COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 041580-82**

Richard F. Tremblay	Employee
Art Cement Products Co., Inc.	Employer
American Mutual Insurance Co/Helmsman Mgt. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Wilson, McCarthy and Smith)

APPEARANCES
Charles R. Casartello, Jr., Esq., & Gerald L. Pellegrini, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

WILSON, J. The insurer appeals the decision of an administrative judge, who denied its complaint to modify or discontinue the employee's weekly benefits of permanent and total incapacity under § 34A. We conclude that the judge's finding that the employee remained totally and permanently incapacitated was based in part on subsidiary findings that were unsupported by the medical or lay evidence and in part on an inadequate vocational analysis. We vacate the decision and recommit the case for reconsideration of the employee's extent of incapacity without reference to the unsupported findings and with a vocational analysis supported by more detailed findings of fact.

Richard Tremblay, who was forty-seven years old at the time of the hearing, has not worked since August 8, 1982, when he injured his lower back while employed as a heavy laborer for Art Cement. He had back surgery in 1982 and again in 1987. In 1988, he received an associate's degree in Human Services, and began working toward his bachelor's degree. However, due to his back pain, he had to withdraw from school. In

1991, an administrative judge awarded him § 34A permanent and total incapacity benefits. (Dec. 2.)[1]

This case arises out of the insurer's complaint to modify or discontinue benefits. At a § 10A conference, the administrative judge denied the insurer's complaint, and the insurer appealed to a full hearing, which was held on June 7, 1996. (Dec. 1, 2.)

The impartial report of Dr. Bernard Stone was admitted as the sole medical evidence. (Dec.1.) He opined that the employee suffers from a failed back syndrome related to his back injury and surgeries. Dr. Stone advised that the employee should avoid lifting weights of more than twenty pounds, and should refrain from standing in one position for more than ten to fifteen minutes or from sitting in any one position for more than one-half hour. He felt that the employee has a permanent partial disability and concluded that he " 'could probably do some sedentary work.' " (Dec. 3, quoting Statutory Ex. 1.)

In finding that the employee remained totally and permanently incapacitated, the judge relied on the employee's report that "he still has pain in both legs, his back, and his hips." (Dec. 3.) He found that, though the employee tried to walk and do pool exercises, "he still always feels run down, and has spasms in his back." Id. The judge noted that, while the employee occasionally vacuums or takes out the trash, he "pays for it" with pain after these activities. Id.

The judge acknowledged that, theoretically, the employee might be able to alternate sitting and standing, as recommended by Dr. Stone over an eight-hour period as some sort of security guard, (Dec. 3-4), which was the only significant work experience the employee had other than that as a heavy laborer. (Dec. 2.) However, he found that "given Mr. Tremblay's credible reports of increased pain even with slight exertional activities along with continual pain and spasm, even this possibility is remote, and I do

[1] The previous award of §34A benefits was affirmed by the reviewing board, and then appealed to the Massachusetts Appeals Court. Subsequent to the hearing on the insurer's request to discontinue benefits but prior to the issuance of the administrative judge's decision, a single justice of the Massachusetts Appeals Court, on August 7, 1996, affirmed the original reviewing board decision. (Mass. App. Ct., No. 94-J-942.)

not find it a firm enough basis for an earning capacity for Mr. Tremblay in the open labor market." (Dec. 4.)

The insurer contends that the judge's subsidiary findings that the employee experienced continual spasms, which he relied upon in his award, is contrary to the medical evidence and is therefore arbitrary. The insurer further alleges that the administrative judge failed to conduct an adequate vocational analysis or make sufficient findings with respect to how the employee's age, education, training, work experience, and other pertinent factors interact with the restrictions imposed by Dr. Stone to support an award of permanent and total incapacity benefits. We agree with both arguments.

"Where crucial and material findings are made without evidentiary support, the error resulting therefrom is not harmless and renders the ultimate decision both arbitrary and capricious." McCarty v. Wilkinson & Co., 11 Mass. Workers' Comp. Rep. 285, 288 (1997); Caira v. Raytheon Corp., 12 Mass. Workers' Comp. Rep. 22, 25 (1998). In the case before us, the judge specifically relied on his findings that the employee "has spasms in his back" and that he has "continual pain and spasm" in concluding that the employee could not perform any gainful work. (Dec. 3, 4.) The transcript, however, is bare of any testimony that the employee had back spasms. His only testimony regarding spasms of any kind was that he has muscle spasms in his legs, (Tr. 26), and that his doctor recently prescribed a medication for "muscle spasms." (Tr. 46.) This testimony does not support the judge's finding of back spasms.

Furthermore, the impartial report, which is the only medical evidence, makes no mention that the employee either reported having back spasms, or that the doctor's examination revealed that he had back spasms. To the contrary, Dr. Stone found that the employee's neurological examination was "completely normal." (Statutory Ex. 1.) In the absence of medical or lay evidentiary support, the judge's finding that the employee had "spasms in his back" is thus arbitrary and capricious.

The finding that the employee had "continual pain and spasm" (Dec. 4) cannot stand for similar reasons. Despite the employee's testimony that he has muscle spasms in his legs, (Tr. 26), the impartial physician has neither reported such spasms upon

examination nor opined that they are related to the employee's back injury. It has long been established that in matters beyond the common knowledge and experience of the ordinary layman, proof of causal relationship must rest upon expert medical testimony. Josi's Case, 324 Mass. 415, 417-418 (1949). Expert testimony would be necessary to relate leg spasms to a lower back injury, and no such testimony exists in this case. Therefore, the judge's finding of "continual pain and spasm" cannot be used to support his conclusion that the employee is permanently and totally incapacitated. On remand, the judge must reassess his findings on extent of physical disability, without assuming either that the employee testified to back spasms or that his testimony as to leg spasms and spasms medication was sufficient to causally relate them to his industrial injury to his lower back.[2]

The judge must also conduct a more thorough vocational analysis. It is well settled that, "[p]hysical handicaps have a different impact on earning capacity in different individuals." Scheffler's Case, 419 Mass. 251, 256 (1994). The judge must evaluate how the employee's age, education, training, and experience affect his ability to cope with his physical injury. Id. Moreover, this board must be able to determine, upon review, whether the administrative judge has correctly applied the law to facts that have support in the evidence. See Praetz v. Factory Mut. Eng'g. & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

The judge may certainly consider the employee's complaints of pain in assessing his ability to work, see Greci v. Visiting Nurses Association, 12 Mass. Workers' Comp. Rep. 462, 465 (1998), but for the reasons noted above, the consideration of spasm or spasm-induced pain must be omitted from the analysis. His findings regarding pain may even permit a finding of total incapacity where the medical testimony is that the employee is partially incapacitated. Id., citing Anderson v. Anderson Motor Lines, Inc., 4 Mass. Workers' Comp. Rep. 65, 67 (1990). Nonetheless, the judge cannot rely solely on

[2] We have no disagreement with our dissenting colleague's position that spasm causes pain. Hence, in considering the effect of the employee's pain on his earning capacity, the

the employee's complaints of pain in assessing extent of incapacity. He must also factor in the pertinent vocational factors together with the medical restrictions, keeping in mind that, even in a complaint to discontinue the employee's § 34A benefits, the employee still has the burden of proving continuing entitlement to benefits. Barnard v. Nissen Baking Co., 12 Mass. Workers' Comp. Rep. 394, 396 (1998). The judge's vocational analysis fell short of the standard. Rather, he has related the employee's testimony that he cannot get a job in the field in which he has an associate's degree (human services), without a bachelor's degree, to a complete lack of employment opportunity. He also mentioned that the employee's only experience other than heavy labor is as a security guard, but found that, while theoretically he might be able to do some kind of security work with the restrictions imposed by the impartial examiner, that possibility is remote due to his pain and spasm. The judge needs to reconsider and make findings on whether the employee has the ability to hold some sort of security guard position in the absence of the assumption that he has back spasms. Additionally, he should both analyze whether the employee has skills gained through or demonstrated by his attainment of an associate's degree that could be applied to other sedentary jobs within the restrictions outlined by Dr. Stone, and consider what the employee's ability to care for his young daughter means with respect to his potential for employment. The judge made no findings on the latter issue, though the employee's uncontradicted testimony was that, during the day, he had been the principal caretaker of his five-year-old daughter since her birth. (Tr. 55.) In summary, the judge needs to make specific and definite findings regarding the extent to which the employee's industrial injury, considered in conjunction with his vocational profile, prevents him from being gainfully employed.

For the above reasons, the decision is vacated and the case is recommitted to the administrative judge for further findings consistent with this opinion.

So ordered.

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administrative judge should take care to consider only the effect of pain from the work-related back injury.

Sara Holmes Wilson
Administrative Law Judge

Filed: July 22, 1999

Suzanne E, K. Smith
Administrative Law Judge

MCCARTHY, J., (dissenting) Injured seventeen years ago while employed as a "heavy laborer", (Dec. 2) Richard F. Tremblay has never returned to work. Back surgeries in 1982 and in 1987 failed to resolve his medical condition. The § 11A physician says Tremblay suffers from failed back syndrome. The doctor limits lifting to twenty pounds, sitting to thirty minutes and standing to ten to fifteen minutes. The judge found Mr. Tremblay credible with respect to his testimony of increased pain even with slight exertional activities. (Dec. 4.)

I view any inaccuracy with respect to findings of spasm as inconsequential. As I understand it, spasm is a sudden, involuntary contraction of a muscle or muscle group attended by pain.[3] It is the severe pain caused by the spasm which is debilitating. In that sense then, it is redundant and therefore harmless to find both pain and spasm.

The vocational analysis, while cryptic, is to the point. The judge found that without a bachelor's degree, (which he could not obtain because of pain), it was not possible to find work in the human services field. (Dec. 2.) No one contends that the employee can return to the heavy labor he was doing when injured. This left only the question of work as a security guard. The judge found that doing this work was but a remote possibility "given Mr. Tremblay's credible reports of increased pain even with slight exertional activities along with continual pain and spasm." (Dec. 4.) Having found as a fact that the evidence presented did not provide " . . . a firm enough basis for an earning capacity for Mr. Tremblay in the open labor market." (Dec. 4), the judge denied the insurer's application to discontinue weekly § 34A benefits.

[3] A cramp is another word often used to describe painful muscular contraction.

The hearing judge has identified the issues, made his call and briefly stated his reasons therefor. General Laws c. 152 § 11B. I would affirm his decision.

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William A. McCarthy
Administrative Law Judge