COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 076072-91**

Raymond Frenier	Employee
Hyde Manufacturing, Inc.	Employer
Public Service Mutual Insurance Co., Inc.	Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Horan and Koziol)

The case was heard by Administrative Judge Poulter.

APPEARANCES
Robert L. Noa, Esq., for the employee at hearing
Charles E. Berg, Esq., and James N. Ellis, Esq., for the employee on appeal
Elizabeth C. Fliss, Esq., for the insurer at hearing
John R. Hitt, Esq., and Peter M. McElroy, Esq., for the insurer on appeal

CALLIOTTE, J. In this appeal of a decision denying his claim for weekly § 34 benefits, the employee asks us to reconsider our prior holdings that a judge need not discuss or adopt expert vocational testimony, as long as it is clear she has considered such evidence. See, e.g., Brooks v. Hoboken Floors, 26 Mass. Workers' Comp. Rep. 165, 168 (2012); Martin v. Sunbridge Care and Rehab. for Hadley, 22 Mass. Workers' Comp. Rep. 1, 5 (2008). We affirm the decision.

The employee, fifty-nine years old at hearing, received his GED in 1974, and began working for the employer as a pre-set-up operator in 1976. On October 1, 1991, he injured his back while bending down to tie up a coil of steel. He continued to work in a light duty capacity until 1993, when he left work due to back pain. (Dec. 5.) From 1993 until 2004, when his § 35 benefits exhausted,[1] he received weekly § 35 partial incapacity

[1] For injuries occurring between January 1, 1986, and December 23, 1991, an employee could receive partial incapacity benefits for up to 600 weeks. See G.L. c. 152, § 35, as amended by St. 1985, c. 572, § 44, by § 68 made effective January 1, 1986. See also Nason, Koziol and Wall, Workers' Compensation, § 18.17 (3rd ed. 2003).

benefits, with an earning capacity of $100 per week, assigned following a § 10A conference. (Dec. 2, 8.) On October 13, 2010, the employee filed a claim for weekly § 34 total incapacity benefits and medical benefits pursuant to §§ 13 and 30. (Dec. 2; Tr. 13.) Those claims were denied following a § 10A conference, and the employee appealed to a hearing. (Dec. 2.)

At hearing, two vocational rehabilitation counselors testified. In her decision, the judge identified them as witnesses and admitted and listed their reports as Exhibits 5 and 6, but did not adopt or discuss the opinions of either vocational expert. (Dec. 1.)

Based on the employee's testimony, the judge found that, after his injury, he worked part-time as a bartender until 2008. (Dec. 5.) Faced with conflicting testimony as to why he left his last bartending job, she credited the employee's statements that he left because he did not care for the job anymore, and had been working twelve hours a week just to keep busy and "kill time." (Dec. 6; Tr. 89.) The judge explicitly stated she discredited the employee's testimony that he left the job due to back pain. (Dec. 6.)

The judge also adopted the medical opinion of the § 11A examiner, Dr. Samuel Brendler, a neurologist, that the employee was partially disabled as a result of his 1991 work injury, that he could perform light duty work with no lifting, pushing or pulling over 20 pounds, and that his bartending job was within those restrictions.[2] (Dec. 7.) "[G]iven his restrictions, age, training, education, background and experience," the judge found the employee "could work light duty jobs, including but not limited to a bartender, cashier, motel clerk or parking lot attendant on a part-time basis." (Dec. 8.) She assigned him an earning capacity of $120.00 per week based on a fifteen-hour workweek at minimum wage. Id. However, because the employee had already collected the maximum § 35 benefits available to him, the judge did not order any partial incapacity payments, and denied his § 34 claim. Id.

[2] Dr. Brendler offered this opinion after being asked to assume the bartending duties were essentially those to which the employee had testified, i.e., pouring beer, making drinks, washing glasses, and socializing with customers, but not stocking cases of beer, changing kegs or doing other heavy work. (Dec. 5; Tr. 33-37, 71; Dep. 15-17.)

On appeal, the employee argues the judge erred by failing to make findings regarding the expert vocational testimony. He maintains that such findings are required by the "factual source" rule of "visible rationality" announced in Dalbec's Case, 69 Mass.App.Ct. 306, 316, 317 (2007). There, the court held that "[a] monetary figure cannot emerge from thin air and survive judicial review as a mystery." Id.

The employee's argument is without merit. The court in Dalbec's Case did not require a judge to address expert vocational testimony to satisfy the "factual source" rule.[3] In fact, the court cited with approval its earlier decision in Sylva's Case, 46 Mass. App.Ct. 679, 681 (1999), which upheld a judge's partial incapacity finding, even though it contained no discussion of the expert vocational testimony. Dalbec's Case, supra at 317 n.11. The fact that the administrative judge "implicitly" considered the expert vocational testimony was sufficient to provide a "rational basis" for an incapacity determination. Id. In Sylva's Case,

> The administrative judge heard testimony from the employee, a vocational expert, and numerous doctors. His findings demonstrate that he took into account the employee's relatively young age (43 at the time of the hearing), his transferable vocational skills, level of education and lack of motivation to seek other jobs. Given these considerations, the administrative judge was warranted in concluding that the employee could perform some kind of 'work other than his usual occupation.'

[3] We note that Dalbec's reference to the "factual source" rule was specifically addressed to the need for "a reasoned computation" of the employee's earning capacity. Id. at 317. However, the requirement that there be a clearly visible factual basis for the judge's findings is a fundamental requirement for all administrative decisions under the Administrative Procedure Act, G.L. c. 30A, and specifically for workers' compensation decisions. See Eady's Case, 72 Mass.App.Ct. 724, 726 (2008); Dalbec's Case, supra at 313 n. 8 (noting the "fundamental requirement of rationality for every administrative decision"); Scheffler's Case, 419 Mass. 251, 258 (1994)(reviewing court to determine "whether the decision is factually warranted and not '[a]rbitrary and capricious,' in the sense of having adequate evidentiary and factual support and disclosing reasoned decision making within the particular requirements governing a workers' compensation dispute"). See also Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4-5 (1993)(reviewing board should be able to look at judge's subsidiary findings of fact and clearly understand the logic behind his ultimate conclusion).

> That the administrative judge in his subsidiary findings *failed to mention the employee's vocational expert's evaluation* does not vitiate his ultimate conclusion.

Id. at 681 (footnote and citation omitted; emphasis added).

Here, as in Sylva's Case, there was clearly a "factual source" and "rational basis" for the judge's determination that the employee was partially incapacitated. It consisted of: 1) the employee's own testimony that he left his bartending job, not because he was unable to do the job, but because he no longer liked it; and 2) Dr. Brendler's testimony that the employee could perform light duty work with a 20-pound lifting restriction, which included the bartending job, as described by the employee. Once the judge adopted this testimony, the case was essentially resolved. In fact, because the employee had no further entitlement to § 35 benefits, the judge's assignment of a *specific* earning capacity was unnecessary. [4]

Accordingly, we deny the employee's request to modify the principle that, while a judge must consider expert vocational testimony, she need not adopt or even discuss it. That position is firmly grounded in the court's decision in Sylva's Case as affirmed in Dalbec's Case, and comports with "the fundamental requirement of rationality for every administrative decision." Id. at 313 n.8. Because the decision lists the vocational experts as witnesses and includes the labor market surveys as exhibits, we are satisfied the judge considered the expert vocational evidence. Casello v. Executive Glass Co., 21 Mass. Workers' Comp. Rep. 221, 223 (2007); cf. Martin, supra (recommittal appropriate

[4] We observe that the assignment of a minimum wage earning capacity, which the judge here made, does have a "factual source," and, as such, is permissible under the court's holding in Dalbec's Case, supra at 317 n. 11 (approving Mulcahey's Case, 26 Mass.App.Ct. 1, 3 [1988] where the administrative judge permissibly assigned a $100 earning capacity "as an estimate of a minimal capacity for 'work at the lower end of the wage scale' "). See also Eady's Case, 724 Mass.App.Ct. 724 (2008)(same); Pobieglo v. Department of Correction, 24 Mass. Workers' Comp. Rep. 97, 100 n.6 (2010)(judges may take judicial notice of minimum wage laws as a "factual source" for earning capacity determinations); Clark v. Longview Assocs., 24 Mass. Workers' Comp. Rep. 253, 257 (2010)(same).

where judge lists labor market surveys as exhibits, but fails to list expert vocational witness or mention her testimony).

Accordingly, we affirm the decision.

So ordered.

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Carol Calliotte
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: ***November 21, 2013***