COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037394-08**

Remberto Galdamez	Employee
Channel Fish Co., Inc.	Employer
Massachusetts Retail Merchants, SIG	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Koziol and Calliotte)

The case was heard by Administrative Judge Jacques.

APPEARANCES
Alan S. Pierce, Esq. for the employee at hearing
Richard N. Curtin, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits. We affirm.

The employee, born and raised in El Salvador, came to the United States in 1987. Within days of arriving in the United States, he began working as a laborer for the employer. (Dec. 6.)

On September 19, 2008, the employee suffered a work-related injury when a heavy barrel rolled off a truck and landed on his shoulder and neck. (Dec. 6-7.) The employee continued to work until the pain became overwhelming. He attempted light duty, but, according to the employer's testimony, he was not able to perform any physical work. (Tr. 101.) The employee was examined by Dr. John Lynch, the impartial physician, pursuant to G.L. c.152, § 11A(2). Though the report was deemed adequate, in response to joint motions filed by the parties, the judge allowed additional medical evidence due to the complexity of the medical issues. (Dec. 3.)

The judge found the employee to be totally incapacitated, based on the medical evidence and the testimony of both the employee and his employer, Louis Sylvestro. The judge also adopted the medical opinions of Dr. James Hewson and impartial

physician Dr. John Lynch, causally relating the employee's injuries and resulting disability to the September 19, 2008 industrial accident. (Dec. 11.)

On appeal, the insurer argues that the judge mischaracterized Dr. Eugenio Martinez's opinion regarding disability by finding that Dr. Martinez opined the employee was totally disabled from gainful employment. (Ins. br. 13.) In fact, the insurer contends Dr. Martinez opined only that the employee suffered from "chronic pain syndrome" and was totally disabled from his *usual* occupation. (Martinez Dep. 39, 41.)

Although we agree the judge mischaracterized Dr. Martinez's opinion, the error is harmless as her decision is not based on his opinion, but on the opinions of Drs. Lynch and Hewson, both of which amply support the judge's conclusion on incapacity. Keane v. McLean Hosp., 27 Mass Workers' Comp. Rep. 9 (2013)(mischaracterization of physician's testimony is harmless where awarded benefits were not based solely on that opinion). The judge adopted Dr. Lynch's opinion that the employee was totally disabled due to his work-related neck and shoulder injury and resulting chronic pain syndrome. (Dec. 8.) Additionally, the judge adopted the opinion of Dr. Hewson, who likewise found that the employee suffered from chronic pain syndrome and was totally disabled from gainful employment as a result of his work injuries.[1] (Dec. 9.) The judge is free to credit the

[1] Dr. Lynch testified at his deposition:

> A. At the time of my examination, I think he was disabled from working.
> Q. And would that disability be total or partial?
> A. At the time, it was my opinion that he was total [sic] disabled.

(Lynch Dep. 49.)

Dr. Hewson testified at his deposition:

> A. I felt that he was disabled and unable to work at any occupation at that time.

(Hewson Dep. 9.)

> Q. Do you have an opinion as to whether or not Mr. Galdamez's incapacity from work, as you previously expressed, is a permanent condition?
> A. I believe, yes, it is a permanent loss of function in the foreseeable future.

(Hewson Dep. 13.)

testimony of one medical expert over another, Wright v. Energy Options, 13 Mass Workers' Comp. Rep. 263, 266 (1999), but the evidentiary basis of that award should be clear. Allen v. Luciano Refrigeration, 15 Mass. Workers' Comp. Rep. 346 (2001). The choice of expert testimony must remain within the boundaries of rationality and not be arbitrary, capricious or abusive of discretion. Baillargeon's Case, 85 Mass. App. Ct. 1109 (2014)(Memorandum and Order Pursuant to Rule 1:28). Because the judge clearly adopted medical evidence supporting her ultimate conclusion on incapacity and causation, any error in mischaracterizing an opinion she did not adopt is harmless.

The insurer also argues that the judge did not adequately address residual capacity because there was no vocational analysis. (Ins. br. 19.) Despite the absence of a specific vocational analysis, the judge does assess a number of relevant factors. She found the employee speaks limited English, has difficulty reading or writing in either Spanish or English, and worked as a laborer for the same employer for twenty-one years. (Dec. 6.) She credited his testimony that he continued to experience pain and debilitating symptoms. (Dec. 10.) She also credited the testimony of the employer that he did not believe the employee was physically capable of performing his work duties. (Tr. 101; Dec. 7.)[2] Thus, in addition to the credited medical evidence, the judge considered the employee's laborious work history, complaints of incapacitating pain, limited education and language difficulties and found the employee to be permanently and totally disabled. Because the finding of total incapacity is supported by the evidence, an explicit vocational analysis to determine residual earning capacity is unnecessary. See Breslin v. American Airlines Corp., 24 Mass. Workers' Comp. Rep. 123 (2010).

[2] The failure to address whether or not the employee may have been wheelchair bound at all times is insignificant as it is not essential to her finding of permanent and total incapacity. " 'An administrative judge is not expected to comment on each and every scintilla of testimony or evidence presented, but only on that which [she] deems persuasive.' " Anderson v. Lucent Technologies, 21 Mass. Workers' Comp. Rep. 93, 97 (2007), quoting Hilane v. Adecco Employment Servs., 17 Mass. Workers' Comp. Rep. 465, 471 (2003).

Accordingly, the decision of the administrative judge is affirmed. Pursuant to § 13A(6), we order the insurer to pay employee's counsel a fee of $1,596.24.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Catherine W. Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **December 18, 2014**