COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 051879-73**

Richard J. D'Agostino	Employee
City of Worcester Parks and Recreation Dept.	Employer
City of Worcester	Self-insurer

REVIEWING BOARD DECISION
(Judges Wilson, Levine and McCarthy)

APPEARANCES
William F. Scannell, Jr., Esq., for the employee
Lori Favata, Esq., and Keith A. Hood, Esq., for the self-insurer at hearing
Lisa Carmody, Esq., for the self-insurer on appeal

WILSON, J. The parties cross-appeal from a decision denying the self-insurer's complaint for discontinuance of permanent and total incapacity benefits to an employee left a quadriplegic after a 1973 injury while working as a lifeguard as a teenager. The employee correctly asserts that the judge failed to render a decision on an issue that was joined to the controversy, namely his claim for weekly wage augmentation under G. L. c. 152, § 51. We recommit the case for a new hearing on that matter.[1] The self-insurer's appeal raises issues regarding the judge's analysis of the employee's capacity to earn. We agree with the self-insurer that the judge's findings regarding the employee's work in his company, RD Equipment, Inc., are deficient, and that recommittal on that issue is necessary. We otherwise affirm the decision, with the exception of a harmlessly erroneous application of the res judicata bar.

We need not recount the vast and complicated factual background of the proceeding in great detail. Suffice it to say that the employee, despite his extraordinary physical limitations, has been able to work part-time for several years as a computer lab

[1] The administrative judge has retired, and the recommittal is for a de novo hearing.

assistant at his alma mater, Cape Cod Community College ("C.C.C.C."). Regarding this aspect of the case, the judge found:

> Mr. D'Agostino has been retained in this position due to accommodations made to his duties and through the support and encouragement of the staff and the students in recognition of his outstanding service over the years to his college. . . . "Responsibilities have been modified for Mr. D'Agostino to accommodate his limited mobility. The actual position requires more manual labor but the tasks have been allowed to be performed by others who are in the lab when he is on duty. Mr. D'Agostino has been retained in this position because of the many friends he has made over the years with faculty, staff, administrators, and students of the college." [Letter of Steven LeClare, Director of Academic and Support Services, Employee's Exhibit # 5.] "I have fought for Mr. D'Agostino's position as room monitor because not only is he very well liked by the faculty, staff, and students, but he is an inspiration to all who comes [sic] into contact with him . . . I also realize how important it is for Mr. D'Agostino to get out of his home and be active and contributing as a participant of his community . . . I feel that having Mr. D'Agostino at the college is very beneficial for his well being as well as beneficial to our students." [Letter of Richard A. Sullivan, Dean of Students, Employee's Exhibit # 6.] . . . Dr. O'Shea [the employee's vocational expert] said, to a reasonable degree of vocational expertise, the employee was permanently and totally disabled and not capable of engaging in anything other than trifling employment. Dr. O'Shea gave a well-reasoned opinion from the stand. The doctor also had an opinion that to the extent that the employee engages in the [work] activities [at C.C.C.C.], such activity is designed to lend meaning and purpose to the employee's life rather than serve as a yard stick for the measurement of earning and/or earning capacity.
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> I find that the employee, Richard J. D'Agostino, was performing trifling work and not work that was competitive on the open labor market and is so employed at this time at the Cape Cod Community College.

(Dec. 8-10.) Although we agree with the self-insurer that the judge's reasoning is inartfully expressed at times, we think that the findings adequately establish the employee's employment at C.C.C.C. as being in the nature of a gratuity. See Shaw's Case, 247 Mass. 157, 160-161 (1923)(amounts paid by employer to injured employee in excess of actual wages earned for light duty, in order to provide the employee his pre-injury income, characterized as gratuity not indicative of earning capacity). The self-

insurer's claim that such analysis disregards the plain meaning of § 35D(1) – that actual earnings shall be used to establish earning capacity – is answered succinctly by the definition of "gratuity" as something unearned.[2]

On the other hand, the judge's findings regarding the employee's company, RD Equipment, Inc., are simply too sketchy to pass muster. We cannot tell from the decision what the employee's activities are with respect to RD Equipment, Inc., a family venture in the design, manufacture and sales of equipment aimed at assisting handicapped individuals. (Dec. 11.) The judge's findings refer to the family participation and the employee's "limited involvement," but he made no findings on the extensive testimony about the employee's participation in that business. (Dec. 12.) There are no findings as to what the income, net earnings and disbursements of the company have been over the years, and how those earnings, if any, and the employee's participation and skills reflect on his capacity to earn. See Rodgers v. Massachusetts Dept. of Pub. Works, 9 Mass. Workers' Comp. Rep. 539, 542 (1995). The judge refers to "one paid person who does some work for the corporation and that person goes to shows and makes presentations to try and show some of the items off." (Dec. 11.) The judge then finds, "Listening to the testimony and looking at the tax returns there were [sic] no accountant or tax expert presented to show where the money came from and who received what for wages." (Dec. 12.) The findings are simply too lacking to qualify as "reasoned decision-making." See Scheffler's Case, 419 Mass. 251 (1994). Recommittal is appropriate. § 11C.

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[2] The judge misapplied the res judicata bar as another reason to deny the self-insurer's discontinuance complaint based on the C.C.C.C. job. The earlier, unappealed order of § 34A benefits/denial of discontinuance was a conference order. (Dec. 7.) As such, there is no way to determine the basis for that prior judge's determination, a prerequisite for the application of the doctrine. See Fabrizio v. U.S. Susuki Motor Corp., 362 Mass. 873, 874 (1972)(element of res judicata bar is that party against whom prior determination was made now seeks to litigate same subject matter again). Contrast Buonanno v. Greico Bros., 17 Mass. Workers' Comp. Rep. ____ (March 12, 2003)(where same vocational profile that was basis for prior hearing decision awarding § 35 benefits put forward at later hearing, judge's award of § 34A benefits based on finding of vocational worsening erroneous due to application of res judicata). The self-insurer here was free to challenge the employee to prove the extent of his incapacity based largely on his job at C.C.C.C., even though he held that job at the time of the earlier conference order. (Dec. 7.) However, the error is harmless in view of the judge's findings on that job as discussed above.

As to the self-insurer's argument that this employee must show that he has made efforts to secure employment in order to remain eligible for permanent and total incapacity benefits, we leave this issue to an administrative judge to decide after a hearing de novo. We point out that the parenthetical, "unless they would be futile," that is part of the stated proposition in Ballard's Case, 13 Mass. App. Ct. 1068, 1069 (1982), may come into play in this case, after a reasoned consideration of the employee's medical and vocational skills profile.

We therefore recommit the case for a new hearing and decision on the self-insurer's complaint for discontinuance based on the employee's physical limitations, his activities in RD Equipment, Inc., and his vocational profile, as well as on the employee's § 51 claim. We reverse the judge's findings regarding the bar of res judicata, but conclude that such error is harmless. We affirm the decision in all other respects.

We transfer the case to the senior judge for reassignment and a de novo hearing.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **June 12, 2003**

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Frederick E. Levine
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge