wage of $1,429.38. (Dec. 7.)

In early 2004, the insurer filed a complaint for modification or discontinuance of weekly compensation. Following a § 10A conference, the judge assigned the employee a $600 weekly earning capacity and ordered the insurer to pay § 35 partial incapacity benefits of $497.63 per week, effective July 1, 2004. The parties cross-appealed and on August 17, 2004, the employee submitted to a § 11A impartial medical examination by Dr. Richard Warnock.

At the hearing on January 13, 2006, the insurer challenged extent of disability and causal relationship, and sought penalties pursuant to G. L. c. 152, § 14, on the ground the employee had been working while collecting workers' compensation benefits. (Dec. 2, 8.) Although the hearing decision does not identify what claims were asserted by the employee, his hearing memorandum indicates the employee sought § 34 total incapacity benefits from June 30, 2004,[1] to September 10, 2005, the date of statutory exhaustion, and § 35 benefits thereafter. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(board may take judicial notice of contents of board file).

The August 17, 2004 impartial medical report of Dr. Warnock was admitted into evidence at hearing. (Stat. Ex. 1.) Five days after the hearing, the insurer filed a motion to submit additional medical evidence, asserting Dr. Warnock's opinions on

[1] Although the § 10A conference was held on June 30, 2004, the modification of benefits was effective as of the filing date of the order, July 1, 2004.

present disability and causal relationship were stale, and additional medical evidence was required to address the period *after* the date of the impartial medical report. The insurer further contended the employee had been working prior to the filing of its modification/discontinuance complaint, and additional medical evidence was necessary to address the "gap period" between that filing and the date of Dr. Warnock's examination of the employee. (Dec. 11-12.)

Over the employee's objection, and without explanation, the judge allowed the motion for additional medical evidence. (Dec. 13.) The employee submitted the April 12, 2006 report of Dr. Victor Conforti, and the insurer offered the April 5, 2006 report of Dr. Robert Pennell. (Dec. 13-14.) Dr. Conforti opined the employee had a herniated disc and instability at L5-S1, causally related to his work injury. He further opined the employee may need surgical stabilization with fusion, and was not fit, or likely to become fit, for any lifting, bending, stooping, climbing or kneeling activities.[2] (Dec. 13-14.) Dr. Pennell, on the other hand, opined the employee had suffered an acute low back strain at work which had resolved by the time of his examination on March 30, 2006. He found no causal relationship between the industrial injury and the L5-S1 disc protrusion, or the employee's continuing low back and left lower extremity symptoms. He believed the employee had reached a medical end result with an excellent prognosis, and had no work limitations as a result of the September 10, 2002 work injury.

In his decision, the judge recounted the opinions of Drs. Conforti and Pennell, without adopting or rejecting them either in whole or in part. (Dec. 14-15.) He adopted the following opinions of Dr. Warnock: 1) the employee suffered from degenerative lumbar disc disease with a bulging/ruptured L5-S1 lumbar disc; 2) the

[2] Following hearing, the parties submitted an agreed statement of facts, which the judge incorporated into his decision. (Dec. 4-9.) The agreed facts included the findings of Dr. Conforti following his first examination of the employee on June 16, 2004, which were essentially the same as those noted in his second report dated April 12, 2006. The doctor's 2004 report was not admitted as additional medical evidence, but was referenced by Dr. Conforti in his 2006 report. (Employee Ex. 3.)

employee's "then current disability" was causally related to his September 10, 2002, work injury; and, 3) "at the time of his examination," the employee was "partially disabled on a permanent basis." (Dec. 10-11.) The judge found, "the Employee was totally disabled for a period of time and continues to be partially disabled." (Dec. 17.) He ordered the insurer to pay § 34 total incapacity benefits from the date of injury[3] to August 17, 2004, the date of the impartial examination; § 35 benefits based on an assigned earning capacity of $600 from August 18 [sic], 2004 to October 9, 2006; and ongoing § 35 benefits based on the employee's actual (but unspecified) wages[4] from and after October 10, 2006. (Dec. 18.) We address the insurer's arguments on appeal seriatim.

The Judge's Subsidiary Findings of Fact

The insurer first contends the judge failed to make adequate findings regarding its allegation the employee engaged in fraudulent conduct by working while receiving total incapacity benefits. At hearing, the insurer alleged the employee worked for a company named PWT, Inc., which was operated by his fianceé out of their home, and he was listed as president in corporate records filed with the New Hampshire Secretary of State's office. The insurer also alleged the employee worked for another company called White Tiger Martial Arts. On appeal, the insurer acknowledges the judge listed its witness, an investigator, and all of its documentary evidence on this subject, but contends he was required to analyze the evidence and resolve conflicts between that evidence and the employee's testimony.

An administrative judge must, of course, consider all admitted testimony and evidence. Martin v. Sunbridge Care and Rehab for Hadley, 22 Mass. Workers'

[3] We observe the relevant period of incapacity in dispute was from and after February 2, 2004, the date the insurer filed its complaint to modify or discontinue weekly incapacity benefits. See Cubellis v. Mozzarella House, Inc., 9 Mass. Workers' Comp Rep. 354, 356 (1995)(order of discontinuance may go back no further than date request for such filed).

[4] By letter dated May 29, 2007 and contained in the board file, employee's counsel informed the judge the employee returned to work on October 9, 2006 earning $22.00 per hour with overtime. See Rizzo, supra.

Comp. Rep. 1, 5 (2008). However, he " 'is not expected to comment on each and every scintilla of testimony or evidence presented, but only on that which he deems persuasive.' " Anderson v. Lucent Technologies, 21 Mass. Workers' Comp. Rep. 93, 96-97 (2007), quoting Hilane v. Adecco Employment Srvs., 17 Mass. Workers' Comp. Rep. 465, 471 (2003). The judge listed all the witnesses, including the insurer's, who testified on the issue of the employee's alleged employment. He credited the testimony of two witnesses who maintained the employee was not working for PWT or White Tiger Martial Arts. (Dec. 15-16.) From the judge's denial of the § 14 complaint, we infer the judge also credited the employee's testimony that he did not work for either company after his injury. Credibility determinations are the sole province of the hearing judge, and we will not disturb them when, as here, they are based on the evidence and reasonable inferences drawn therefrom. Frechette v. Northeastern Univ., 21 Mass. Workers' Comp. Rep. 105, 110 (2007), and cases cited. Because the judge's findings were adequate, we affirm this aspect of his decision.

The Award of § 34 Benefits

The insurer also contends the medical evidence adopted by the judge does not support his award of § 34 benefits from February 2, 2004, the date the insurer's modification/discontinuance complaint was filed, to August 17, 2004, the date of the impartial medical examination. It maintains the judge could not rely on Dr. Warnock's opinion to find the employee totally disabled prior to the date of his examination but partially disabled thereafter. (Ins. br. 10-11.)

Where the insurer seeks to discontinue total incapacity benefits, it must produce evidence of improvement in the employee's medical or vocational status, or a lessening of the degree of incapacity, in order to meet its burden of producing evidence sufficient to create a dispute. Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007)(regarding insurer's burden of production when seeking discontinuance of § 34A benefits); Slater v. G. Donaldson Constr., 17 Mass. Workers' Comp. Rep. 133, 137 (2003)(same). However, the employee always has the burden of proving every element of his claim, including extent and duration of

incapacity. Sponatski's Case, 220 Mass. 526 (1915); Tran v. Constitution Seafoods, Inc., 17 Mass. Workers' Comp. Rep. 312, 323 (2003).

There are many instances when the impartial medical report, considered in conjunction with the employee's testimony, can warrant an inference the employee's medical status has remained unchanged in the pre-impartial medical examination period. Bajrami v. Perini Kiewit Cashman, 19 Mass Workers' Comp. Rep. 254, 257 n.3 (2005); Cugini v. Town of Braintree School Dep't, 17 Mass. Workers' Comp. Rep. 363, 366 (2003), citing Conroy v. Fall River Herald News Co., 360 Mass. 488, 493 (1940)("Not infrequently an inference is permissible that a state of affairs . . . proved to exist, has existed for some time before"). Here, however, Dr. Warnock's opinion could not reasonably be read to address that prior period of incapacity. No fair reading of Dr. Warnock's report permits the conclusion he addressed the nature and extent of the employee's disability for any period prior to his examination on August 17, 2004. Rather, Dr. Warnock opined:

> He is *at this time* partially disabled on a permanent basis. Restrictions *at this time* consist of no lifting greater than 25 pounds, the ability to sit or stand at will and a sedentary position.

(Stat. Ex. 1; emphases added.) Even the judge found Dr. Warnock "opined that *at the time of his examination* the employee was partially disabled on a permanent basis." (Dec. 11; emphasis added.)

Moreover, the employee offered no testimony concerning his pain and physical limitations during the gap period. (See Tr. 29-30; 59-60.) Thus, the impartial medical report, even considered in conjunction with the lay testimony, cannot support the judge's finding the employee was totally incapacitated until Dr. Warnock examined him. See Bajrami, supra at 257 (where judge declared impartial doctor's opinion fully adequate, and doctor opined that *at the time of his examination,* employee was partially disabled, employee not entitled to total disability benefits during the "gap" period).

Additional medical evidence for the gap period was necessary if the employee

was to substantiate his claim for the period from the filing date of the insurer's modification/discontinuance complaint[5] to the date of the § 11A examination. Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 99-100 n.1 (2004). Although the judge admitted such additional medical evidence, he made no findings adopting any of it. Because there is no adopted expert medical opinion addressing the extent of the employee's disability during the period from February 2, 2004 to August 17, 2004, we vacate the judge's award of § 34 benefits.

The Judge's Inconsistent Use of the Impartial Medical Report

Lastly, the insurer argues the judge erred by relying on Dr. Warnock's stale report to find the employee partially incapacitated after he returned to work. It contends the judge further erred by basing the award of § 35 benefits following the employee's return to work on his actual wages. Although the judge did not express his reasons for allowing the insurer's motion for a finding of inadequacy, in the absence of any stated rationale, we infer the judge agreed Dr. Warnock's report was inadequate due to staleness. Notwithstanding that ruling, the judge could still adopt that report. See O'Sullivan v. Certainteed Corp., 18 Mass. Workers' Comp. Rep. 16, 25 (2004)(where additional medical evidence admitted, impartial opinion loses its prima facie effect, and judge may adopt other opinions or impartial opinion).

The problem, however, lies in the judge's apparent inconsistent use of Dr. Warnock's report. In Doonan v. Pointe Group Health Care and Sr. Ctr., 23 Mass. Workers' Comp. Rep. 53 (2009), we disapproved such an inconsistent use of the impartial physician's disability opinion. We held:

> If the impartial report represents evidence of medical improvement yielding a $640 earning capacity, it cannot also support the earlier $360 earning capacity. Likewise, if the impartial opinion supports the earlier earning capacity assignment, then the date of the impartial report cannot also be the basis for the judge's increase in earning capacity.

[5] The insurer was not entitled to relief on its complaint any earlier than the date on which the complaint was filed. See footnote 3, supra.

Doonan, supra at 54-55. Likewise here, the impartial medical opinion, by itself, cannot support both a $600 earning capacity on August 17, 2004, the date of Dr. Warnock's examination, and a presumably different earning capacity, based on the employee's actual earnings, over two years later, on October 10, 2006. As in Doonan, on recommittal, the judge must make further findings resolving this inconsistency. However, because the insurer argues only that Dr. Warnock's report cannot support the award of partial incapacity benefits *after* the employee returned to work, we do not disturb the § 35 award based on a $600 assigned earning capacity between August 17, 2004 and October 10, 2006.

We also agree the judge erred by basing the employee's earning capacity after he returned to work solely on his actual earnings. " 'Actual earnings are but one factor in assessing earning capacity under § 35D and may establish the floor -- not the ceiling -- for the assignment of that figure.' " Hartnett v. Hogan Regional Ctr., 23 Mass. Workers' Comp. Rep. 49, 51 (2009), quoting Perez v. Work Inc., 20 Mass. Workers' Comp. Rep. 117 (2006). As the employee returned to work in another job approximately nine months *after* the hearing, there was no evidence before the judge as to what the employee's actual earnings were, or the nature of the job, or whether his vocational or medical status, or the market for his skills, changed at that time.[6]

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[6] As the Appeals Court has recently emphasized, "[t]he decision maker must . . . support the earning capacity he assigns by explaining its 'source and application,' including a 'factual source' for the monetary figure." Eady's Case, 72 Mass. App. Ct. 724, 726 (2008), quoting Dalbec's Case, 69 Mass. App. Ct. 306, 317 (2007). The three elements, or subsidiary findings, supporting the assignment of an earning capacity are:

> (1) the employee's medical limitations, see Trant's Case, 21 Mass. App. Ct. 983, 984-985 (1986), (2) the employee's employment capabilities, including age, education, work experience and transferable skills, see Ballard's Case, 13 Mass. App. Ct. 1068, 1068-1069 (1982), and (3) the market for the employee's skills. See Dalbec's Case, [69 Mass. App. Ct. 306], 316-317, 318 n.14 (2007). See also Sylva's Case, 46 Mass. App. Ct. 679, 681 (1999)(referring to this third element as the "economic element").

Eady's Case, supra at 727.

Accordingly, we affirm the judge's denial of the insurer's § 14 claim and his award of § 35 benefits from August 18, 2004 through October 10, 2006. We vacate the award of § 34 benefits from February 2, 2004 to August 17, 2004, and the award of § 35 benefits based on the employee's actual, but unspecified wages, after October 10, 2006. We recommit the case to the administrative judge to reconsider the additional medical evidence admitted and to make additional subsidiary findings consistent with this opinion, specifically, further findings on the extent of the employee's incapacity during the pre-impartial medical examination period, taking into consideration the additional medical evidence submitted by the parties. [7]

In addition, the judge on recommittal should make explicit findings on the employee's earning capacity after his return to work. See Hartnett, supra ("even if the actual . . . earnings are found to be the true measure of the employee's earning capacity . . . such an indeterminate order that relies on the parties' assigning the earning capacity or capacities is disfavored"). If he finds a change in earning capacity based on a change in the employee's medical condition, the judge may not rely on Dr. Warnock's two-plus year old opinion, but must base the new earning capacity, at least in part, on the additional medical evidence submitted by the parties. [8]

Because the employee has prevailed by defeating the insurer's § 14 complaint, see Richards's Case, 62 Mass. App. Ct. 701 (2004), and has retained benefits for a period of incapacity disputed by the insurer, pursuant to § 13A(6), the insurer is directed to pay employee's counsel a fee of $1,497.28.

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[7] As the employee has not appealed the hearing decision, he may not obtain a more favorable result on recommittal. See, e.g., Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep ___ (December 16, 2009); Andre v. F. C. Constr. Co., 19 Mass. Workers' Comp. Rep. 124, 128 (2005), citing Brackett v. Modern Continental Constr. Co., 19 Mass. Workers' Comp. Rep. 11 (2005).

[8] Of course, although the employee's medical condition might remain the same, his vocational status, i.e., his education or training, could increase his capacity to earn. The agreed statement of facts indicates the employee was involved in a retraining program. (Dec. 9.) However, the judge made no findings on the nature, length, or impact of the program on the employee's job prospects.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **June 8, 2010**