COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 006365-91**

Oscar Henry	Employee
S & S Construction	Employer
Travelers Casualty & Surety	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge Hernandez.

APPEARANCES
Alan S. Pierce, Esq., for the employee
Donna Gully-Brown, Esq., for the insurer

FABRICANT, J. The employee appeals from a recommittal decision, Henry v. S & S Const., 24 Mass. Workers' Comp. Rep. 321 (2010), in which the judge was specifically required to provide findings supported by appropriate vocational analysis, and address the issue of worsening. Because the resulting decision provides an explanation and satisfactory analysis of evidence on these issues, we affirm.

The employee, a construction laborer, injured his lower back and right knee on January 21, 1991.[1] The employee filed a claim for § 34A benefits from May 1, 2005, and continuing, plus §§ 13 and 30 benefits. The May 27, 2009 hearing decision denied the employee's § 34A claim and ordered payment pursuant to § 35 for partial incapacity, at a rate of $451.64 per week based on the average weekly wage of $727.46 and an assigned earning capacity of $200.00 per week. (Dec. 5-

[1] The lower back and right knee injuries had been accepted by the insurer. After the hearing, the judge found the claimed left knee condition was also related to the work injury of January 21, 1991. (Dec. 19.)

6.)[2] In Henry, supra, we recommitted this case because the judge's incapacity analysis was internally inconsistent: a $200.00 weekly earning capacity was assigned without a supporting vocational analysis.

Two vocational rehabilitation counselors testified at the second hearing. The judge adopted the opinion of the insurer's vocational expert, which provided a vocational analysis identifying several positions matching the employee's physical limitations and skill set. (Ex. 10; Dec. 15-17.) Addressing incapacity, the judge considered "the vocational testimony as well as the employee's age, education, background and training," and found that, although the employee could not return to the heavy construction work he did prior to the accident, his restrictions were not totally disabling. (Dec. 21.)[3]

On appeal, the employee argues the judge erred in adopting the insurer's vocational opinion because there was no adequate foundation to conclude the employee could return to work. Further, the employee argues there was no basis for the judge to assign an earning capacity of $187.27. (Employee br. 6.) We disagree.

The judge concluded the employee was not permanently and totally incapacitated after evaluating his communication skills, experience and medical limitations, based upon the employee's testimony and the vocational and medical evidence. (Dec. 21.) " 'The goal of disability adjudication is to make a realistic appraisal of the medical effect of a physical injury on the individual claimant and award compensation for the resulting impairment of earning capacity, discounting

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[2] The administrative judge also prospectively ordered § 34 benefits for a closed period of twenty weeks, following the recommended surgical procedure. (Dec. 6.)

[3] The judge found:

> "Along with his communicative skills and his experience, I find it is not beyond his vocational means or his medical limitations, to perform and sustain gainful employment earnings."

(Dec. 21.)

the effect of all other factors.' '' Scheffler's Case, 419 Mass. 251, 256 (1994), quoting from, L. Locke, Workmen's Comp. § 321 at 375-376 (2d. ed. 1981).

The judge acknowledged the employee's back and knees prevented him from returning to heavy construction work, but that those restrictions did not totally incapacitate him from all work. The employee argues that his own testimony compels a finding that "both knees were worse, his ability to walk and hold positions including sitting had worsened and his pain had worsened."[4] (Employee br. 8.) However, the § 11A examiner, Dr. Daniel J. Quinn, opines that the employee's "subjective description of pain is not supported by any objective findings." (Ex. 1, p. 2; Dec. 15.) Ultimately, the judge is exclusively tasked with the job of weighing the credibility of the employee's testimony and claims of worsening against the medical and vocational evidence before him. Brommage's Case, 75 Mass. App. Ct. 825 (2009)(judge may give "decisive weight" to testimony of employee).

Here, the judge appropriately adopted the opinion of the insurer's vocational consultant, who identified jobs within the employee's skill level and physical capacities established by the medical evidence. The jobs identified by the vocational expert ranged in pay from $373.60 per week to $538.00 per week, and therefore provided the judge with a factual basis for the earning capacity he ultimately deemed appropriate. (Ex. 10; Dec. 17.) The assignment of $187.27, approximates the wages for part-time work at the low end of the pay range assigned by the vocational expert, and infers that the judge did weigh factors such as age, education and training in making that determination. Mendes v. Percor, Inc., 12 Mass. Workers' Comp. Rep. 487, 490 (1998)(extent of earning capacity is a question of fact solely within the province of the administrative judge to decide). See Mulcahey's Case, 26 Mass. App. Ct. 1, 3-4 (1998). Therefore, the judge's finding of a $187.27 earning capacity was based on a "factual source" and has a

[4] The employee concedes that, other than his age, his vocational factors had not changed since the first hearing. (Employee br. 8.)

"rational basis" consistent with Dalbec's Case, 69 Mass. App. Ct. 306, 316, 317 (2007)(monetary figure may not emerge from thin air; judge must explain source and application of earning capacity). See also Sawyer's Case, 315 Mass. 75, 76 (1943)(essential facts need not be proved by direct evidence but may be established by reasonable inferences from the facts shown to exist).

The judge provided an appropriate incapacity analysis, and acted within his authority and discretion in determining the extent of the employee's work capacity based upon the evidence before him. There is no error. The decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

Filed: **June 24, 2014**