

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 028712-06

Paul D. Regan
Massachusetts Turnpike Authority
Massachusetts Turnpike Authority

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Koziol, Fabricant and Levine)

The case was heard by Administrative Judge Tirrell.

APPEARANCES

Brian R. Sullivan, Esq., for the employee
Elizabeth A. Fleming, Esq., for the self-insurer at hearing
Arthur Jackson, Esq., for the self-insurer on appeal
Radha Tilva, Esq., for the self-insurer on appeal

KOZIOL, J. The employee appeals from the judge's decision allowing the self-insurer's complaint to modify his weekly incapacity benefits by ordering discontinuance of § 34 total incapacity benefits, and payment of ongoing § 35 partial incapacity benefits as of April 28, 2008.¹ On appeal, the parties agree the judge's incapacity analysis was flawed as a result of an erroneous finding of material fact regarding the employee's age: the judge found the employee was forty-nine years old at the time of the hearing rather than his actual age of fifty-nine.² The parties also agree that under the circumstances, the error is substantial

¹ The employee is being paid weekly § 35 benefits at a rate of \$445.79, based on an assigned minimum wage earning capacity of \$320.00.

² The employee asserts that the error had its origin in a scrivener's error appearing on the Employee's Biographical Data Sheet, which identified the employee's birth year as 1960 rather than the actual year, 1950. (Employee Ex. 1.) The self-insurer does not contest this contention. The transcript, as well as the opinions of the impartial medical examiner, Dr. Nabil Basta, and the insurer's independent medical examiner, Dr. Kenneth Polivy, whose opinions the judge adopted as fact pertaining to the employee's disability, indicate that, at all relevant times, the employee was fifty-nine years of age. (Tr. 53-54 [employee testified to forty-year work history following graduation from high school, twenty years

and requires recommitment for further findings of fact and reconsideration of the incapacity analysis pursuant to Frennier's Case, 318 Mass. 635 (1945). Greene v. Ethyl Prods., 23 Mass. Workers' Comp. Rep. 95, 97 (2009)(recommitment required where "eight-year age difference - particularly in the latter portion of an individual's working life" was not insubstantial and may have affected judge's assessment of employability).

Because we agree that the error is not harmless,³ we reverse the decision, reinstate the employee's § 34 benefits retroactive to April 28, 2008, and recommit the case for further findings consistent with this decision.

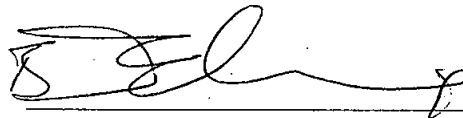
So ordered.



Catherine Watson Koziol
Administrative Law Judge

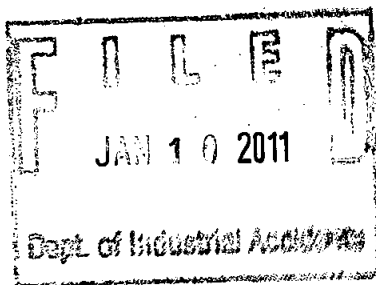


Bernard W. Fabricant
Administrative Law Judge



Frederick E. Levine
Administrative Law Judge

Filed:



as a rubbish collector followed by twenty years of work for the employer]; Stat. Ex. at 2; Self-ins. Exs. 3 and 4.)

³ In his findings of fact pertaining to the extent of the employee's incapacity, the judge stated, "[a]t forty-nine years of age, Mr. Regan is still a relatively young man." (Dec. 5.)