

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 045239-02**

Richard Sicard  
General Electric Co.  
Electric Insurance Co.

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**  
(Judges Fabricant, Carroll and Costigan)

**APPEARANCES**

Daniel C. Finbury, Esq., for the employee  
Richard N. Curtin, Esq., for the insurer at hearing  
Paul M. Moretti, Esq., for the insurer on appeal

**FABRICANT, J.** The employee appeals from a decision in which an administrative judge denied his claim for ongoing weekly incapacity benefits related to his accepted carpal tunnel syndrome. The employee contends that the judge erred by failing to allow his motion for additional medical evidence on the basis of inadequacy and medical complexity, asserting that the judge mischaracterized the opinion of the § 11A physician, and improperly used the employee's receipt of short term disability benefits for an unrelated psychiatric condition as a reason to deny weekly benefits. We agree, reverse the decision, and recommit the case for further proceedings.

The employee suffered an onset of carpal tunnel syndrome due to increased keyboard work at his job as a mechanical designer in the spring of 2002. The employee suffered from pre-existing diabetes and a pre-existing depressive and paranoid psychiatric condition. The pre-existing conditions were not work-related. The employee left work on a short-term disability for his psychiatric condition on June 10, 2002, and began receiving short-term disability payments at that time. Carpal tunnel release surgery was performed on September 16, 2002, followed by physical therapy. (Dec. 752.) The employee's short-term disability

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benefits were exhausted as of December 2002, at which time he attempted to receive an extension of those payments. (Tr. 45-46.) The employee did not return to work, and moved to Florida. (Dec. 751, 753.)

Following a §10A conference, the judge ordered the insurer to pay for the employee's carpal tunnel treatments. The judge did not award the employee's claimed weekly benefits. The employee appealed the conference order to an evidentiary hearing. (Dec. 751.)

Dr. Alan N. Ertel conducted a § 11A medical examination on September 12, 2003. Dr. Ertel diagnosed carpal tunnel syndrome, flexor tenosynovitis and diabetes, and stated he felt that there was a connection between all of the diagnoses. However, Dr. Ertel's report was unclear as to causal relationship between the employee's keyboard work and his upper extremity symptoms. (Ex. 3.) At his deposition, Dr. Ertel opined that *one* of the causes for the increase in the employee's symptoms in the spring and summer of 2002 was the increase in the employee's keyboard workload, but that a causal relationship was uncertain due to all of the diagnoses. (Dep. 29-31) Although the doctor could not say how much of a contribution the employee's work made to his symptomatology, (Dep. 30), he opined that as of the date of his examination, the employee was partially disabled due to his carpal tunnel syndrome, but could return to restricted full-time work. (Dep. 43-45.)

The judge found Dr. Ertel's medical testimony to be adequate under § 11A(2), and adopted his opinions. (Dec. 755.) The judge considered that the employee could return to his former employment with few restrictions, and that the employee's symptoms were not due to his work, but to his pre-existing conditions. The judge further concluded that the employee was not entitled to weekly benefits, in any event, because he had been receiving short-term disability payments for a non-work-related psychiatric condition during the period of alleged work-related incapacity. The judge concluded:

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The employee is not entitled to workers' compensation benefits during the period of disability because he had no diminution of earning capacity as he was collecting short term disability for an unrelated medical condition during that time.

(Dec. 755.) We agree with the employee that the judge's reliance on the employee's unrelated short-term disability benefits in rejecting his claim for workers' compensation benefits was error. First, it was the insurer that raised the issue of the short-term disability as a bar to compensation. (Ex. 2.) The issue was therefore in the nature of an affirmative defense. As such, "[i]f the [insurer] desired to make this contention . . . it was at least incumbent upon them to go forward with the necessary evidence. . . ." City of Lawrence v. Commissioners of Public Works, 318 Mass. 520, 527 (1945). See Hughes v. Williams, 229 Mass. 467, 470 (1918)(burden of proving facts necessary to support affirmative defense lies upon party asserting it).

There is no evidence in the record regarding the extent of disability attributable to the employee's psychiatric condition, how long the disability may have lasted, and what benefits he received as a result. Without requisite evidence, there is no way to determine, with any specificity, that the psychiatric condition was totally disabling, and even arguably a bar to benefits he would be entitled to receive under c. 152 for his carpal tunnel condition. Thus, the insurer has failed to make out its defense. To the extent that the judge assumed all of these unsubstantiated facts, his conclusion as to the disability payments barring an award of compensation cannot stand.

Moreover, it does not appear that the insurer's underlying premise – that such unrelated disability payments should factor into the incapacity analysis under c. 152 – is accurate. Indeed, the plain meaning of G. L. c. 152, § 38, mitigates against the administrative judge's rationale:

Except as expressly provided elsewhere in this chapter, no savings or insurance of the injured employee independent of this chapter shall be

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considered in determining compensation payable thereunder, nor shall benefits derived from any other source than the insurer be considered in such determination.

There is also decisional authority, primarily in the civil area (but referencing workers' compensation case law), casting support for disregarding independent disability payments from consideration in incapacity analysis under c. 152:

It is well settled that evidence that plaintiff received money from other sources during a period of incapacitation is irrelevant. Such transactions were held long ago to have no bearing on the extent of a plaintiff's injuries. . . . Recovery for impairment of earning capacity is not affected by the fact that the injured person received payments under an insurance policy during the period of incapacity or is paid in full wages under a contract of employment, since he is not being compensated for lost wages but for impairment of earning capacity.

Rolanti v. Boston Edison Corp., 33 Mass. App. Ct. 516, 523 (1992).

The element of damages in question is properly described as compensation for diminution of earning power, or conversely as the value of that part of the plaintiff's capacity to work and earn of which he was deprived. . . . One who would not have worked if he had not been injured may nevertheless recover for his impaired power to work and earn. [Citations omitted.] One who has lost no wages because his pay has been continued by his employer as a gratuity or as compensation for disability, may nevertheless recover damages for impairment of earning capacity. [Citations omitted.] A person may have an earning capacity in excess of the wages paid him in the job that he happens to have at the time of the injury. Federico's Case, 283 Mass. 430 [1933].

Doherty v. Ruiz, 302 Mass. 145, 146 (1939). In Federico, *supra*, a workers' compensation case, the court referenced the above-quoted § 38 and stated, "[O]ne may have income other than earnings, and such income does not affect his right to compensation." *Id.* at 432. See also Shea v. Rettie, 287 Mass. 454, 457-458 (1934) ("Moneys received by an insured under the terms of a policy providing accident or disability insurance do not diminish the damages which must be paid by one who has caused the insured's disability.") Accord Cantara v. M.B.T.A., 3

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Mass. App. Ct. 81, 87-88 (1975)(court disregarded independent disabling condition of deafness subsequently acquired in analysis of evidence admissible to prove loss of earning capacity).

We conclude that the independent source of disability payments should not have been considered in the determination of entitlement to workers' compensation benefits. We reverse the judge's finding that the short-term disability benefits bar the employee's recovery under c. 152.

The case must therefore be recommitted for a new incapacity assessment. We agree with the employee that the judge on recommitment must allow additional medical evidence in order to address the causation issue inadequately handled by the impartial physician. Finally, we note Dr. Ertel testified that the employee, although able to return to work, had some restrictions in the use of his hands as of the date of his examination in September 2003. (Dep. 44.) Therefore, we reverse the judge's conclusion that the impartial medical evidence did not support any award of incapacity benefits.

Accordingly, we reverse the decision in part, and recommit the case for further findings consistent with this opinion.

So ordered.

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Bernard W. Fabricant  
Administrative Law Judge

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Martine Carroll  
Administrative Law Judge

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Patricia A. Costigan  
Administrative Law Judge

Filed: **May 5, 2006**