COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 025490-07 030260-07 043208-07**
Richard K. Harwood	Employee
Corporate Environmental Advisors	Employer
Insurance Co. of the State of Pennsylvania	Insurer
AIM Mutual Insurance Co.	Insurer
General Mechanical Contractors	Employer
Hartford Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Levine and Fabricant[1])

The case was heard by Administrative Judge Benoit.

APPEARANCES
John K. McGuire, Jr., Esq., for the employee
William M. LeDoux, Esq., for Insurance Co. of the State of Pennsylvania
Peter Harney, Esq., for AIM Mutual Ins. Co., at hearing and on appeal
Holly B. Anderson, Esq., for AIM Mutual Ins. Co., on appeal
Douglas F. Boyd, Esq., for Hartford Ins. Co.

LEVINE, J. Insurance Co. of the State of Pennsylvania (insurer) appeals from a decision in which the administrative judge awarded the employee benefits for a work-related injury. It alleges three grounds of error. It argues that the judge erred in calculating the employee's average weekly wages. It argues that the judge erred when he made on-the-record comments regarding his observations of the employee at the hearing. Finally, it argues that recommittal is necessary because the judge did not acknowledge or make findings on the deposition testimony of the employee's treating physician. We agree that recommittal is appropriate on this issue, but we affirm the decision in all other respects.

[1] Judge Koziol recused herself from this case.

On August 29, 2007, the employee suffered a back injury while working for Corporate Environmental Advisors, then insured for workers' compensation by Insurance Co. of the State of Pennsylvania. (Dec. 8-9, 13.)[2] He claimed that earnings from an alleged concurrent employer, General Mechanical Contractors, Inc. (GMC), should be included in calculating his average weekly wage.[3] So included, his average weekly wage is $1,113.60. (Dec. 3.) On that claim, the judge made the following findings:

> The Employee had an ongoing employment relationship with [GMC] over many years, first on a full-time basis from 1985 to 1990 and from 1996 to 2001 and thereafter on an unusual part-time, will call basis, from 2005 until he stopped working altogether [due to his work injury] in 2007. The unusual aspect was that he would actually work in spurts, this is to say, for a number of consecutive weeks followed by an extended period of not working, all of which depended on the contracts that [GMC] had for different projects. While the records of 8/13/2005 through 8/4/2007 do not reflect any particular pattern of months of activity, they are remarkably consistent in terms of gross annual amount earned, to wit, $10,967.84 and $10,779.31, respectively. It is clear to me that the Employee had an ongoing employment relationship with [GMC] when he was injured on August 29, 2007, just as would be the case, albeit on a significantly different temporal scale, if he had had a Monday through Friday concurrent job and happened to get injured at work for a different, full-time employer on a Saturday.

(Dec. 12-13.) As a result, the judge found that the employee was concurrently employed by GMC. (Dec. 13.)

The case is controlled by Sylva's Case, 46 Mass. App. Ct. 679 (1999). There, the court held that "wages earned from concurrent employment where the employee is injured after involuntary termination from a second job from which income is derived," id. at 685, are to be included in that worker's § 1(1) average weekly wage.

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[2] The other insurers were joined as parties. The claims against them were denied. (Dec. 14.) The issues on appeal do not pertain to them.

[3] General Laws c. 152, § 1(1), states in part: "In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several employers and self-insurers shall be considered in determining his average weekly wages."

Here, the employee's last employment with GMC ended on August 4, 2007; hence, his "involuntary termination" from that second job. Like Sylva, the present employee had been out of work at that second job "about one month before his injury." Id. at 683. As had been the practice over the two years prior, however, but for his August 29, 2007 work injury, the employee would have remained ready to work for GMC as it became available. The Sylva court characterized such circumstances as "an employee [who] would have remained 'on call' for work," id. at 685, thereby including the fifty-two weeks of earnings from that concurrent employment in that employee's average weekly wage. Consistent with Sylva, the judge here appropriately included the concurrent wages earned by the employee at GMC in the calculation of his average weekly wage. We therefore affirm the judge's determination of the employee's § 1(1) average weekly wage.

The insurer next argues that the judge's comments on the record as to observations he made of the employee during the course of the hearing were impermissible and therefore require a hearing de novo before a different judge. We disagree. The judge's comments -- that the employee appeared to be in pain and discomfort, (February 5, 2010 Tr. 74-75) -- were appropriate as notice to the parties that the judge was, in fact, making such observations. First, the judge acted within his authority in basing findings on his personal observations of the employee. See Coelho v. National Cleaning Contr., 12 Mass. Workers' Comp. Rep. 518, 521 (1998). And, to his credit, the judge effectively afforded the parties the opportunity to respond to his observations, which came after cross-examination, but before redirect and re-cross examinations. Cf. Mastrangelo v. Ametek Aerospace, 7 Mass. Workers' Comp. Rep. 184, 186-188 (1993)(due process concerns may arise when parties not apprised of evidence which judge may consider in reaching his conclusions). Furthermore, the insurer did not object at the time the judge stated his observations. As a result, it has waived any objection. Liacos, Brodin, Avery, Massachusetts Evidence § 3.8.1 (7th ed. 1999).

Finally, the insurer argues that recommittal is necessary because the judge failed to include the treating physician, Dr. E. Russell Young (by deposition), in the list of witnesses, or failed to discuss the doctor's opinions. (Dec. 3, 9-12.) See Morrissey v. Benchmark Assisted Living, 20 Mass. Workers' Comp. Rep. 303, 304-305 (2006)(failure to consider deposition testimony requires recommital for further findings of fact). The employee does not dispute that the deposition was taken, and that the decision does not acknowledge it. (Employee br. 5, 9.) "Where a judge neither lists a witness at the beginning of the decision nor acknowledges that witness's testimony within the decision, we are unable to determine whether he has actually considered that witness's testimony, thereby assuring an adequate foundation for his conclusions." Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362, 366 (2005). Nonetheless, the employee argues that the error is harmless. See Giovanella v. Westborough State Hosp., 7 Mass. Workers' Comp. Rep. 177, 179 (1993)(failure to list medical evidence as exhibits not prejudicial where the judge referred to the exhibits generally and referred to two of the reports in his recitation of the evidence). But because the decision fails at all to acknowledge or consider the deposition testimony, we cannot say that the error was harmless. "Failure to consider this portion of the medical evidence could adversely impact on substantial rights. . . ." Morrissey, supra at 305.

Accordingly, we recommit the case for the judge to consider and make findings on the deposition testimony of Dr. Young.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **April 11, 2012**