COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037433-00**

Nectarios Akoumianakis	Employee
Stadium Auto Body, Inc.	Employer
Eastern Casualty Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Levine, Wilson and Costigan)

APPEARANCES
Ronald A. Dardeno, Esq., for the employee
William E. Holtz, Esq., for the insurer at hearing
Kerry G. Nero, Esq., for the insurer on brief

LEVINE, J. The insurer appeals from an administrative judge's decision awarding the employee a closed period of weekly § 34 temporary total incapacity benefits and ongoing § 35 temporary partial incapacity benefits. The insurer makes two arguments. First, it contends that the judge's decision is based on medical records not in evidence and, second, that the decision contains insufficient findings regarding the employer's job offer and the employee's earning capacity. We agree with both arguments and, therefore, we vacate the award and recommit the decision for reconsideration based on properly admitted medical evidence, and for an adequate vocational analysis.

Nectarios Akoumianakis was a twenty-one year-old automotive technician with an eleventh grade education at the time of his stipulated industrial injury. He also had on-the-job training in mechanics and had taken a course in telecommunications wiring. As part of his job, the employee repeatedly lifted up to 150 pounds. (Dec. 3.) On September 22, 2000, while at work, the employee was hit and knocked down by a motor vehicle. His hip, arm, head and back were struck, and he lost consciousness. The vehicle also ran

over his left foot.[1] He was taken to the hospital where he was given ibuprofen and told that he could return to work in a few days. However, he was advised to return to the emergency room if he experienced nausea, vomiting or headaches. (Dec. 4.) At the time of hearing, the employee testified that he suffered mid- to low- back pain, stabbing pain radiating down his left buttock, and foot pain which prevented him from running or walking fast. (Dec. 6.)

After a conference on the employee's claim, the insurer was ordered to pay § 34 temporary total incapacity benefits from September 22, 2000 until October 11, 2000, and weekly § 35 partial incapacity benefits thereafter. (Dec. 4.) Both parties appealed the conference order, but the insurer later withdrew its appeal.[2] At hearing, the employee moved to amend his claim by adding a claim for illegal discontinuance. (Dec. 2.)

Pursuant to § 11A, on May 25, 2001, the employee was examined by Dr. Lawrence Geuss. Neither party moved to submit additional medical evidence nor did the judge sua sponte authorize the submission of additional medical evidence. Though the insurer was granted permission to depose the impartial examiner, it did not do so. (Dec. 2.) The judge summarized Dr. Geuss's report as follows:

> [Dr. Geuss] concluded that the employee experienced some tenderness in his neck, upper and lower back with no muscle spasms and that he had received a contusion to his left mid-foot indicated by some tenderness to touch. He determined that his upper and lower back strain directly related to his industrial accident of September 22, 2000. Dr. Geuss found that the employee had a small protrusion of his disc in his thoracic spine, at T6-7, which "whether related to this accident or not is difficult to say." (11A Report, 5/25/01). Dr. Geuss also found that employee had full range of motion of his neck, shoulder, foot and ankle and no neurological deficit in either upper or lower extremity. He was not in acute distress. He also found that the employee had reached his medical end-point.

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[1] The judge stated that x-rays indicated a fracture and soft tissue injury to the employee's left foot, (Dec. 4), but the § 11A examiner, Dr. Geuss, stated in his report that there was no evidence of a fracture in the x-rays. (Exh. 3.)

[2] The judge stated in his decision that only the insurer appealed the conference order, (Dec. 2), but the parties state in their briefs that there were cross appeals and the insurer withdrew its appeal.

> Dr. Geuss' report concluded that employee was "certainly capable of gainful employment," limited in this respect by only "his subjective complaints." He determined such work to include modified auto body work where employee lifted less than approximately forty (40) pounds. Dr. Geuss expected employee would have recovered from his accident "within a few months."

(Dec. 6-7.)

Although Dr. Geuss's opinion was the only medical evidence in the case, the judge discussed in detail several other medical reports and records, including those of Dr. David Cancian, the employee's treating physician; Dr. Lester Sheehan, an orthopedist to whom Dr. Cancian referred the employee; Dr. Murray Goodman, an examining physician; and notes from Mount Auburn Hospital. (Dec. 4-6.) In his general findings, the judge concluded: "Based on the credible evidence presented *including* the employee's testimony and *his treating physician's medical reports, I find that the employee is partially disabled."* (Dec. 8; emphasis added.) The judge found the employee totally incapacitated from September 22, 2000 to October 11, 2000, and partially incapacitated thereafter, with an earning capacity of $118.40. (Dec. 9.)[3] The judge also found that the insurer was not liable for § 8 penalties for illegally discontinuing benefits because it appeared to have made a job offer having in mind the § 11A report that described the modified conditions under which the employee could return to work. (Dec. 7.)[4]

The insurer first argues that the judge erred by basing his decision on medical records not in evidence. The employee responds that the judge did, in fact, rely on the impartial report, which adopted and incorporated the reports of medical records submitted for his consideration by the parties. We agree with the insurer.

General Laws c. 152, § 11A, provides that the "impartial physician's report shall constitute prima facie evidence of the matters contained therein." The statute further

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[3] The parties stipulated that the employee's average weekly wage was $473.60. (Dec. 3.)

[4] The decision contains no information as to when the insurer discontinued payment of weekly benefits to the employee. The question of illegal discontinuance is not raised on appeal.

states that:

> [N]o additional medical reports or depositions of any physicians shall be allowed by right to any party; provided, however, that the administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner.

We have held that an administrative judge violated the provisions of § 11A merely by reviewing two medical reports submitted at conference but not at hearing, where the judge had not authorized the submission of additional medical evidence. Whelan v. Brigham and Women's Hosp., 17 Mass. Workers' Comp. Rep. ___ (June 6, 2003). Since we could not determine the extent to which the judge's review of those reports affected his assignment of an earning capacity, we recommitted the case for reassessment of the employee's earning capacity absent consideration of the unadmitted reports. Id. Similarly here, we cannot tell how the judge's findings on earning capacity were affected by his consideration of the unadmitted medical records.[5]

Moreover, the judge did not simply review these unadmitted medical records, he actually *adopted* a medical opinion which had not been admitted, that of the employee's treating physician. (Dec. 8.) By contrast, the judge never indicated that he had adopted the opinion of the impartial medical examiner, which had exclusive prima facie effect. See Silverman v. Department of Transitional Assistance, 15 Mass. Workers' Comp. Rep. 176, 179 (2001). In a similar case, we held that the judge violated the parties' due process rights when, "[w]ithout authority or notice to the parties, he relied in his [hearing] decision on medical reports submitted solely for the conference and for the impartial examination." Behre v. General Elec. Co., 17 Mass. Workers' Comp. Rep. ___ (June 2, 2003). Failure of due process results from foreclosing the "opportunity to present testimony necessary to present fairly the medical issues." O'Brien's Case, 424 Mass. 16,

[5] We also note that the judge's discussion of the medical records was in much greater detail than the discussion of them by the impartial physician.

23 (1996). Even where additional medical evidence has been properly admitted for the limited purpose of addressing incapacity during the gap period, we have held that utilizing such evidence to address ongoing causal relationship without notifying the parties of this expanded use deprives them of the right to have the opportunity to put in evidence on that issue. Gulino v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 378, 380-381 (2001), citing O'Brien's Case, supra.

In the instant case, by reviewing and then relying on medical records not in evidence and without giving notice to the parties through a ruling on inadequacy or complexity that he was allowing additional medical evidence, the judge deprived the parties of the opportunity to fully address the medical issues by presenting further medical evidence of their own choosing and/or cross-examining expert witnesses.[6] See Gulino, supra at 381. Compare Leydon v. General Elec. Co., 17 Mass. Workers' Comp. Rep ___ (June 18, 2003) (judge's consideration of additional medical evidence in absence of ruling on inadequacy, complexity or bias was error, but did not require recommittal where the judge nevertheless adopted the § 11A impartial opinion).

On recommittal, the judge should reassess his determination on extent of incapacity and earning capacity based only on properly admitted medical evidence, which, at this point, is the § 11A opinion of Dr. Geuss.[7]

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[6] The employee's citation to our decision in Leveille v. AT&T Communications, Inc., 9 Mass. Workers' Comp. Rep. 508 (1995), where we approved the judge's weighing of medical evidence, is inapposite. That case did not involve a § 11A examiner's report having prima facie weight, and all medical evidence considered by the judge was properly admitted in evidence.

[7] As we noted in Whelan, supra at ___ n. 3, the parties on recommittal may move for additional medical evidence should they perceive a "gap period" not covered by the impartial opinion. Compare Strong v. John's Oil Burner Service, 17 Mass. Workers' Comp. Rep. ___ (May 20, 2003) (admission of additional medical evidence absent finding of inadequacy, complexity or bias, was permissible for the "gap period" prior to the impartial examination, though for no other purpose). But see Cugini v. Town of Braintree, 17 Mass. Workers' Comp. Rep. ___ (July 17, 2003)(additional medical evidence not necessary for period prior to the examination by the impartial physician where an inference could be made that the employee's medical condition was essentially unchanged during that period of time).

The insurer also argues that the judge made insufficient findings on earning capacity.[8] The insurer contends that it is not clear that the judge considered the employer's job offer in his earning capacity analysis and, even assuming he did, the earning capacity analysis contains insufficient findings. We agree that the judge's vocational analysis is inadequate. Though extent of earning capacity is a question of fact for the administrative judge, Paschal v. Lechmere Co., 15 Mass. Workers' Comp. Rep. 313, 317 (2001), the judge must do more than merely state that he has considered such vocational factors as age, education, training, and work experience. He must make findings addressing how these factors impact on the employee's ability to earn wages in light of his medical disability. Scheffler' s Case, 419 Mass. 251, 256 (1994); Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 385 (2001). Here, the judge has performed no vocational analysis that explains how he arrived at his conclusion that this young employee with an eleventh grade education, training in mechanics and telecommunications wiring, and an ability to lift up to forty-pounds, has an earning capacity of only $118.40 per week.[9] Compare Lolos v. Monsanto Co., 12 Mass. Workers' Comp. Rep. 83, 84-85 (1998). On recommittal, he must do so.

As to the job offer made by the employer, the judge mentioned the written job offer, (Exh. 4), but only with respect to the alleged illegal discontinuance under §8(2)(d). (Dec. 7; see discussion earlier in this decision at p. 3.)[10] The judge did not deal with the employer's job offer with respect to the employee's earning capacity. The employer made

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[8] Section 35D provides four alternative means of determining earning capacity, and it instructs that the greatest of the four be used: (1) the employee's actual weekly earnings; (2) the earnings the employee can earn in the job held at the time of the injury, provided the job is available and within the employee's capability; (3) the earnings the employee can earn in a particular suitable job provided it is made available and within the employee's capacity; or (4) the earnings the employee is capable of earning.

[9] Based on a forty hour work week, the assigned weekly earning capacity of $118.40 is less than minimum wage.

[10] As pointed out in footnote 4, supra, the propriety of the insurer's discontinuance of benefits under §8(2)(d) is not before us.

a written job offer, (Exh. 4), and its president testified that a job was available for the employee. See, e.g., Tr. 53, 56, 63-64.

Findings regarding the job offer are required. Since the written job offer in this case does not identify a specific job, it is of dubious adequacy. See Cassidy v. Sodexho USA, 14 Mass. Workers' Comp. Rep. 42, 44 (2000)(indefinite offer containing general pledge to make accommodations does not meet the "particular suitable job" requirement of § 35D(3)). But the judge must make findings on the job offered in the testimony of the employer's president, as that job offer may bear on the employee's earning capacity. General Laws c. 152, § 35D,

> requires the judge, when confronted with a job offer, to determine whether the job offer is bona fide, within the employee's physical and mental capacity to perform, and bears a reasonable relationship to the employee's work experience, education, or training either before or after the employee's injury. G. L. c. 152, § 35D(3) and (5).

Thompson v. Sturdy Memorial Hosp., 10 Mass. Workers' Comp. Rep. 133, 136-137 (1996).

Accordingly, we vacate the award and recommit the decision for reconsideration and further findings consistent with this opinion.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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