COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 043531-04

Paul Holloway	Employee
R.M. Sullivan Transportation	Employer
A.I.M. Mutual Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Costigan and Horan)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Thomas E. Casartello, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

McCARTHY, J. The employee appeals from a decision in which the administrative judge granted the insurer's request to modify § 34 benefits and assigned an earning capacity of $320. The employee contends that because the judge did not cite a "factual source" to support the amount of the earning capacity assigned, recommittal is required. See Eady's Case, 72 Mass. App. Ct. 724 (2008); Dalbec's Case, 69 Mass. App. Ct. 306 (2007). The employee also argues, without much elaboration, that the judge failed to make the vocational findings required under Frennier's Case, 318 Mass. 635 (1945)(age, education, training and work experience). We agree with the employee's contention that the judge's vocational findings are inadequate, and recommit the case for further findings on that issue.

Paul Holloway, the employee, was fifty-four years old at the time of hearing. He has worked for the employer since 1985 as a platform switcher and yard jockey, a position which required a great deal of trailer jack cranking. (Dec. 2.)

On December 27, 2004, the employee fell at work, injuring his right shoulder. In March 2005, he left work and on June 13, 2005, he underwent surgery to repair a torn right rotator cuff. (Tr. 10,

29.) The insurer voluntarily commenced payment of total incapacity benefits pursuant to § 34. (Dec. 2.)[1]

In February 2007, the insurer filed a complaint to discontinue or modify the employee's compensation, which was denied at conference. The insurer appealed, but prior to the hearing, the employee's § 34 benefits exhausted, and the insurer voluntarily began paying § 35 partial incapacity benefits based on a minimum wage earning capacity.[2] The employee's left shoulder complaints, which he claimed arose from overuse after the injury to his right shoulder, were the issue at hearing. (Dec. 2.)

The judge adopted the opinion of the § 11A physician, Dr. MacEllis Glass, that the employee had a substantial dormant degenerative process in his left shoulder before the overuse began, but that overcompensation was a major cause of his present symptoms in that shoulder. (Dec. 3.) The judge's entire analysis of the employee's work capacity is as follows:

> It is clear and pretty much undisputed that as a result of the injury to his right shoulder, Paul Holloway is partially disabled from his previous occupation which required cranking and lifting. What is really at issue is whether the work injury to the right shoulder and subsequent use of the left shoulder is a major cause of Mr. Holloway's present left shoulder symptoms. The impartial physician opines that it is and I adopt his opinion.
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> But even with this causal connection Mr. Holloway still has some light work capacity for a 40 hour a week job according to the impartial physician, and therefore the assignment of the minimum wage earning capacity is warranted**.**

(Dec. 3.) The judge authorized the insurer to modify benefits as of October 4, 2007, assigning a weekly $320 earning capacity (full-time minimum wage), and ordered payment of medical expenses relative to the employee's left shoulder under §§ 13 and 30. (Dec. 4.)

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[1] Although not mentioned in the decision, we take judicial notice of documents in the board file indicating payment by the insurer. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice of board file appropriate).

[2] At this same time, a claim for § 34A permanent total benefits was filed by the employee and joined for hearing.

There can be no doubt that the decision is bereft of *any* vocational profile analysis under the principles of Frennier's Case, 318 Mass. 635 (1945), and Scheffler's Case, 419 Mass. 251 (1994). The employee alludes to this omission in his brief (pp. 7-8), and his citation to Eady's Case, supra, stands as authority for the requirement for such vocational profile analysis:

From the case law, we discern three elements, or subsidiary findings, that support an assignment of earning capacity: (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, supra at 316-317, 318 n.14.

Eady, supra at 727 (emphasis added). Here, the second element listed requires findings of fact, not the "factual source" rule of the third element listed, citing Dalbec's Case. We need not decide, at this juncture in the proceedings, whether that third element of Eady applies when there is a minimum wage earning capacity assignment. See Mulcahey's Case, 26 Mass. App. Ct. 1, 3 (1988).

Accordingly, we recommit the case for further findings on the employee's age, education, work experience and transferable skills, and the effect those factors have on his employment opportunities.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: July 15, 2009